Responsible Development? The Need for Revision to Seattle’s Inclusionary Housing Plan

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I. INTRODUCTION

Like cities across the country struggling with city-core development growth in the 21st century, the City of Seattle needs to create more affordable housing¹ while still increasing urban density² and providing economic incentives to sustain private development. Like other rapidly growing cities, Seattle has enacted a set of municipal laws to achieve these competing goals. To address Seattle’s demand for affordable housing, the Seattle Housing Authority (SHA) publicly manages 5,200 housing units.³ In addition to managing residential units, the SHA offers senior housing facilities and gives more than 8,300 housing choice vouchers to low-income families.⁴ Through these efforts, the SHA’s housing programs serve an estimated 26,000 people.⁵ The efforts of the SHA, however, fall short of meeting the demand for affordable housing in the city.

The SHA estimates that 8,130 households are waiting for affordable housing units to become available.⁶ Moreover, because 78% of those

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⁵ Id.

⁶ Id. These vouchers subsidize the cost of the private rental market. Id.
receiving housing benefits have incomes well below 30% of the median income of Seattle residents, the SHA fails to serve thousands of residents that fall between 30% and 80% of the area median income.

The current housing market conditions further contribute to the lack of affordable housing units in Seattle. Housing experts have suggested that Seattle’s local economy and job growth will propel the Seattle housing market into the company of “superstar” housing markets like the housing markets in New York and San Francisco. Because Seattle’s median price for a detached home is $435,000 and its median price for a condominium unit is $284,450, residents with incomes below or even equal to the local per capita income struggle to find affordable housing. Moreover, as national mortgage financing standards have become increasingly restrictive following the meltdown of the mortgage market, fewer Seattle residents are making the jump into homeownership. The stall in the housing market has led to a steady increase in demand for rental units. Analysts predict that this demand will drive down the vacancy rate and raise the average rental rate above its current level of $930. Furthermore, although Seattle ranks 83rd in foreclosure activity among 100 metropolitan markets, a foreclosure bug has bitten housing markets across the country, including large markets in California. These conditions create significant challenges to low- and moderate-income renters and purchasers, making Seattle ripe for the enactment of an inclusionary housing plan.

7. Id. In fact, the average public housing resident’s income is just $12,600. Id.
8. King County Hous. Auth. Key Facts, http://www.kcha.org/aboutus/keyfacts.aspx (last visited Nov. 8, 2008). Although the Seattle Housing Authority cannot reach many households, the King County Housing Authority is also available to help needy households. Id. The King County Housing Authority manages 8,636 units throughout King County and also provides rental assistance in the form of housing vouchers to 7,934 households. Id. The King County Housing Authority’s primary area of operations, however, is outside of the city of Seattle. Id.
12. Id.
13. Id. The current average is an 8.6% increase from 2006. Id.
14. Elizabeth Rhodes, Seattle Foreclosure Activity Up. But Still Much Lower Than Much of Nation, SEATTLE TIMES, July 25, 2008, at D1, available at 2008 WLNR 13911810; see also Realty Track, http://www.realtytrack.com (last visited Nov. 7, 2008) (enter “QuickSearch” of Seattle, Wash.). Although the numbers change daily, there were 1,148 properties in Seattle either up for auction or held by a bank as of November 7, 2008. Id.
This Comment explores how Seattle’s enactment of a limited inclusionary housing plan can effectively meet the challenges of responsible development, both satisfying the city’s need for density and affordability and maintaining an economic environment conducive to developer profitability. Although Seattle’s current inclusionary housing plan may give adequate incentives to developers, the city needs to move away from its current voluntary plan and toward a mandatory plan that balances increasing developer incentives with a demand for affordable on-site development to serve a broader spectrum of income levels.

Part II of this Comment lays out the background of exclusionary and inclusionary zoning laws, which form the foundation of every modern inclusionary housing plan. Part III examines the different approaches taken by the cities of Seattle, San Francisco, and Denver within the inclusionary housing framework. Finally, Part IV proposes several recommendations that will enhance the effectiveness of Seattle’s inclusionary housing plan.

II. EXCLUSIONARY AND INCLUSIONARY ZONING

A. Exclusionary Zoning

Exclusionary zoning laws bar certain populations from particular communities. Initially, cities enacted exclusionary zoning laws to limit the kinds of buildings constructed on private lands in order to slow population increases during the early 20th century. During this era, the Supreme Court recognized a municipality’s authority to divide land for specific uses as a full extension of the state police power. Land use policy makers have since enjoyed considerable autonomy in determining the kind of zoning laws that best fit the needs of their municipalities.

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15. The concept of responsible development can be contrasted with the broader-based concept of smart growth that includes more direct environmental concerns that are beyond the scope of this article. For a discussion of the broad-based concept of smart-growth that encompasses community planning and discourse, as well as the environment, see Tim Iglestas, A Place to Call Home? Affordable Housing Issues in America Article Our Pluralist Housing Ethics and the Struggle for Affordability, 42 WAKE FOREST L. REV. 511, 573–82 (2007); Patricia E. Salkin, From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls, 20 PAC ENVTL. L. REV. 109, 117–26 (2002). In this Comment, responsible development refers to a city’s successful balancing of density and affordability across a broad spectrum of socio-economic levels with continued developer profitability.


