
Coates' Canons Blog: A Primer on Inclusionary Zoning

By Tyler Mulligan

Article: <https://canons.sog.unc.edu/a-primer-on-inclusionary-zoning/>

This entry was posted on November 16, 2010 and is filed under Affordable Housing & Minimum Housing Codes, Community & Economic Development, Land Use & Code Enforcement, Zoning

As part of its comprehensive planning process, a town commissioned a housing study to determine whether its current and projected housing stock is adequate to meet the needs of its local residents and workforce. The results weren't terribly surprising. Most of the town's service sector and public sector workforce (for example, retail workers, police, and teachers) earn less than the county's median wage. Those workers make up a sizeable portion of the workforce, but in order to afford a home in the town, they must devote approximately half of their wages to housing costs. The housing situation for this group has not changed much over the past decade even though the town experienced steady growth during that period. The housing market has not responded to demand for housing at lower price points, even though such housing could have been constructed profitably—but perhaps not as profitably as at higher price points.

Taking this information into account, town leaders incorporated language into the final comprehensive planning document that clearly articulates a desire to use all legally-available regulatory tools on remaining developable land to increase production of housing at lower price points. This housing was called "workforce housing." Strategies mentioned prominently include eliminating some land use restrictions, increasing the availability of subsidized housing, and inclusionary zoning.

A task force was established to look more closely at inclusionary zoning. For the task force's first meeting, the town attorney has been invited to explain the difference between voluntary, conditional, and mandatory inclusionary zoning programs, and to identify a few initial legal considerations for the task force to keep in mind. Below is some key information the attorney could convey.

Inclusionary Zoning Generally

Inclusionary zoning involves using a local government's zoning power to encourage private developers to construct workforce housing. In its simplest form, for example, an inclusionary zoning ordinance might require 20% of the units in a residential development to be affordable to workers earning a first-year teacher's wage. That simple example is just the tip of the iceberg; inclusionary zoning ordinances can get considerably more complicated (for the full array of policy options, refer to the School of Government publication on inclusionary zoning).

There are three general categories of inclusionary zoning in North Carolina: voluntary, conditional, and mandatory. They are loosely classified based on the zoning mechanism employed and the compulsory nature of their inclusionary requirements.

Voluntary Programs

A voluntary program typically employs conditional use districts as the mechanism for encouraging the development of workforce housing. Conditional use districts are overlay zoning districts—that is, they are overlaid on top of the original zoning district, providing the owner two different zoning options for a single piece of property. The conditional use district's zoning standards are triggered only after an owner applies for and is granted a conditional use permit. In the inclusionary zoning context, the conditional use district will usually provide certain defined incentives to a developer in exchange for the construction of workforce housing. Incentives typically take the form of more relaxed development controls—such as greater density allowances and smaller setbacks, lot sizes, and buffers—that make a development more profitable. The incentives and requirements are defined by ordinance and applied uniformly to any owner that is granted a permit for that conditional use.

Due to its voluntary nature and the use of incentives, this type of inclusionary zoning program is usually considered the safest—politically and legally—for a local government to enact. Dare County enacted a voluntary inclusionary zoning program that provides higher density allowances to developers who comply with affordability requirements. The county sought and obtained a local act granting it specific authority to implement the density incentives, though it is questionable whether a local act was necessary.

Conditional Programs

Conditional inclusionary zoning programs are still voluntary in the sense that an owner must request that a development be subject to the program's requirements, but no uniform requirements are applied; rather, the requirements are individually negotiated for each development. This zoning tool is called a “conditional district” (as opposed to a conditional use district). Under North Carolina law, any conditions or site-specific standards imposed on such districts must address either conformance with the comprehensive plan or impacts reasonably expected to be generated by the development.

In the hypothetical discussed above, inclusionary zoning requirements are already mentioned prominently in the comprehensive plan. However, it would also be possible to demonstrate that inclusionary requirements address impacts generated by residential development. The town could make reference to the housing study that identified an undersupply of affordable housing in the community. More sophisticated studies could articulate how further market-rate residential development would tend to exacerbate that undersupply.

A conditional program was used in Chapel Hill for years before it transitioned to a mandatory program.

Mandatory Programs

An example of a simple mandatory program was provided earlier in the post; to restate it, a mandatory inclusionary zoning ordinance might require 20% of the units in all residential developments to be affordable to workers earning a first-year teacher's wage. The units typically remain in private hands, so there is no taking of private property by the government. In some jurisdictions, local governments and nonprofits may offer to manage the affordable units on behalf of the owner.

Mandatory programs rely on an interpretation of the zoning, subdivision, and police powers that is plausible but untested in court. Recent decisions by the North Carolina Court of Appeals have interpreted those powers rather narrowly—more narrowly than precedent would have indicated—so it remains to be seen how a mandatory program would fare if challenged in court. The Town of Davidson has employed a mandatory program for years.

