
Recent Developments in Land Use, Planning and Zoning

Integrating New Urbanism and Affordable Housing Tools

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I. Introduction

NEW URBANISM CONTINUES to exert an increasing influence on new development projects. Originating largely from the design professions, New Urbanism focuses on building walkable, mixed use neighborhoods with a strong sense of place as an alternative to sprawling low-density, single-use, automobile dependent development. The most comprehensive articulation of the concepts of New Urbanism is the *Charter of the New Urbanism*, developed by the Congress for the New Urbanism.¹ Providing a mixed housing stock is one aspect of New Urbanism. According to the *Charter*, “[w]ithin neighborhoods, a broad range of housing types and price levels can bring people of diverse ages, races, and incomes into daily interaction, strengthening the personal and civic bonds essential to an authentic community.”²

Despite this theoretical emphasis on providing a diverse housing stock, observers have criticized traditional neighborhood developments and other New Urbanist-influenced projects for not meeting a diversity of housing needs.³ Many of these projects actually provide expensive housing available only to a select few. They generally do not provide affordable housing. As a result, these New Urbanist projects have been criticized as resulting in a “new style of sprawl rather than an alternative to sprawl.”⁴ Critics are also concerned about other New Urbanist pro-

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1. Information about Congress for the New Urbanism is available at www.cnu.org.

2. Congress for the New Urbanism, *Charter of the New Urbanism* (1993), at 2, available at http://www.cnu.org/cnu_reports/Charter.pdf (last visited Sept. 6, 2004).

3. See, e.g., Martha A. Lees, *Expanding Metropolitan Solutions Through Interdisciplinarity*, 26 N.Y.U. REV. L. & SOC. CHANGE 347, 385 (2000/2001) (reviewing GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (2001)).

4. Peter Calthorpe, *New Urbanism: A Blueprint for Building a Better Neighborhood*, DENVER POST, Apr. 26, 1998, at F-01.

jects, often infill projects, leading to gentrification and displacing low-income individuals.⁵ Compounding the challenge is the apparent willingness of consumers to pay a premium for living in traditional neighborhood developments.⁶ The demand can drive up the value of units creating a problem when units built as affordable are sold without any long-term guarantees that the units need to remain affordable. These observations raise the question: Is affordable housing one of the unfulfilled promises of New Urbanism?

This article explores the relationship of New Urbanism with two tools for promoting affordable housing: local inclusionary zoning ordinances and state laws providing developers with relief from burdensome local regulations that exclude affordable housing.

II. Inclusionary Zoning

Inclusionary zoning, also often called inclusionary housing, is a requirement in local plans and ordinances that a developer of new residences make a certain percentage of those residences affordable to low-and/or moderate-income households. *Inclusionary* zoning is the antithesis of *exclusionary* zoning. Exclusionary zoning results from provisions in local zoning ordinances and practices (not permitting certain types of housing, requiring large lot sizes and large minimum floor area requirements, etc.) that increase the cost of housing. The increased cost of housing due to these ordinance provisions and practices has the effect of excluding certain socio-economic classes of people.

Land use practitioners and scholars have long criticized zoning because of the exclusionary nature of zoning and its adverse impact on affordable housing.⁷ The Mount Laurel, New Jersey cases in the 1970s

5. James A. Kushner, *Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations*, 21 UCLA J. ENVTL. L. & POL'Y 45 (2002/2003). Others, however, view the United States Department of Housing and Urban Development's incorporation of New Urbanism design principles for a number of HOPE VI public housing projects as helping to make public housing more livable. See, e.g., Ngai Pindell, *Is There Hope for HOPE VI?: Community Economic Development and Localism*, 35 CONN. L. REV. 385 (2003).

6. Yan Song & Gerrit-Jan Knaap, *New Urbanism and Housing Values: A Disaggregate Assessment*, National Center for Smart Growth Research Education and Research (2003) (unpublished paper available at http://www.smartgrowth.umd.edu/research/pdf/Jue_paper.pdf).

7. Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Norman Williams, Jr. & Thomas Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971); RICHARD F. BABCOCK & FRED P. BOSSELMAN, *EXCLUSIONARY ZONING: LAND USE REGULATION IN THE 1970s* (1973). See also NAT'L COMM'N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY*, H.R. Doc. No. 91-34, at 254-72 (1968) (calling for drastic overhaul of the existing system).

helped to highlight the severity of the problems.⁸ These cases led to New Jersey's state mandated fair share housing law. The early critics of zoning also looked to the emerging concept of the planned unit development as a potential way to address some of the exclusionary effects of zoning.⁹ Over the years, however, planned unit developments have not adequately addressed the affordable housing issue. Some local governments also began to experiment with the concept of inclusionary zoning ordinances in the 1970s.¹⁰ Montgomery County, Maryland, one of the most prominent programs nationally, was adopted in 1974.¹¹

The more recent criticisms of zoning by New Urbanists are in some ways reminiscent of the earlier criticisms of the exclusionary nature of zoning. Advocates for New Urbanism criticize zoning because it often prohibits (excludes) New Urbanist development like traditional neighborhood developments.¹² Advocates for affordable housing still criticize zoning because of its exclusionary effect. Similarly, for both forms of criticism, the root of the problem is local public policy as articulated in local land use ordinances. Both are largely private sector initiatives seeking to remove public sector barriers.¹³ Herein lies the opportunity for an interesting convergence of two similar local public policy objectives—how can local ordinances promote (or at least not prohibit) New Urbanism and how can local ordinances promote (or at least not exclude) affordable housing. Advocates for New Urbanism need to work more closely with affordable housing advocates to achieve their common goals.¹⁴

8. *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 719 (N.J. 1975).

9. See DANIEL R. MANDELKER, *CONTROLLING PLANNED RESIDENTIAL DEVELOPMENTS* (1966).

10. Jerome G. Rose, *The Mandatory Percentage of Moderately Priced Dwelling Ordinance (MPMPD) is the Latest Technique of Inclusionary Zoning*, 3 REAL EST. L.J. 176 (1974).

11. Karen Destorel Brown, Brookings Inst. Ctr. on Urban and Metro. Policy, *Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area* (2001), available at <http://www.brook.edu/es/urban/publications/inclusionary.pdf> (last visited Sept. 13, 2004).

12. See, e.g., ANDRES DUANY & ELIZABETH PLATER-ZYBERK, *TOWNS AND TOWN-MAKING PRINCIPLES* (1992); JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* (1993); Andres Duany & Emily Talen, *New Urbanism and Smart Growth: Making the Good Easy: The Smart Code Alternative*, 29 FORDHAM URB. L.J. 1445 (2002).

13. Charles C. Bohl, *To What Extent and in What Ways Should Governmental Bodies Regulate Urban Planning?*, 6 J. OF MARKETS & MORALITY 211 (2003), available at http://www.acton.org/publicat/m_and_m/2003_spring/bohl2.html (last visited Sept. 6, 2004).

14. Such cooperation is similar to the collaboration urged between environmental advocates and affordable housing advocates. See Rusty Russell, *Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia?*, 30 B.C. ENVTL. AFF. L. REV. 437 (2003); Robert L. Liberty, *Abolishing Exclusionary*

In response to the interest in New Urbanism, a growing number of communities across the country have adopted traditional neighborhood development ordinances.¹⁵ An increasing number of local governments are also using a variety of inclusionary zoning techniques to promote affordable housing.¹⁶ Sometimes these local efforts overlap, other times they do not.

Some traditional neighborhood development ordinances cite the need to create mixed-income housing. For example, the “design objectives” of Gainesville, Florida’s traditional neighborhood development ordinance states, in part, that it is intended to establish a neighborhood that “[p]rovides a full range of housing types and work places, allowing all age groups and economic classes to integrate in an authentic community.”¹⁷ A few traditional neighborhood development ordinances include provisions for the accommodation of special needs housing such as community living arrangements.¹⁸ Some traditional neighborhood development ordinances include density bonuses for affordable housing.¹⁹ However, many traditional neighborhood development ordinances do not include any specific provisions related to actually providing affordable housing.

There are a subset of cities that have adopted both traditional neigh-

Zoning: A Natural Policy Alliance for Environmentalists and Affordable Housing Advocates, 30 B.C. ENVTL. AFF. L. REV. 581 (2003).

15. See, e.g., Congress for the New Urbanism, *Codifying New Urbanism: How to Reform Municipal Land Development Regulations*, PLANNING ADVISORY SERVICE REP. NO. 526 (American Planning Association 2004) (contains a survey of communities using New Urbanism); Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783 (2003) (provides an overview of the growing number of local governments that are amending their local ordinances to incorporate New Urbanism principles).