Widespread zoning techniques, however, have also succeeded in barring access to certain communities by certain types of people. 19

Exclusionary zoning laws, both purposely and inadvertently, have excluded disadvantaged groups, such as minorities or low- and moderate-income citizens, from certain areas. 20 Today, exclusionary residential zoning policies are no longer based explicitly on racial classifications or income levels; instead, exclusionary residential zoning policies regulate standard residential uses. 21 Yet, the seemingly neutral regulation of standard residential uses produces the same exclusionary effect as earlier zoning laws based explicitly on race or income level. 22

Although cities may no longer purposefully enact an exclusionary housing ordinance, modern zoning requirements may nonetheless effectively exclude all but the rich by restricting the development of smaller, affordable residences and promoting the development of larger single-family residences. 23 Moreover, because a large percentage of low-income households are also minority households, exclusionary ordinances raise issues of racial and ethnic segregation. 24

Although courts have invalidated some exclusionary zoning laws, many of these laws have subsisted. 25 Legislative deference and the standing requirement pose particular barriers to challenging exclusionary

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19. Id.
20. Id.
22. Id.; see also Zimmerman & Cohen, supra note 16, at 41. For example, zoning requirements that are benign on their face—such as minimum lot size requirements, minimum and maximum building sizes, restrictions on the number of bedrooms, minimum floor areas, street frontage requirements, the prohibition of mobile homes, or the exclusion of multi-family development—may harm low- and moderate-income persons seeking housing. Id.
23. See HOUSING FOR ALL UNDER LAW: NEW DIRECTIONS IN HOUSING, LAND USE, AND PLANNING LAW 52, 54–55 (Richard P. Fishman ed., Ballinger Publ’g 1978) [hereinafter HOUSING FOR ALL]. Limiting development to single-family dwellings allows a municipality to eliminate realistic housing opportunities for low- and moderate-income persons because single-family housing is more expensive than multi-family housing. Id. Multi-family housing is cheaper because of the increased density and decreased unit size achieved by larger apartment buildings. Id. Raising the unit size requirement results in larger units within the zoned area, making them proportionally more expensive to build, and pricing low- and moderate-income residents out of the community. Id.
25. Id. §§ 1[b], 2 (when the courts find a reasonable connection between zoning restrictions and the public health or safety of a community the exclusionary zoning regulation has been upheld as being within the traditional scope of police powers that enable municipalities to regulate and restrict land use for the purpose of promoting the public health, safety, or general welfare of the community); but see Isla Verde Int’l Holdings, Inc. v. City of Camas, 146 Wash. 2d 740, 758, 765, 49 P.3d 867 (2002) (holding that a Camas City ordinance requiring a developer to set aside 30% of a subdivision as open space violated the exclusionary language of WASH. REV. CODE § 82.02.020 as a prohibited charge).
zoning laws. First, because an exclusionary zoning law is presumed to be valid and constitutional under the doctrine of legislative deference, a court will uphold the law unless the litigant can show its unconstitutionality by clear and convincing evidence. Second, to have standing to challenge an exclusionary zoning law, a litigant must show that she has been "aggrieved."

Litigants have occasionally succeeded in challenging exclusionary zoning laws. For example, in Mt. Laurel I, the New Jersey Supreme Court held that a municipality could not presumptively foreclose housing opportunities for low- and moderate-income residents; rather, the municipality must affirmatively afford those residents housing opportunities. The issue concerned a set of zoning regulations that allowed the municipality to make deals with developers at the time of development, rather than applying predefined zoning regulations to the project. As a result, most of the residential projects developed under the agreements were for single-family occupancy, making the bulk of the available housing beyond the financial reach of low- and moderate-income families. For example, the municipality limited apartments to one-bedroom and limited the number of child-inhabitants. Through these schemes, the rental and sales prices were pricing low- and moderate-income residents out of the municipality.

After the municipality failed to institute any changes to afford low- and moderate-income households the opportunity to get housing, Mount Laurel II was initiated to enforce the court’s earlier judgment. In Mt. Laurel II, the court noted that no lower-income housing units had been built since Mt. Laurel I. The court explicitly specified two actions mu-

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26. Kemper, supra note 24, § 2. A litigant must generally have a legal or equitable interest in the disputed property to pursue a claim. Id.
27. Id. § 3(a).
28. Id. § 2.
30. Mt. Laurel I, 336 A.2d at 724–25. The decision in Mt. Laurel I came to be known as the Mt. Laurel Doctrine.
31. Id. at 720. This kind of land use planning is commonly referred to as Planned Unit Development (PUD).
32. Id. at 721–22.
33. Id. The municipality required developers to record a covenant stating that the developer would pay for the increased financial burden associated with the public school enrollment of children living in that residential development if, on average, there were more than 0.3 school-age children per unit developed. Id.
34. Id.
35. Mt. Laurel II, 456 A.2d at 390, 461.
36. Id.
nicipalities would need to take to achieve the required housing result: first, institute mandatory set-asides of units for low- and moderate-income persons within a given development and second, offer general incentive zoning that gives developers density bonuses to increase development density in exchange for affordable housing.37 This holding eventually evolved into the fair share doctrine that requires a municipality to show that it has provided for the creation of low- and moderate-income housing.38

