



# **INCLUSIONARY ZONING** GUIDELINES FOR CITIES & TOWNS

Prepared for the Massachusetts Housing Partnership Fund  
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The **Massachusetts Housing Partnership Fund** is a quasi-public state agency that was established in 1985 to support affordable housing and neighborhood development across Massachusetts. MHP is the only public agency in the United States that uses mandatory lines of credit from the banking industry to provide long-term loans for affordable housing and neighborhood development. Established by an act of the Legislature in 1985, MHP has helped more than 4,500 families buy their first home, financed the rehabilitation or new construction of almost 10,000 affordable housing units and helped the majority of cities and towns in the state to form local housing partnerships. Since 1992, MHP has utilized over \$200 million in funding from banks and provided financing or technical services in 260 out of the Commonwealth's 351 cities and towns, including every major city in Massachusetts.

Additional information on inclusionary zoning events and publications sponsored by MHP is available by visiting [www.mhpfund.com](http://www.mhpfund.com).

# INTRODUCTION

Following a May 31, 2000 conference on inclusionary zoning sponsored by the Massachusetts Housing Partnership Fund (MHP), it was clear that Massachusetts communities wanted ongoing guidance on how to draft inclusionary zoning ordinances and by-laws. These guidelines, drafted for MHP by Edith Netter, a land-use attorney, seeks to assist municipal officials by posing key questions and providing useful answers that address the various steps of drafting, implementing and ensuring maximum benefit from inclusionary zoning.

These guidelines are divided into three parts:

- 1.) What policy questions do you need to consider before you begin work on an ordinance or bylaw?
- 2.) What technical issues should you consider before drafting the ordinance or bylaw?
- 3.) What will be required to successfully implement the bylaw/ordinance?

Although these guidelines are limited to inclusionary zoning programs, the same questions can be applied to linkage programs, which require or encourage commercial developers to provide fees for affordable housing or to build affordable housing. These guidelines are not intended to be a substitute for the assistance of legal counsel.

Often, the literature, the court cases and the public discussion around inclusionary housing programs has grouped all zoning approaches under the heading "inclusionary zoning." This effort to use a single simple term has resulted in some confusion that seems most easily remedied by using more precise terms – "inclusionary zoning" and "incentive zoning."

Inclusionary zoning mandates that residential developers make some of their housing affordable. Incentive zoning provides that developers seeking special permits may obtain favorable zoning treatment, such as increases in density, in exchange for providing affordable housing. Inclusionary zoning is less common than incentive zoning.

The two fundamental legal questions that must be considered when creating these programs are whether they are authorized by statute (and whether they need to be so-authorized) and whether they are constitutional. The Massachusetts Zoning Act expressly authorizes incentive zoning. It is silent as to inclusionary zoning. Massachusetts is a home rule state, so such explicit authorization for inclusionary zoning may not be necessary.

Changes in the U.S. Supreme Court's interpretation of the constitutional issue known as the "taking issue" have made it advisable to create backup ("nexus") studies to document why inclusionary zoning programs are necessary. The "taking issue" refers to a judicial determination of whether land use regulations are so restrictive that government has unconstitutionally "taken" land without payment of just compensation.

The most important practical consideration, because it is so often overlooked, is how inclusionary housing programs are implemented. Carefully drafted local decisions, effective monitoring systems and the legal documentation to support long-term affordability are key elements of a program's success.

# BEFORE YOU DRAFT THE BYLAW OR ORDINANCE

## 🔴 IS THERE A HOUSING MARKET STUDY?

- ❑ Is the real estate market strong enough to support an inclusionary or incentive zoning program and what type of program could it support?
- ❑ If the real estate market is weak, additional requirements will increase disincentives to development. As a result, the program probably won't create very much housing.

An analysis should be made of your town's residential real estate market to determine:

- (1) What is the housing demand?
- (2) How much land is available and at what cost?
- (3) What housing projects are in the pipeline?
- (4) What development opportunities would exist if there were no zoning restrictions?
- (5) At what point would inclusionary or incentive zoning requirements impede development in your community?