Legal Uncertainty Associated with Inclusionary Zoning

An inclusionary zoning program is an ambitious policy endeavor that involves a certain amount of legal uncertainty. To get a feel for some of the uncertainty, two threshold issues are discussed below.

Does inclusionary zoning impermissibly regulate a structure's manner of ownership?

In North Carolina, the zoning power can regulate the use of structures but not the *manner of ownership*. In *Graham Court Assoc. v. Town Council of Town of Chapel Hill*, 53 N.C.App. 543 (1981), a zoning regulation was invalidated because it purported to prevent an owner from converting rental apartments into condominiums. The multifamily structure in the case was an authorized use under the local zoning ordinance and was not going to be altered—only the manner of ownership

was changing. The zoning regulation was invalidated for attempting to regulate the building's ownership when its use was otherwise permitted.

Some have tried to apply this principle to inclusionary zoning by arguing that inclusionary zoning is more akin to a regulation of ownership than a regulation of use. However, it is not difficult to distinguish inclusionary zoning from the cases involving manner of ownership (another is here). The manner of ownership cases dealt with existing structures that remained unchanged—only ownership was being changed. Inclusionary zoning arguably does not deal with existing structures; it regulates price as a means of affecting how proposed developments will be constructed. Indeed, the evidence from studies of inclusionary zoning show that regulating price does indeed affect how structures are built: inclusionary zoning units tend to be smaller and are located in denser developments. In the absence of case law on point, however, it is uncertain how a court would address this issue.

Does the zoning statute grant authority to local governments to regulate the price point of units in a proposed development?

Another area of legal uncertainty is the extent of authority that a local government possesses under the zoning statute. In *Union Land Owners Ass'n v. County of Union* (analyzed in Rich Ducker's post here), the N.C. Court of Appeals instructs local governments that they "must achieve [their zoning goals] using the tools authorized by the zoning statute." Those tools are enumerated in G.S. 160A-381 (cities) and G.S. 153A-340 (counties) as follows: "A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes." Price points are not one of the listed tools, so an inclusionary zoning ordinance would need to be considered a regulation of "use" under the statute. The question is whether it is permissible to establish a use category such as workforce housing that is defined in part on its price point. The answer is not clear.

Use categories have never been restricted only to broad categories such as residential, commercial, or industrial. North Carolina zoning ordinances have for decades defined narrow categories of use that are not explicitly identified in the zoning statute. Very narrow use categories have been upheld even when they are not explicitly mentioned in the zoning statute. One example is the manufactured housing use category, which was upheld by the North Carolina Supreme Court in *City of Raleigh v. Morand*, 247 N.C. 363 (1957), prior to the time that the General Assembly enacted specific statutory authority for regulating that type of housing.

Furthermore, a recent amendment to North Carolina's fair housing law provides some support to the notion that a use category can incorporate price points. The General Assembly has specifically identified "affordable housing" as a distinct category in land use decisions. It is a violation of the fair housing law (G.S. 41A-4(g)) to discriminate in land use decisions against developments containing affordable housing, but an exemption is provided where a land use decision is based on limiting high concentrations of affordable housing. Affordable housing is defined in the statute as housing offered at lower price points for qualified buyers (specifically, households earning less than 80% of area median income). Inclusionary zoning seems to fit the exemption by regulating the location of affordable housing to avoid overconcentration, thus lending support to the conclusion that a workforce housing use category defined by price point or affordability is permissible under North Carolina law.

The issue is further complicated by the prospect of hybrid formulations. How would a court handle a hypothetical workforce housing ordinance that regulated price indirectly—for example, by requiring a percentage of units in a residential development to be designed with such "height ... size of buildings ... percentage of lots that may be occupied, [and] size of yards" to enable those units to be priced at lower price points for qualified buyers? Is that a regulation of price or a regulation of height and size of buildings or both?

Case law does not settle the debate over using price points in zoning. There is therefore some risk in establishing zoning use categories that are defined in part on that basis.

Other legal issues

This brief overview provides a glimpse of some threshold legal issues. Other issues include, to name a few, authority for density bonuses in voluntary inclusionary zoning programs; exactions in the context of conditional programs; the statutory



prohibition of rent control under G.S. 42-14.1; and means of keeping inclusionary units affordable over the long term. Refer to the School of Government publication on inclusionary zoning for a more detailed discussion of these and other legal issues associated with inclusionary zoning.

Links

- www.sog.unc.edu/publications/books/inclusionary-zoning-guide-ordinances-and-law
- appellate.nccourts.org/opinions/?c=2&pdf=2329
- appellate.nccourts.org/opinions/?c=2&pdf=5139
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-381.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-340.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_41A/GS_41A-4.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_42/GS_42-14.1.html