The Mt. Laurel decisions have lasting importance for two reasons. First, at least in New Jersey, the decisions allowed trial courts to maneuver around the long-standing policy of legislative deference by giving the courts the authority to revise a municipality’s zoning ordinances.39 Second, several states followed New Jersey’s lead by enacting statutes forcing municipalities to provide their fair share of lower income housing.40

Washington is one of the states that followed the principles articulated in Mt. Laurel. Washington’s Growth Management Act of 1990 (GMA) requires larger municipalities to create a comprehensive growth plan that identifies policies to satisfy a municipality’s housing needs across income levels.41 This growth plan requirement, however, is limited. The requirement does not explicitly state the guidelines under which a municipality would need to achieve a proper balance of housing. Furthermore, it does not specifically reference the fair share doctrine set forth in the Mt. Laurel II decision.42

Despite the absence of a direct reference to the Mt. Laurel decisions, Mt. Laurel’s impact on Washington’s development and housing strategies is evident from the housing element in the GMA.43 The housing element requires municipalities to establish goals for the development of housing, identify sufficient land for housing, and make adequate provisions for projected housing needs.44 These requirements strongly suggest that the Mt. Laurel decisions have affected the development policy of Washington,45 as well as that of other states and municipalities.46

37. Id. at 445–47.
38. Id. at 422.
40. Pennsylvania and New York also have taken a constitutionally derived skepticism to exclusionary housing. See Zimmerman & Cohen, supra note 16, at 63–72.
42. See WASH. REV. CODE § 36.70A.070(2).
43. Id.
44. Id.
45. See id.
46. Id.; see also Zimmerman, & Cohen, supra note 16, at 63–72.
B. Inclusionary Zoning

In the early 1970s, in response to the decrease in affordable housing stemming from exclusionary zoning laws, municipalities began enacting inclusionary zoning laws. 47 Today, zoning laws are generally a product of both legislation at the state and local levels and, to a lesser extent, judicial decisions like *Mt. Laurel I & II.* 48 Initially, inclusionary zoning was neither voluntary nor triggered by incentives. 49 Mandatory inclusionary zoning was seen as necessary because the *Mt. Laurel* decisions and other early studies showed that developers were unlikely to participate in voluntary programs. 50 After, however, the Virginia Supreme Court invalidated a county’s mandatory inclusionary zoning law in 1973, other municipalities broadened their inclusionary zoning laws to include both mandatory and voluntary plans. 51

Today, inclusionary zoning laws fall into one of three broad categories: (1) set-asides, (2) density bonus programs, or (3) hybrids of the two. 52 Set-asides require a developer to incorporate a certain minimum amount of lower-income housing into a particular development. 53 This minimum ranges from 5% to 25% of a total development and can be either mandatory or voluntary. 54 In contrast, density bonus programs are voluntary programs that give developers the opportunity to increase the density of a multi-family project in exchange for a certain allocation of affordable housing units. 55 Finally, as a result of increased creativity in drafting inclusionary zoning laws, municipalities now employ hybrid plans alongside set-asides and density bonus programs. 56 These hybrid plans recognize the problems associated with developing lower-income

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47. Peter Salsich, State and Local Regulation Promoting Affordable Housing, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT, supra note 16, at 89. In 1971, a few years before the *Mt. Laurel* decisions, Fairfax County, Virginia, installed a program, and Montgomery County, Maryland, followed suit in 1973. *Id.* Since that time, California has been the largest proponent of inclusionary zoning, with over 100 municipalities adopting inclusionary zoning ordinances. *Id.*

48. *Id.* at 89–91; see also HOUSING FOR ALL, supra note 23, at 584.

49. Salsich, supra note 47, at 90.

50. *Id.*

51. HOUSING FOR ALL, supra note 23, at 198. In Bd. of Supervisors of Fairfax County v. DeGroff Enters., 198 S.E.2d 600 (Va. 1973), the court struck down Fairfax County’s mandatory inclusionary zoning ordinance on the grounds that the ordinance was beyond the authority granted to the county under the state enabling act, and would therefore constitute a “taking” of private property. *Id.*

52. Salsich, supra note 47, at 92, 95.

53. *Id.*

54. Voluntary programs are most successful in housing markets that are strong enough that developers will be able to fund and include below market rate units in a project in exchange for an increase in density levels. *See id.* at 90.

55. *Id.*

56. See 2 ZIEGLER ET AL., supra note 21, §22.23.
housing and offer alternatives to on-site construction, including off-site construction. More recent plans go so far as to accept either dedications of land for lower-income housing or cash payments in lieu of immediate development. Modern inclusionary housing programs provide for municipal oversight, not only to set proper unit sale and rental prices at the outset, but also to monitor the units to ensure continued affordability.