16. See Nico Calavita, *Origins and Evolution of Inclusionary Housing in California*, 3 NAT'L HOUS. CONF. AFF. HOUS. POL'Y REV. 1 (2004), available at <http://www.nhc.org/nhcimages/California%20IZ/CaIZ04.pdf> (last visited Sept. 20, 2004) (evaluating the proliferation of inclusionary zoning programs in California); see also David Rusk, *Jurisdictions with Mandatory IZ Laws* (2003), available at <http://www.gamaliel.org/DavidRusk/Table%201-list%20of%20IZ%20laws.pdf> (last visited Sept. 20, 2004) (list of local governments in the United States with mandatory inclusionary zoning laws).

17. GAINESVILLE, FLA., CODE OF ORDINANCES § 30-238(9) (2004), available at http://library.municode.com/gateway.dll/FL1/florida1/13646?f=templates&fn=default.htm&nusername=10819&npassword=MCC&npc_credentialspresent=true&vid=default (last visited Sept. 6, 2004).

18. See, e.g., RIVER FALLS, WIS., MUN. CODE § 17.112 (2004), available at http://municipalcodes.lexisnexis.com/codes/riverfalls/_DATA/TITLE17/Chapter_17_112_TRADITIONAL_NEIGHB/index.html (last visited Sept. 6, 2004).

19. See, e.g., MUSKEGO, WIS., MUN. CODE ch. 39 (2004), available at <http://www.ci.muskego.wi.us/municode/Chptr39.pdf> (last visited Sept. 6, 2004) (reflecting the language of the model ordinance prepared for the Wisconsin requirement that cities and villages above 12,500 adopt a traditional neighborhood development ordinance).

borhood development and inclusionary zoning ordinances.²⁰ A recent study of the inclusionary housing program in the City of Salinas, California, indicates the potential synergy between New Urbanism objectives and the provision of affordable housing.²¹ Salinas is the county seat of Monterey County and home to approximately 145,000 people. The study analyzed the feasibility of raising the percentage of required affordable dwelling units from 12% under the existing ordinance to a higher level. According to the study, raising the number of affordable units to 20% would be financially feasible for developers, leaving them with at least a 13% profit for owner occupied developments under the city's conventional development ordinances.²² However, the study also concluded that building consistent with traditional neighborhood development principles identified in the city's general plan could justify increasing the level of affordable units required to 40 percent while still allowing the developer a sufficient return on their investment.²³

Madison, Wisconsin, also presents an interesting case study of the interactions between New Urbanism and affordable housing. Madison, Wisconsin, is a city of slightly over 200,000 residents located in a metropolitan area of approximately 400,000. The city is home to the state capital and the University of Wisconsin. Interest in New Urbanism in the Madison area is fairly strong. Like many older cities, Madison has seen many recent infill projects influenced by New Urbanism. Many of these infill projects are higher density multi-story buildings approved as planned unit developments that offer a mixture of first floor retail/commercial space with the remainder of the building devoted to residential uses. Other projects only include single uses but are located in neighborhoods offering a mixture of uses. The buildings feature design treatments appropriate for an urban setting such as intricate facades and limited setbacks.

In addition, there are several New Urbanist traditional neighborhood developments underway on undeveloped land both within the City of Madison and in adjacent communities. The first New Urbanist influenced traditional neighborhood development was Middleton Hills, lo-

20. *See, e.g.,* SUFFOLK, VA., UNIFIED DEV. ORDINANCE art. IV, § 31-411, *available at* http://www.suffolk.va.us/citygovt/udo/a4/section31411abcd_zoning.pdf (last visited Sept. 6, 2004) (an example of a city that has adopted a unified development ordinance that includes inclusionary zoning provisions and traditional neighborhood development provisions).

21. BAY AREA ECONOMICS, CITY OF SALINAS INCLUSIONARY HOUSING PROGRAM FEASIBILITY STUDY (2003), *available at* <http://www.ci.salinas.ca.us/CommDev/InclusHousing/InclusHousingRpt.pdf> (last visited Sept. 6, 2004).

22. *Id.* at 26-27.

23. *Id.* at 27-31.

cated in the Madison suburb of Middleton and designed by Andres Duany, the father of traditional neighborhood developments. Begun in the mid-1990s, this project helped to raise local public awareness about the concept of traditional neighborhood developments. Since that time, several other traditional neighborhood developments have been approved. The largest homebuilder in the state, Veridian Homes, based in Madison, is also supportive of traditional neighborhood development and is building several traditional neighborhood developments in the City of Madison and in adjacent communities. The development community therefore perceives a market for the traditional neighborhood product.

