

AFFORDABLE HOUSING MANDATES: REGULATORY MEASURES USED BY STATES, PROVINCES AND METROPOLITAN AREAS TO SUPPORT AFFORDABLE HOUSING

Introduction

This report reviews a number of affordable housing mandates that have evolved in various upper-tier jurisdictions in the United States and, in two provinces—Ontario and British Columbia. The mandates discussed focus on four states—New Jersey, California, Massachusetts and Connecticut—and two metropolitan areas—Portland, Oregon and Minneapolis/St Paul, Minnesota (also called the Twin Cities).

These mandates enable the above jurisdictions to require their respective constituent municipalities to use their planning regulations and associated development approvals to support—not just plan for—the provision of affordable housing.

These mandates represent only one vehicle that has emerged in the U.S. in support of affordable housing, since the deep cuts made in the early 1980s to federal funding for affordable housing construction. What has evolved is a system that no longer relies predominantly on federal funding, but involves multiple sources of support from a broad range of stakeholders and participants.

Definition

The term “affordable housing” in this report is recognized in the U.S. (not necessarily in Canada) as “lower-income” housing provided on a permanent or long-term basis specifically for households with low- or moderate-income. These are household with incomes no more than 80% of the local median household income. The term also refers to “below-market” housing which has a reduced price or rent due to some form of financial or regulatory assistance. The housing can be provided by for-profit as well as non-profit and public developers.

Research Program

The report contains a series of profiles that describe the origins and achievements of the affordable housing mandate in eight jurisdictions. The main features shared by these mandates are also summarized in a separate chapter.

The information was gathered from past studies and surveys, government legislation and reports, as well as recent interviews with housing officials and other experts in all of the jurisdictions. The interviews were conducted and information collected mainly in late 2000 and early 2001.



Findings

These mandates, in various but similar ways, harness the planning regulations and associated development approval process to assist in the provision of affordable housing.

The objective of the mandates are twofold: to increase the production of affordable housing in light of reduced federal funding, and to increase the production of affordable housing in previously under-represented in suburban communities which historically had often employed exclusionary regulations to prevent the production of affordable housing.

These mandates extend beyond the expectation of good planning practices— providing sufficient development land, zoning for higher densities and cutting municipal red tape. Municipalities are obliged to affirmatively support the provision of affordable housing—they are required to assist in lowering the cost of housing, so it is affordable, specifically to lower-income households.

Obligations are established and performance is measured by a set of quantified targets for the municipalities. Targets may be expressed by a specific allocation assigned to each municipality or, through a standard minimum quota applied to all municipalities.

Some mandates also require municipalities to assume an additional allocation, which is a portion of regional housing need. This approach is founded on a widely-held principle known as “fair share” whereby all municipalities in a market area or large jurisdiction should assist in the provision of affordable housing on common and equitable basis. This provision is directed particularly at suburban municipalities that have resisted the provision of affordable housing in the past.

Enforcement of Obligations

To enforce these obligations, special approval procedures for affordable housing projects and access to appeals tribunals are made available to developers. Municipalities can only deny approvals on narrow, limited grounds and must have the burden of proof in defending their decisions.

Regulatory Concessions

Recognizing the limited financial resources of most municipalities, the various mandates do not prescribe how a municipality must support affordable housing but provide for a range of municipal options, primarily regulatory concessions that provide a subsidy through the development approval process.

The main regulatory concessions generally available to support the provision of affordable housing include:

- density bonuses;
- expedited approval procedures;
- reduced development standards; and
- waivers to various application fees or development charges.

The concessions are aimed mainly at enabling for-profit developers to build affordable housing. Non-profit developers can also take advantage of these provisions, but often are required to secure deeper subsidies from government funding programs. Some municipalities will supplement non-profit developers by providing loans and grants, land at a reduced cost, and/or relief from property taxes.

Mixed-Income Projects

For-profit developers typically participate in what is referred to as inclusionary or mixed-income projects. They are mainly market-rate housing projects that reserve a small proportion, typically, 10 to 25%, of units for lower-income households. The provision of affordable units is supplied in exchange for density bonuses and other regulatory concessions.

To ensure affordability over the long term, for-profit developers must put in place legal agreements ensuring that only eligible households occupy affordable units, and that rents or prices are capped at an affordable level for a specified period, typically, a minimum of 20 years, permanently or, for the life of the building.

Summary of Mandate Features

The mandates discussed all share one or more of these key features:

- directing their constituent municipalities to make affirmative efforts to support the provision of affordable housing;
- setting quantified targets for specifically defining the amount of affordable housing each municipality is expected to accommodate;
- directing the municipalities, as part of those targets, to accommodate a share of the regional housing need;
- providing regulatory concessions for supporting the provision of affordable housing, especially by for-profit developers; and
- providing special approval procedures for developers to use when the municipalities do not meet their affordable housing obligations.