Regardless of whether an inclusionary program is categorized as a set-aside, density bonus, or a hybrid of the two, the program should address (1) the minimum unit threshold at which a project will trigger the inclusionary ordinance; (2) the percentage of units within a project that must be affordable; (3) the segment of the population that will be eligible for the affordable units; and (4) the time during which the units will remain affordable.

Inclusionary zoning laws that successfully address these issues have several socioeconomic benefits. First, inclusionary zoning allows affordable housing to be developed within larger market-rate developments, creating economically diverse communities. Second, inclusionary zoning enables low- and moderate-income residents to live near where they work, which creates more density, reduces displacement of lower-income residents as new market-rate development is created, and diversifies the workforce. Finally, inclusionary zoning encourages community members to embrace the idea of affordable housing by providing economic incentives. Developing buildings that are constructed entirely of low-income units often creates anxiety amongst community members who fear that affordable housing will increase crime and stunt property values. Although the accuracy of these fears is debatable, inclusionary zoning laws nonetheless mitigate the opposition to affordable

57. 2 id.
58. 2 id. The in-lieu fees are pooled to finance construction of affordable units at a later date.
2 Id.
59. 2 Id.
60. Salsich, supra note 47, at 90.
62. Id.
63. See id. Shifting the financial burden of creating affordable housing onto developers also enables municipalities to devote their resources to other capital improvement projects. Id.
housing by combining affordable units with market-rate units and, thus, decrease the social and economic costs of convincing community members to accept affordable housing.  

Despite these socioeconomic benefits, passing the economic costs of inclusionary housing plans entirely onto developers, although appealing to municipalities, significantly affects the feasibility of these programs.  

For example, developers often increase the sale or rental prices for market-rate units in the newly constructed buildings to offset the reduced or negative return on the inclusionary units.  

As the prices rise, market-rate purchasers and renters become less likely to enter the market, in turn defeating the general goal of inclusionary zoning: the creation of affordable housing units through the development of market-rate units.  

To reduce the costs of inclusionary zoning, some municipalities have granted developers incentives. Municipal incentives relax certain zoning restrictions in return for a developer’s agreement to build a specified number of lower-income units. The underlying theory is that the additional profit generated by constructing bonus market-rate units will offset the lost revenue associated with constructing affordable housing units. Other incentives include the waiver of building permit processing fees, expedite of permit plan review, and exemption from utility hookup charges.

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66. See Affirmed Hou. Group, Myths and Stereotypes About Affordable Housing 1–3 (2004), http://www.affirmedhousing.com/resources/pdf/myths_stereotypes.pdf. Affordable housing has been shown to have no impact on the property values of surrounding buildings or units and, in fact, can actually raise property values. Id. at 1. Moreover, by helping to maintain a stable population affordable housing can actually help to reduce crime rates. Id. at 3.

67. Chris Fiscelli, New Approaches to Affordable Housing: Overview of the Housing Affordability Problem 3 (Reason Found. 2003), http://reason.org/update20_affordablehousing.pdf. The potential loss of money by developers is the one factor that affects the viability of an inclusionary housing plan. Id. If the costs are high enough to deter a developer from undertaking a building opportunity, then as a corollary, the number of inclusionary units that are built is significantly reduced. Id.

68. Id. at 4.

69. See id. at 4. Even if the developer raises the prices of market-rate units or absorbs the cost of building affordable units, it may still run into problems marketing the full-price units because of the perception that the value of the market-rate units is reduced because of their proximity to the affordable units.

70. 2 Ziegler et al., supra note 21.

71. See 2 id. For example, under incentive zoning, a developer who could normally only build a 100-unit development may be permitted to build an additional twenty-five units if a certain number are reserved as affordable. See 2 id.

72. See 2 id.
III. INCLUSIONARY HOUSING PLANS

Although incentive-based plans appear economically efficient, they have not been entirely successful in practice. This Part examines how inclusionary zoning laws (or “inclusionary housing plans”) have been implemented in Seattle, San Francisco, and Denver.

A. Seattle

1. 1989 CAP Initiative

In May of 1989, Seattle citizens passed Initiative 31, the Citizens Alternative Plan (“CAP”) Initiative.73 To slow growth in Seattle, CAP placed a limit on building heights throughout the city74 and placed a ceiling on the amount of office space built in a given year.75 Unfortunately, CAP was a homegrown movement driven more by neighborhood activism than by level-headed planning.76 To that end, the new density regulations established under the plan were ill advised.77 Experts now agree that CAP erroneously transferred the power over zoning matters from elected officials and city planners to city residents.78

Although CAP focused primarily on commercial development, it affected residential growth by limiting new building heights to 85 feet in areas that could have benefited from new multi-family development.79 CAP also required developers to scale back mixed-use projects designed to incorporate housing.80 For example, the first project approved after CAP was a ten-story, 250,000-square-foot building developed by Martin

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73. See Walter Hatch, Voters Put a Lid on It: CAP Winners Savor the Message Sent to City Hall, SEATTLE TIMES, May 17, 1989, at A1. Sixty-two percent of the citizens who participated in the special election approved the measure. Id. The CAP initiative was part of a larger response by disgruntled citizens to change the approach City Hall had taken to increased multi-family development in traditional single-family neighborhoods. Id.