Further elevating the concept of traditional neighborhood development in Wisconsin is the 1999 state law requiring cities and villages with populations of at least 12,500 to adopt traditional neighborhood development ordinances.²⁴ The 1999 law, however, does not require that cities and villages mandate traditional neighborhood development. The law simply encourages cities and villages to offer traditional neighborhood development as an option for developers. As of mid-2004, however, none of the cities and villages in the Madison area had complied with the requirement. The traditional neighborhoods under development in the Madison area are all approved as planned unit developments under existing planned unit development ordinances. Developers have used the conventional planned unit development process to vary many of the conventional standards found in local ordinances, such as streets with sixty-six feet of right of way—"the widths of some airport runways" in the county, according to one developer. The cost of complying with these conventional standards can have an exclusionary impact by raising the cost of housing. Introducing standards consistent with New Urbanism can help reduce the exclusionary impacts of the ordinances.

While there is heightened public awareness about New Urbanism in the Madison area, there is also heightened awareness about the need for affordable housing. On January 20, 2004, the Madison City Council adopted a strong inclusionary zoning ordinance.²⁵ The ordinance requires that all developments of ten or more owner-occupied units provide a minimum of 15 percent of the units for sale to families with an annual median income at or below 50–80 percent of the median income

24. See WIS. STAT. § 66.1027(3)(a) (2003); Robert J. Sitkowski & Brian W. Ohm, *Enabling the New Urbanism*, 34 URB. LAW. 935 (2002).

25. MADISON, WIS., GEN. ORDINANCES § 28.04(25) (2004), available at http://www.cityofmadison.com/cdbg/iz/docs/IZ_ord_final.pdf (last visited Sept. 6, 2004).

for the Madison metropolitan area.²⁶ There are also corresponding provisions to provide affordable units for certain rental housing projects. For owner-occupied residences, the ordinance places requirements on the resale of the unit in an attempt to ensure long-term affordability.²⁷ While the traditional neighborhood development projects in and around the city offer a broader range of housing choices than found in conventional subdivisions, the city's inclusionary zoning ordinance requires a level of affordability that has not been found in the traditional neighborhood development projects.

The ordinance is the result of advocacy by affordable housing interests. It was not directly part of an agenda to promote New Urbanism, though the state's largest developer who is building several traditional neighborhood developments in the City of Madison was a strong supporter of the inclusionary zoning ordinance. The developer sees a number of challenges for building traditional neighborhood developments under the provisions of the inclusionary zoning ordinance. One challenge is meeting the requirements of the affordable housing ordinance given the amenities associated with traditional neighborhood developments. A particular issue will be the cost of neighborhood association fees. A portion of those fees goes to the annual costs of maintaining the amenities.

Nevertheless, the purpose for the inclusionary zoning ordinance has a strong correlation with principles of New Urbanism. Both seek to provide a "range of housing choices for families of all income levels" in order to promote "diverse and thriving neighborhoods."²⁸ In addition, the provisions of the inclusionary zoning ordinance will help to encourage other objectives that are consistent with New Urbanism principles. For example, to compensate developers for the cost of providing the affordable units, the inclusionary zoning ordinance provides for a number of incentives including density bonuses and a reduction in parking requirements.²⁹ The inclusionary zoning ordinance also applies to infill development. As a result, inclusionary zoning can help address some of the concerns about gentrification caused by some New Urbanist infill developments by ensuring that affordable units are built to help replace affordable units that might be lost due to the infill project. However, only time will tell if the effects of the Madison inclusionary zoning ordinance will encourage more New Urbanist development.

26. *Id.* §§ 28.04(25)(b), (d)(3).

27. *Id.* § 28.04(25)(h).

28. *Id.* § 28.04(25)(a).

29. *Id.* § 28.04(25)(d).

III. Zoning Override, or “Builder’s Appeal,” Statutes

Besides local efforts to promote affordable housing through inclusionary zoning ordinances, there are also state legislative approaches to promoting affordable housing that are meant to counter local exclusionary zoning tactics. In at least four states—Massachusetts,³⁰ Connecticut,³¹ Rhode Island,³² and Illinois³³—legislatures have responded in a unique (some would say draconian) way to housing market conditions in certain areas of their states where municipal employees, such as firefighters or school teachers, cannot afford to live in the very municipality that they serve. While each of these schemes differs in application, these laws generally require localities to maintain a specific threshold percent of housing units in their jurisdiction as “affordable,” most commonly defined as below 80 percent of the area medium income. In those localities that do not meet this threshold, developers of affordable housing may be able to seek relief from development regulations that inhibit or prohibit the construction of affordable housing, especially those dictating density. While this approach is not without its problems in terms of implementation,³⁴ it presents an interesting, although limited, opportunity for New Urbanist development to meet its goals of changing the development pattern through increased density and providing a mix of housing types, albeit on a project-by-project basis.