## 🔴 IS THERE AN ECONOMIC BASIS FOR YOUR PROGRAM?

- ❑ It may be useful to prepare a study for an inclusionary zoning program or for an incentive zoning program that involves fees.
- ❑ It is less important to prepare a study for an incentive zoning program that requires a housing set-aside only.

A community must be able to demonstrate the impacts of market-rate housing on the availability of housing for lower-income households. In addition, a community must be able to show the relationship between these impacts and what the developer is being required to provide. Frequently, communities prepare a study (loosely referred to as a "nexus" study) to develop the inclusionary or incentive zoning programs and to assist the community in successfully withstanding constitutional challenges to it.

## 🔴 HAS A STRATEGY BEEN DEVELOPED FOR CREATING LOCAL POLITICAL SUPPORT FOR AN INCLUSIONARY OR INCENTIVE ZONING PROGRAM?

- ❑ It is important to determine who your initial supporters will be, who can be persuaded as to the merits of the program, and who or what entity will spearhead the efforts to create community consensus on the program.

Programs that meet all legal and technical requirements may fail because of a lack of town meeting or city council support.

# DRAFTING THE BYLAW OR ORDINANCE

## 🔴 SHOULD THE PROGRAM BE INCENTIVE OR INCLUSIONARY ZONING?

- ❑ An incentive zoning program is one where a residential developer is developing pursuant to a special permit. Typically, the developer receives increases in density and/or reductions in regulatory requirements such as parking, in exchange for providing affordable housing.
- ❑ An inclusionary zoning program is one where a developer must create affordable housing if he chooses to develop a market-rate housing project.

## 🔴 DO YOU NEED TO GET LEGISLATIVE APPROVAL FOR YOUR PROGRAM?

- ❑ The legal authority for incentive zoning ordinances/bylaws is clear. Section 9 of the Zoning Act provides that communities that provide density bonuses or the like shall require the provision of affordable housing or other amenities as a condition of granting the special permit. (M.G.L. c.40A§9)
- ❑ Inclusionary zoning ordinances/bylaws (whether they are enacted pursuant to zoning or subdivision) are not expressly authorized by statute.

In the special permit context, the Massachusetts Zoning Act clearly authorizes, and in fact requires, a public amenity such as affordable housing to be provided in exchange for a density bonus. Some people take the position that affordable housing may be required as a special permit condition even where a density bonus is not provided.

There is an argument to be made that statutory authority is not required for mandatory inclusionary zoning; these programs may be enacted pursuant to "home rule." However, it should be noted that the Massachusetts courts have not determined whether express statutory authority is or is not required.

## 🔴 SHOULD INCLUSIONARY AND INCENTIVE ZONING PROGRAMS ALLOW PAYMENT OF FEES IN LIEU OF HOUSING?

- ❑ The arguments in favor of requiring housing are obvious. The developer is required to provide the site for the housing and build it.
- ❑ There are circumstances, however, where a "buy-out" (fees in lieu of housing) might be a good alternative. One example is where a project is too small to provide housing. Another is when fees can be leveraged by a local nonprofit organization, ultimately resulting in more affordable housing than would otherwise have been the case.

Most incentive and inclusionary zoning programs require affordable housing. Some allow fees in lieu of housing ("buy-outs"). If there is a fee requirement or option, it is important to earmark the funds for affordable housing and document that the fee is proportionate to the project's impacts. If fees are part of a program, it is important that drafters carefully read the recent Appeals Court decision in Greater Franklin Developers Association, Inc. v. Town of Franklin, striking down school impact fees.

# DRAFTING THE BYLAW OR ORDINANCE

## 🔴 SHOULD ALL RESIDENTIAL DEVELOPMENT PROJECTS BE INCLUDED IN AN INCENTIVE OR INCLUSIONARY ZONING PROGRAM?

- ❑ Some projects are so small that providing affordable housing (or fees in lieu of affordable housing) may not be financially feasible. Additionally, it might be necessary to exclude smaller projects to obtain the support necessary to pass political muster.