74. Walter Hatch, Questions and Answers about the CAP, SEATTLE TIMES, May 1, 1989, at A9. Specifically, CAP restricted building heights to 450 feet in the downtown financial district, 300 feet in the districts north and east of the financial district, and from 240 to 400 feet in the retail district. Id.

75. Id.


77. Id. Density is measured by floor-area-ratio (“FAR”), which represents the ratio between the square footage of a building and the square footage of the lot. Id. CAP effectively reduced the allowable FAR from 20 to 14 in the financial district and from 14 to 10 in other downtown districts. Id.

78. See id.

79. Id.

80. See, e.g., Terry Lawhead, Panel OK’s Selig Building Downtown, Project First to Face CAP Scrutiny, SEATTLE TIMES, Dec. 7, 1989, at D1.
Selig. The original design called for a fifty-story, mixed-use building composed of both condominium units and office space. Because CAP limited the number of allowable square feet for the entire downtown area, however, the developer scaled back the building before its approval, and, as a result, all of the housing units were lost. Thus, although CAP purported to control growth, it accelerated urban sprawl as developers fanned out to the suburbs, causing a loss of housing in the downtown core.

Less than twenty years later, some previously staunch proponents of CAP now support the new City Development Plan enacted in April of 2006. One former CAP proponent even called the new zoning regulations a “milestone” and “turning point” in the history of development in Seattle. Unlike CAP, the new rules are intended to bring more development and residents to downtown Seattle, which will in turn help curb urban sprawl.

2. 2006 Legislative Changes

In response to the increased growth in population, the City of Seattle enacted the Downtown Livability Legislation in 2006, which aimed to enhance livability and increase the range of housing available in downtown Seattle. By reworking the residential zoning laws so that developers could build taller and denser buildings, the city promulgated a vision of a new urban landscape that would entice residents to move to the

81. Id.
82. Id.
83. Id. The Seattle Downtown Project Review Panel approved the reduced project. Id. Under CAP, only 500,000 square feet of office space could be built in a given year between Denny Way and South Dearborn Street, severely restricting mixed use projects such as the original Selig project. Id.
85. See Young, supra note 84.
86. Former Seattle City Councilman Peter Steinbrueck was a proponent of CAP but has been more recently the chief architect behind the new City Development Plan. Id.
87. Id.
88. Press Release, City of Seattle Mayor’s Office, Mayor Signs Historic Bill for Livable, Affordable City Center (Apr. 12, 2006), available at http://www.ci.seattle.wa.us/news/detail.asp?ID=6046&Dept=40 (last visited Oct. 16, 2008). The legislation was also a response to calls from the downtown neighborhoods for more downtown jobs and housing. Id.
downtown core, slow urban sprawl, and create more jobs near where people lived.\footnote{Id.} The other main selling point for many community activists and city council members was the promise that this legislation would generate more affordable housing in downtown Seattle.\footnote{Id.}

More specifically, the city promised affordable housing worth $100 million for city purchasers with incomes of up to 100% of the median income.\footnote{Id.; see also Seattle Office of Hous., Downtown Residential Bonus Program, http://www.seattle.gov/housing/incentives/residential_bonus.htm (last visited Nov. 10, 2008).} Renters in Seattle generally qualify for lower-income housing if their annual income does not exceed 80% of the median household income for the city.\footnote{Id.} If the median income for a one-person household were $57,000, then, to qualify for subsidized housing, a one-person household with an income of $45,600 could spend no more than $1,140 per month to rent a studio unit and no more than $1,221 per month to rent a one-bedroom unit.\footnote{Id. These limits are published by the U.S. Department of Housing and Urban Development (HUD) during the first quarter of each year. Id.} Because the Downtown Livability Legislation set the income ceiling for homebuyers at 100% of the median household income, the legislation reached out to more residents in need of affordable housing in downtown Seattle.\footnote{Id.}

The affordable housing section of the Downtown Livability Legislation, as codified under the Seattle Municipal Code, gives residential developers the opportunity to increase the height of buildings under construction in several of the downtown core zones in exchange for affordable housing commitments.\footnote{See SEATTLE, WASH., MUN. CODE tit. 23, § 49.015 (2006), available at http://clerk.ci.seattle.wa.us/~public/code1.htm (enter 23.49.015); id. § 49.008, available at http://clerk.ci.seattle.wa.us/~public/code1.htm (enter 23.49.008); id. § 49.020, available at http://clerk.ci.seattle.wa.us/~public/code1.htm (enter 23.49.020).} To facilitate the dual goals of market-rate development and increased affordable housing, the city turned to an inclusionary housing plan.\footnote{Id. § 49.015. Under the old zoning code, building heights in the old DMC zones had a maximum height of 290'. Under the revamped code provisions, however, a developer can either choose to build to the old maximum height (which is now the base height) or up to a maximum of 400' in additional bonus height. Id. Similarly, whereas projects zoned DOC-1 had an old maximum height of 450', those projects can now be constructed to an unlimited building height. Id. Finally, DOC-2 building projects had an old maximum building height of 300', whereas now those buildings can soar to 500'. Id.} More specifically, the city opted for a voluntary plan that applies to three zoning designations used in the downtown
core and nearby areas: Downtown Office Core-1 (DOC-1), Downtown Office Core-2 (DOC-2), and Downtown Mixed Commercial (DMC). 97