Presuming that a developer is able to “pencil out” a proposal that will satisfy the stringent affordability requirements found in these statutes, they are presented with an opportunity to use these statutes to remove some of the regulatory obstacles that discourage New Urban development forms. Indeed, the developer of Mashpee Commons, one of the most well-known New Urbanist developments in the United States, is finally on its way to achieving its sought after housing component after seventeen years by using Massachusetts’s “Anti-Snob” zoning override statute. Since its inception, Mashpee Commons was to include a housing component, but the Cape Cod town of Mashpee’s regulations did not allow for it. As Mashpee Commons became a suc-

30. MASS. GEN. LAWS ANN. ch. 40B, §§ 20–23 (West 2004).

31. CONN. GEN. STAT. § 8–30g (2003).

32. R.I. GEN. LAWS §§ 45–53–1, 45–53–8 (1999).

33. Affordable Housing Planning and Appeal Act of 2003, Pub. Act 93–0595 (to be codified at 310 ILL. COMP. STAT. 67/1–50), available at <http://www.legis.state.il.us/legislation/publicacts/fulltext.asp?name=093–0595> (last visited Sept. 18, 2004).

34. See Sam Stonefield, *Affordable Housing in Suburbia: The Importance But Limited Power and Effectiveness of the State Override Tool*, 22 W. NEW ENG. L. REV. 323 (2001).

cessful retail, restaurant, and service business center, the developer considered a regulation amendment to provide the regulatory basis for residential uses, but the main requirement for doing so—a town meeting—was very difficult to achieve since it involves a two-thirds vote of electors. In the alternative, the developers approached the town with a “friendly” zoning override proposal, in which 25 percent of the 396 units are designated as affordable.³⁵

IV. Conclusion

Inclusionary zoning and “builder’s appeal” statutes present two very different legal processes for promoting affordable housing within new developments. Inclusionary zoning is an affirmative initiative of local government to promote affordable housing. Builder’s appeal statutes, on the other hand, are the state’s response to local government efforts to impede affordable housing. Both tools, however, provide a vehicle for advocates of New Urbanism to promote the goal of a diverse housing stock.

Local efforts to truly promote New Urbanism need to take a more comprehensive approach than afforded by most traditional neighborhood development ordinances, which continue to evolve. Many early ordinances focused on a project scale with stand alone traditional neighborhood development ordinances. More recent efforts have focused on “form-based” codes that present more comprehensive efforts to promote New Urbanism at the scale of the community and the region. A main focus of the ordinances, however, is still on design. As these approaches continue to evolve, it is critical to continue to move to a comprehensive approach to development that encompasses tools to create affordable housing.

Inclusionary zoning ordinances are one such tool for a more comprehensive approach. It is important to remember that private actions operate within the sphere of local ordinances. Local ordinances are essentially an expression of the public interest. Local governments have the opportunity to promote affordable housing as part of that public interest and help achieve the objectives of New Urbanism. Integrating tools such as inclusionary zoning ordinances with New Urbanism ordinances can help provide the standards for evaluating whether a proposed development actually meets the goals of New Urbanism. It

35. *Here Comes the Neighborhood*, NEW URB. NEWS, Sept. 2003, at 10. The application is pending, as of the date of this article, according to Douglas S. Storrs, Senior Vice President of Mashpee Commons, L.P.

becomes a consumer protection tool to certify that a residential development project labeled as “New Urbanist” or “traditional neighborhood development” will actually include affordable homes, similar to approaches taken by local government and nonprofit organizations to certify green-built development.

At least in those few states with “builder’s appeal” statutes, the failure of New Urbanist ordinances to evolve to address affordable housing issues might result in developers looking to the use of the builder’s appeal statutes to promote New Urbanist projects. While this is a more cumbersome approach than proactive efforts to include affordable housing, the affordable housing rhetoric of New Urbanism will undoubtedly lead to a renewed examination of the utility of these statutes as a vehicle for local governments to revise their local ordinances to provide for greater housing choices. Without a greater commitment to providing a truly diverse housing stock, the objectives of New Urbanism will be significantly undermined.