## 🔴 WHAT TYPE OF MARKET-RATE PROJECTS SHOULD BE SUBJECT TO THE ORDINANCE/BYLAW?

- ❑ Typically, incentive and inclusionary zoning ordinances/bylaws apply to new residential construction.
- ❑ In other parts of the country, communities have created “housing replacement” regulations that apply to situations where housing units are lost through demolition or conversion to nonresidential uses.

## 🔴 DO INCENTIVE AND INCLUSIONARY ZONING PROVISIONS HAVE TO “STAND ALONE” OR CAN THEY BE INCORPORATED INTO OTHER TYPES OF REGULATIONS?

- ❑ Incentive and inclusionary zoning provisions can be incorporated into any type of regulation that includes market-rate housing.

Examples include mixed-use planned unit development regulations, regulations designed to protect open space by encouraging smaller lots, regulations designed to encourage development in village centers and regulations designed to promote first floor shops and second floor housing.

## 🔴 SHOULD THERE BE A REQUIRED PERCENTAGE OF AFFORDABLE UNITS?

Communities can require certain types of affordable housing based on need. For example:

- ❑ In some communities there is a shortage of affordable housing for families with children.
- ❑ In others, there is a shortage of apartments available for rental.

Typically, incentive and inclusionary zoning regulations establish a ratio between market-rate and affordable units. For example, a “ten percent set-aside” would mean one affordable unit is required for ten market-rate units.

# DRAFTING THE BYLAW OR ORDINANCE

## 🔴 SHOULD THE AFFORDABLE UNITS BE ON- OR OFF-SITE?

- ❑ An argument in favor of the “on-site alternative” is that it disperses affordable housing throughout a community, increases choice in location and prevents income-based concentration.
- ❑ An argument in favor of the “off-site alternative” is that if land is cheaper off-site, you might be able to require more affordable units . Also, separate sites can accommodate different types of housing. For example, a community needing affordable, rental family housing might find a separate site more desirable if the market-rate component is luxury condominiums for seniors.

This question is particularly relevant in a community where land values in one area are very different from those in another.

## 🔴 IF THE AFFORDABLE UNITS ARE ON-SITE – ARE THEY TO BE DISPERSED THROUGHOUT THE PROJECT? SHOULD THEY BE INDISTINGUISHABLE FROM THE MARKET-RATE UNITS?

- ❑ Usually the affordable units are required to be dispersed throughout the project and indistinguishable (at least from the exterior) from the market-rate units.

## 🔴 WHEN SHOULD THE AFFORDABLE UNITS BE PROVIDED? WHEN SHOULD THE FEES BE PAID?

- ❑ Communities can require that the affordable units be phased in during the construction process (i.e., for every 5 units of market-rate housing built, there shall be 1 affordable unit) or that the affordable units be built upon completion of the market-rate units. Fees can be required at various junctures, such as at building permit or certificate of occupancy.

# DRAFTING THE BYLAW OR ORDINANCE

## 🔗 WHAT IS THE REQUIRED DURATION OF AFFORDABILITY?

- ❑ Some housing subsidy programs require only a short period of affordability (15-30 years).
- ❑ Other communities may require a longer period – such as in perpetuity (up to 99 years).

Factors to be weighed when deciding on the appropriate length of time include: (1) ensuring the unit is available to lower income households for as long as legally possible, (2) ensuring that the units count toward a community's "ten percent" standard (required by the Anti-Snob Zoning Act, also known as Chapter 40B or Chapter 774), and (3) allowing for neighborhood change over time. The question to be asked is, "what happens to the affordable units, where a neighborhood is in flux, perhaps changing from residential to commercial?" Will these units continue to be adequately maintained over time? Will long-term resale controls hamper the process of change?

## 🔗 WHAT IS THE INITIAL SALES OR RENTAL PRICE OF THE UNIT AND HOW IS IT SET?

- ❑ One way initial sales prices may be set is by determining how much a household earning less than 80% of the median income can spend, assuming that housing costs no more than 30% of the household's income.

## 🔗 WHAT IS THE MAXIMUM INCOME FOR A HOUSEHOLD ELIGIBLE TO OCCUPY THE AFFORDABLE UNITS?

- ❑ Should all households earning below a specified income (i.e. 80% of the area median income) be eligible? If so, is household income to be adjusted for household size or number of bedrooms in the affordable unit?