Within this voluntary scheme, a developer may pursue either a performance option or a payment option. 98 If the developer determines that the project requires bonus area, it executes a Voluntary Agreement with the city, whereby the developer promises to provide low- or moderate-income housing via either the performance option or the payment option. 99

The performance option allows developers to construct taller buildings in exchange for reserving 11% of the net residential floor area sought as bonus development for low- or moderate-income housing. 100 The developer must either incorporate the units in the particular project being built or provide the units within one block of the main project site. 101

The following example illustrates the application of this option. Developer A proposes a new thirty-nine-story apartment tower in a DMC 240'–290'–400' zone. 102 The average unit size is 700 square feet, with the plan calling for half the units to be constructed as studios and half as one-bedroom apartments. 103 Hypothetically, the total gross bonus residential floor area sought by the developer is 131,700 square feet. 104 To compute the net floor area that must be reserved as affordable housing, the gross floor area of 131,700 square feet is multiplied by an efficiency factor of 80%, 105 providing a net total floor area of 105,360 square feet. Eleven

97. Id. § 49.015(B). The legislation allows a developer to elect to seek bonus development for projects in DOC-1 (base height of 450'—unlimited with density bonus), DOC-2 (base height of 300 '–500' with density bonus), or DMC zones (base height of 290'–400' with density bonus) in exchange for either reserving 11% of the net bonus residential floor area sought or the payment of $10 per square foot of net bonus residential floor area between the height of 85 feet and the base height; $15 per square foot on the first four floors above the base height, $20 per square foot for the next three floors; and $25 per square foot for the remaining floors up to the building height maximum, not to exceed $18.94 per square foot for the net residential floor area sought as bonus development in DMC zones. See id. The rate for DOC-1 and DOC-2 zones is $18.94 per square foot of net residential floor area sought above the base height. See id.

98. Id.

99. Id. § 49.015(A)(2). The Voluntary Agreement is recorded before the city issues the master use permit, which gives bonus development approval for the project. Id. § 49.015(B)(3)(ii). Under the Voluntary Agreement, all units provided under the bonus program must remain affordable for fifty years. Id. § 49.015(B)(2).

100. Id. § 49.015(B)(1)(a).

101. Id.

102. See id. The base height is 290' with an achievable height of 400'.

103. Id.

104. Id. The area between 290' and 400' plus the area between 85' and 240' that exceeds the allowable base floor area.

105. See id. The efficiency factor accounts for the amount of space in every project that is not livable, such as square footage lost to stairwells, elevator shafts, insulation, and framing. Id.
percent of net floor area would then have been reserved as affordable, for a total of 11,590 square feet. Because the affordable housing units can be smaller than the market-rate units, based on a 600-square-foot apartment configuration, twenty affordable units would be created for inclusion in the development. The maximum household income at initial occupancy is 80% of the median income for the city, which means that a developer may charge $1,140 for a studio unit, depending on the renter’s actual household size.

In lieu of the performance option, a developer may exercise the payment option. Rather than keeping 11% of the net bonus square footage for on-site development, the developer pays a fee based on the square footage of the desired bonus area above the base building height into an affordable housing pool. The city then uses the amounts contributed to the housing pool to fund affordable low-income housing.

A recently approved project in Seattle illustrates this option. OPUS NWR Development, L.L.C., is developing a thirty-eight-floor, 400-foot luxury condominium tower near Seattle’s Pike Place Market. The building is located in a DMC 240’/290’-400’ zone, meaning that normally the developer would have to pay into the city’s affordable housing pool for all net residential square feet between 290’ and 400’. Because, however, the project calls for floor plates that are larger than allowable on floors below the base height, OPUS must also pay for 17,430 gross square feet of bonus area up to the base height, equal to $139,440.

Once the base height has been achieved, OPUS must contribute an amount of $15 per square foot for the first four floors beyond the base height, $20 per square foot for the next three floors, and $25 per square