Mandate Profiles

The mandates examined varied widely in terms of their content, origin, development, and effectiveness. The most demanding mandates are found in New Jersey, California and Massachusetts. Portland's mandate is evolving comparably. The Canadian mandates profiled; British Columbia and Ontario, and two U.S. examples: Connecticut and the Twin Cities, are the least comprehensive and effective mandates reviewed in the study. Ontario's mandate, while included, has since been dismantled.

New Jersey

New Jersey's affordable housing mandate is based upon two state landmark rulings, known as the Mount Laurel rulings, which initiated a direct attack on the exclusionary zoning practices of a suburban community.

In 1975 the court ruled that all growing municipalities in the state had an obligation through their planning instruments, to provide a "realistic opportunity" for meeting a "fair share" of the affordable housing needs of their regions. Known as the "fair share doctrine", this is the conceptual foundation of the state's mandate.

In absence of any response to its earlier ruling, the court set about vigorously enforcing the doctrine laid out in the 1975 decision in its lengthy 1982 ruling. The ruling obliged all developing municipalities to support the provision of a specified amount of affordable housing and endorsed the use of various "affirmative measures", including: inclusionary zoning, density bonuses, tax abatements and donated municipal lands for affordable housing.

The ruling led to the development of a detailed methodology for precisely calculating the "fair share" of affordable housing in every municipality. The methodology required municipalities to incorporate existing needs, projected regional needs, building capacity and a great many other factors in development plans.

At the same time, lower trial courts responsible for implementing the doctrine through development litigation, started expediting the proceedings and imposing the so-called "builder's remedy". The remedy required—through individual approvals or wholesale changes to municipal policies—that all for-profit residential projects contain a proportion of affordable housing. Typically, mixed-income projects were required to set-aside 20% for affordable housing in exchange for a density bonus of 20%.

The state legislature passed its *Fair Housing Act* of 1985 in response to these forceful actions of the courts. A new state agency was established to assume administration of the fair share doctrine and the attending responsibility for codifying the regulations within the principles set out by the courts. While the statute has never been revised, the regulations have evolved over time.

The statute resulted in a new state-wide planning system for affordable housing which required all municipalities to prepare and adopt local plans for affordable housing needs every six years, subject to state certification. Municipalities with certified plans regained control of housing development in their communities, while the remaining municipalities continued to be vulnerable to court-imposed remedies. The municipalities are able to meet their affordable housing obligations in various ways. Most notably, they are able to use inclusionary zoning requiring all residential developments to contain a certain proportion of affordable units, and/or to charge new commercial and residential construction with development fees dedicated to the provision of affordable housing.

California

California's affordable housing mandate is the product of a series of statutes modified over time. The mandate's foundation is the "housing element law of 1980", which sets out the requirements for local comprehensive plans. This law is supplemented by many other statutes specifically addressing affordable housing.

Under the "housing element law", all local governments must use their vested planning powers to make adequate provision for the housing needs of all economic segments of the community. This stipulation includes an assigned share of regional housing need based on regional projections of housing growth made by the state's housing department every five years and municipal allocations made by regional councils of government using both technical and political considerations.

The state's housing department is also responsible for certifying adopted comprehensive plans to ensure they comply substantially with the law but does not have the authority to compel compliance. Enforcement of the laws depends upon civil litigation brought mainly by housing developers and advocates. Local governments without certified plans are vulnerable to court-imposed development freezes and other remedial interventions.

One of the most significant supplementary statutes is the “density bonus law” of 1979 which requires local governments to provide every affordable housing project with a minimum density bonus of 25%, and additional incentives such as: reduced development standards, expedited approvals, waived fees and financial assistance, to ensure projects are financially feasible. Non-profit and for-profit projects containing a prescribed percentage of affordable units, are eligible for these incentives.

The state’s “anti-NIMBY law”, 1991, provides special approval and appeal procedures in local jurisdictions failing to provide for affordable housing. The statute severely limits the grounds upon which affordable housing projects can be denied and subjects adverse decisions to expedited court procedures. Local governments bear the burden of proof in defending decisions and the courts are able to override local land-use controls, including density limits and even land-use designations in some cases.

Inclusionary zoning has been adopted by many local governments to meet their affordable housing needs, due mostly to the state’s early advocacy. Nevertheless, there is no state law explicitly authorizing inclusionary zoning, nor prescribing how it must be implemented.

Massachusetts

This state’s mandate was founded on a comprehensive permit process—a special approval procedure for affordable housing projects introduced in 1969 through the *Housing Appeals Law*—once popularly known as “anti-snob zoning law”. The legislation has not changed, but key amendments have been introduced through creative re-interpretation of the statutory regulations.