## 🔗 SHOULD THERE BE ONE INCOME LIMIT OR A RANGE OF INCOME LIMITS?

- ❑ One alternative is to require some of the units to be available to households below one income limit (i.e. 50% of median income) and other units to be available to households below another income limit (i.e. 80%).

## 🔗 WHAT GEOGRAPHIC AREA IS TO BE USED TO SET INCOME LIMITS?

- ❑ Consideration should be given to whether area (metropolitan statistical area) median income, county median income, or any other definition should be used.

# IMPLEMENTING THE BYLAW OR ORDINANCE

## 🔴 WHO (OR WHAT ENTITY) WILL BE RESPONSIBLE FOR CHOOSING PURCHASERS OR TENANTS, MONITORING AND ENSURING THE LONG-TERM AFFORDABILITY OF THE UNITS, AND MANAGING THE “BUY-OUT” FUND?

- ❑ Sometimes the municipality chooses to monitor and administer these programs.
- ❑ More typically, the local housing authority, an affordable housing trust fund or a housing consultant, working on behalf of the community performs these tasks.

This decision is critical - responsible and effective administration, monitoring and enforcement are the “make or break” factors in these programs.

Cambridge has an Affordable Housing Trust Fund that receives public and private money, advises the city on housing policy, and monitors and administers the Cambridge Inclusionary Zoning Program. The town of Norwell has hired a housing consultant, to work on behalf of its housing authority, to administer its affordable housing units.

## 🔴 IS THERE LEGAL DOCUMENTATION CONCERNING THE MONITORING PROCESS?

- ❑ This documentation could be in the form of a “regulatory agreement” between the developer and the municipality or if the bylaw or ordinance involves a special permit process, the monitoring provisions could be in the special permit decision.

## 🔴 WHAT FORMULA IS TO BE USED TO DETERMINE MAXIMUM RESALE PRICE?

- ❑ There are different formulas that may be used to cap resale prices. One example of such a cap is the lesser of a specified percentage of the appraised value of the unit or no more than 30% of that which a lower-income household earns. A key consideration is whether to include the cost or value of capital improvements in these calculations.

## 🔴 IF THE PROJECT IS A CONDOMINIUM, DO THE CONDOMINIUM DOCUMENTS ADEQUATELY PROTECT THE OWNERS OF THE AFFORDABLE UNITS?

- ❑ The condominium documents should, at a minimum, ensure the owners of the affordable units will not be required to pay for capital improvements they cannot afford, and that they, in general, have sufficient voting rights.

# IMPLEMENTING THE BYLAW OR ORDINANCE

## 🔗 WHAT ARE THE MECHANISMS FOR ENFORCEMENT OF THE RESALE AND USE RESTRICTIONS?

- ❑ Typically, developers provide municipalities (or housing authorities or affordable housing trust funds) with an option to purchase or a right of first refusal at resale. This ensures an opportunity for continued participation by the community in the resale process (and an opportunity to monitor resale prices).

## 🔗 IS THERE A DEED RIDER ENSURING LONG-TERM AFFORDABILITY?

- ❑ A deed rider should be attached to the deed of each affordable unit, setting forth affordability parameters including how the maximum resale price is to be determined and what entity has a right of first refusal or an option to purchase the affordable unit at resale.

## 🔗 WHO SHOULD DRAFT INCENTIVE OR INCLUSIONARY ZONING DECISIONS?

- ❑ The board or official that approves the project should draft the decisions unless legal counsel is available to assist. Legal counsel, knowledgeable in this field, should review decisions to ensure the affordable units remain affordable over time and in the event of condominium projects, to ensure that owners of the affordable units will be treated fairly.

## 🔗 WHAT TOPICS SHOULD BE COVERED IN AN INCLUSIONARY ZONING DECISION?

- ❑ The answers to many of the questions listed in these guidelines should be included in the decisions on particular development projects. This is in addition to the basic requirements of any well-drafted decision, which includes a project description, summary of the public hearing process, findings, decision, and conditions.