106. Id. § 49.015B(1)(a).
107. See id. § 49.015B(b)(8). Twenty units are created when the total square feet is divided by a 600 square foot unit size: 11,590/600 = 19.3 (rounded to 20).
109. Seattle, Wash., Mun. Code tit. 23, § 49.015(B)(b). If the developer wants to avoid accruing interest, it must remit payment when the building permit is issued; alternatively, the developer may delay payment until the first certificate of occupancy is issued, at which point the total sum plus interest accrued from the date of the permit issuance is due. Id. § 49.015(C)(2).
110. Id. § 49.015(C)(2).
113. See id. § 49.015B(1)(a). A floor plate refers to the total square footage per floor. The plates in the OPUS project are larger than allowed on floors 7 through 28, and therefore, the developer must pay for the additional bonus floor area of about 830 square feet per floor. There are twenty-one floors between the 85’ and the 290’ base height. Thus, when the 17,430 gross square feet is multiplied by the efficiency factor of 80% and then multiplied by the $10 per square foot fee there is $139,440 due ((17,430 x .8)x10) from OPUS for the floors from 85’ to the 290’ base height. Letter from William Justen to Laura Hewitt-Walker, supra note 111.
foot for all remaining floors. Ultimately, the total bonus payment due from OPUS is $1,751,000. Although the price per square foot of bonus area fluctuated by floor, it averaged $17.97 per net square foot, less than the maximum allowable charge of $18.94 per net square foot.

Commercial office and hotel developments are also tied to a city program that seeks to generate affordable housing. The commercial program is similar to the residential bonus program because a developer may elect to build taller in exchange for building affordable housing off-site or making a payment into the affordable housing pool. At the same time, the commercial program is also different in three regards. First, the city calculates the bonus square footage using the base and maximum floor-area-ratios set for a particular zone. Second, the city charges a developer a variable rate per square foot, which is tied to designated low- and moderate-incomes levels. Finally, in addition to requiring commercial developers to contribute a maximum of $18.75 per net bonus square foot for housing, the city requires developers to contribute $3.25 per square foot for childcare, resulting in a total payment of $22 per square foot.

In the six years between July of 2001 and June of...

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114. The next four floors above the 290' base height (floors 29–32) are assessed a $15 per square foot bonus surcharge ((43,320 x .8)15 = $519,840). Floors 22 through 35 are assessed a $20 per square foot bonus surcharge ((32,490 x .8)20 = $519,840). The top three floors (36–38) are assessed a $25 per square foot bonus surcharge ((28,594 x .8)25 = $571,880). Letter from William Justen to Laura Hewitt-Walker, supra note 111.
115. Id.
118. Id. § 49.012(A)(2).
119. See discussion supra note 77.
121. Id. § 49.012(A), available at http://clerk.ci.seattle.wa.us/~public/code1.htm (enter 23.49.012; scroll to (h); click 23.49.012(A)). Although the payments vary depending on whether the housing is affordable for those citizens with incomes at 30% below median, 50% below median, or 80% below median, the developer will never pay more than $18.75 per square foot for the bonus space sought. Id.
122. Seattle Office of Hous., Downtown Commercial Bonus Program, http://www.seattle.gov/housing/incentives/Commercial_bonus.htm (last visited Nov. 8, 2008). For example, if a developer seeks to develop a 30,000-square-foot site in a DOC-2 zone up to a FAR of 9, the amount required under the payment option would be calculated as follows. See id. A base FAR of 5 multiplied by the site size yields a commercial floor area allowed outright of 150,000 square feet (5 x 30,000). See id. The total commercial floor area the developer is seeking is 270,000 square feet (9 x 30,000). See id. Thus, the bonus floor area above the base FAR is 120,000 square feet, and the total bonus payment toward housing, assuming there are not any other bonuses, would be $2,250,000 (120,000 square feet x $18.75 per square foot). Id. Moreover, the total developer payment toward childcare would be $390,000 (120,000 square feet x $3.25). Id. See also SEATTLE, WASH., MUN. CODE tit. 23, § 49.012.
2007, developers have contributed about $8 million to the affordable housing pool and $1.1 million for childcare through the program.  

In contrast, in about a year and a half, the newer residential bonus program has brought in about $570,000. An additional $1,751,000 is due from the OPUS project upon the issuance of the first certificate of occupancy. Of the forty-two current residential or mixed residential projects in the pipeline within either DMC or DOC zones, however, only three projects have entered into Voluntary Agreements. Although one additional project appears to have plans for bonus space, and ten other projects could potentially seek bonus height at some point, none of the developers behind these projects have made an affirmative commitment by signing Voluntary Agreements. Even assuming that these developers do sign Voluntary Agreements, they will likely delay payment until after the city issues the certificate of occupancy, making it difficult to estimate how much money is in the pipeline for affordable housing unit construction. In contrast to the meager numbers produced thus far by Seattle’s plan, San Francisco’s inclusionary housing plan has seen greater success in creating affordable housing units by rejecting a voluntary plan.

B. San Francisco

California requires that each local government develop a comprehensive long-term general plan establishing policies for future development. In response to an affordable housing shortage, the City of San

123. Laura Hewitt-Walker, Seattle Office of Hous., Developer Contributions (2007) (unpublished spreadsheet of developer contributions) (on file with author). Seven projects have participated in the program, with the single largest contribution coming from the new Washington Mutual Tower II project, which achieved an additional 150,000 square feet in exchange for a contribution of $2.8 million into the fund. Payments under the current ordinance all stem from the development of projects between 2004 and 2007. Id.