As originally conceived, the process was intended to facilitate the approval of housing subsidized by government funding. Since that time, funding cutbacks have led to the extension of eligibility to other types of affordable housing projects, including mixed-income projects built by for-profit developers.

The comprehensive permit process benefits affordable housing developers by instituting a single expedited approval procedure encompassing all local regulations and subject to stringent time limits. Developers are able to obtain exemptions to any local regulations, including, density limits, where essential to a project’s economic feasibility. Under very limited conditions—serious health, safety, environmental, or planning concerns that clearly outweigh the need for affordable housing —municipalities are able to deny applications.

In most municipalities, developers can appeal any adverse decision to a dedicated state board which is authorized to override the local jurisdictional authorities. The burden of proof rests on the municipality to provide documented evidence justifying a decision.

The appeals procedures applies only in municipalities failing to meet their affordable housing obligation—municipalities where less than 10% of the total housing stock is affordable housing. Although arbitrary and not entirely reflective of housing need, 10% represents an easily understood benchmark that has been accepted as the measure of “fair share” in the state. Only a few municipalities in the state meet this criteria.

Connecticut

Connecticut enacted its affordable housing provisions through its *Affordable Housing Land Use Appeals Act* of 1989 which was subsequently amended in 1995 and 2000. The law established special approval procedures for affordable housing projects modeled on the Massachusetts system. Like Massachusetts, Connecticut also has a weak state planning system.

Connecticut’s procedures are less effective than the previous mandates discussed in addressing most, but not all, of the local development regulations. Specifically: approvals and appeals are not regulated by tight time limits in an assigned court and, there are no provisions that enable or encourage local municipalities to support affordable housing.

Portland Metropolitan Area, Oregon

The metropolitan government for the Portland area introduced a “regional affordable housing strategy” in early 2001. The mandate assigned a proportional “fair share” of affordable housing needs to each municipality based on 5- and 20-year regional- wide projections for households earning 50% or less of the area’s median income. It also identified an array of regulatory and financial tools for use by municipalities in meeting allocations which are to be incorporated in local plans. The metropolitan government will assess municipal efforts and performance in three years, and decide if more demanding or specific directives are necessary.

These provisions build upon an earlier and extant mandate, the state’s 1981 “Metropolitan Housing Rule”. Under this rule, all municipalities were directed to use specified minimum average densities when planning for new residential development and to plan for at least 50% of the residential units to be attached or multi-family housing. These requirements were aimed at making housing more affordable generally but not at providing for

lower-income households specifically. The requirements have been important in breaking down barriers to the provision of more affordable housing and, in laying the foundation for a collective approach to housing problems.

Twin Cities Area, Minnesota

The affordable housing regulatory provisions for the Twin Cities metropolitan area are contained in the Housing Incentive Program, created as part of the state's *Liveable Communities Act* in 1995. Under this program, local municipalities negotiate with the metropolitan government and, agree to a number of housing goals for 2010 intended to increase the density of residential development and percentage of affordable housing.

In return for housing goal agreements, municipalities become eligible for funding administered by the metropolitan government raised through a metropolitan-wide property tax levy. The funding can be used for various specified types of community improvements projects sponsored by municipalities, not limited to affordable housing. Projects can be targetted to the diversification of housing (cost and type), the intensification of development around transit stops or, the clearing of contaminated lands for commercial and industrial development.

This approach differs from the others reviewed in this report relying on discretionary funding as an incentive for setting negotiated goals instead of imposing mandatory obligations on the municipalities. The goals are not directed at meeting solely projected housing needs but at making practical improvements to past development practices.

The program does not provide municipalities with additional tools but relies on available federal and state funding, and municipal financial resources, including; property tax levies, tax abatements and tax increment financing, and government bonds.

British Columbia

Through legislation passed in 1992-94, B.C. established various municipal planning obligations for affordable housing. For the first time, all municipalities were required to plan for affordable, rental and special needs housing and were authorized to use incentives such as: density bonusing, comprehensive density zoning, and the selling or leasing of municipally-owned land at less than market value.

This legislation, however, does not impose any binding obligations specific to lower- income households and does not define affordable housing or set any specific targets. Consequently, the municipalities have a wide latitude in how they define and meet their affordable housing needs.

Ontario

Ontario's affordable housing obligations, in force for seven years, were contained in two provincial policy statements. In 1989, Ontario established various policies directing municipalities to plan for a full range of housing types. In 1994, the policies were extended to allow for specific requirements for lower-income housing. Most of these provisions, including all those related to lower-income housing, were deleted in a revised statement released in 1996.

These former Ontario obligations were less demanding than the U.S. mandates. The municipalities were expected to plan and zone appropriately for affordable housing, but not to assist in its provision through regulatory tools or other supports to non-profit or for-profit developers. All of the necessary subsidies were to come from senior levels of government.

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