125. Letter from William Justen to Laura Hewitt-Walker, supra note 111.

126. Hewitt-Walker, supra note 123. In addition to the OPUS project at 1521 2nd Avenue (121,834 square feet), a project at 1635 8th Avenue has made a payment of $570,236 (representing 37,635 square feet of bonus area), and a project at 2000 3rd Avenue has signed an agreement seeking 148,939 square feet of bonus space of which 16,384 square feet will be reserved on site as affordable. Id.; see also Laura Hewitt-Walker, Seattle Office of Hous., DPD Land Use Bulletins (2007) (unpublished spreadsheet of DPD land use information bulletins) (on file with author) (the Ava Tower Project has requested 113,285 bonus square feet, and a project at 1903 5th Avenue has stated that it could seek up to twenty floors of bonus area, and ten other projects have yet to determine whether bonus area will be sought).

127. Id.

Francisco expanded on a limited inclusionary housing plan in 2002, enacting a comprehensive mandatory plan administered under the auspices of the Mayor’s Office of Housing. Through this plan, the city sought to address concerns about both the displacement of low-income households and the exploding housing market. San Francisco requires developers to record a Notice of Special Restrictions, which outlines affordability restrictions for all affordable housing units, referred to as Below Market Rate units (BMRUs). This notice makes all BMRUs affordable for the life of the building.

The length of unit affordability is a particularly contentious issue in San Francisco. Developers and proponents of free market flexibility argue that long-term price controls on inclusionary units reduce the property values of market-rate units. As a result, developers will seek to maximize their bottom lines by creating high-end luxury units to compensate for the decrease in unit values and pass the costs onto market-rate purchasers. Affordable housing advocates, however, argue that an increase in the length of affordability ensures that communities remain viable for low- and moderate-income residents. San Francisco has adopted the position that sustained affordability of inclusionary units will

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130. S.F., CAL., PLAN. CODE art. 3, § 315.2, available at http://www.municode.com/Resources/gateway.asp?id=14139&sid=5 (select sec. 315.2). In May of 2005, the California Association of Realtors reported the median home price in San Francisco was $755,000, 365% higher than the national average; moreover, the mean rent for a 2-bedroom apartment was $1821 per month, which is affordable to households earning over $74,000. Nicholas Brunick, Inclusionary Housing: Proven Success in Large Cities, 10 J. AM. PLAN. ASS’N 5 (2004), available at http://www.oaklandnet.com/BlueRibbonCommission/PDFs/BlueRibbon8-proven%20success.pdf.
132. Id. § 315.2.
133. Id. § 315.7(a). San Francisco’s developmental maturity is an underlying reason why inclusionary units created must be recorded as permanently affordable. Id. § 315.7. San Francisco is a mature city, whose geographical location at the northern end of a peninsula prevents substantial new development and limits development to areas such as infill sites and sites not previously designated as residential. See id. § 315.2(4).
135. Id. at 16.
136. Id.
prevent the long-term loss of affordable housing;\textsuperscript{138} therefore, BMRUs remain permanently affordable.\textsuperscript{139}

San Francisco maintains specific income level thresholds for very-low-, low-, and moderate-income residents.\textsuperscript{140} Residents earning as much as 150\% of the median income for the city are allowed to apply to buy a BMRU.\textsuperscript{141} In contrast, rental units are restricted to those citizens with an income not exceeding 60\% of the median income for the city.\textsuperscript{142} Yet, because of the limited number of available BMRUs, only the neediest households generally receive them, leaving a void for low- and moderate-income households.\textsuperscript{143}

In exchange for constructing BMRUs, San Francisco offers developers several economic benefits, including refunding planning and development fees.\textsuperscript{144} The most attractive part of the plan is the relaxation of building standards, which enables developers to build more units than is generally allowed by the planning code, resulting in projects with increased density.\textsuperscript{145}

The trade-off for these density bonuses, however, is the steep price that San Francisco exacts from developers by mandating that all devel-

\begin{footnotesize}
\begin{enumerate}
\item[138] Id. at 164–65.
\item[139] S.F., CAL., PLAN. CODE art. 3, § 315.7(b) (2007).
\item[140] Mayor’s Office of Hous., City & County of S.F., 2007 Sample Sales Prices for the San Francisco Inclusionary Housing Program, http://www.sfgov.org/site/uploadedfiles/moh/Rent_Levels/MOH2007AMI_InclusionaryPurchaseCales_CCSFonly(1).pdf. See also Mayor’s Office of Hous., City & County of S.F., 2007 Maximum Monthly Rent by Unit Type, http://www.sfgov.org/site/uploadedfiles/moh/Rent_Levels/MOH2007AMI_RentLimitsCCS-Fonly.pdf. When considering income level thresholds, the city employs the universal HUD benchmark that limits allowable rent to 30\% of income. Id.
\item[141] Mayor’s Office of Hous., City & County of S.F., Maximum Qualifying Income Limits for the Purchase of a BMRU, http://www.sfgov.org/site/uploadedfiles/moh/Rent_Levels/MOH2008AMI_IncomeLimits-CCSFonly.pdf. For a one-person household, 150\% of the median is $87,100. Id.
\item[143] Id.; see also Mayor’s Office of Hous., City & County of S.F., BMR Units Available, http://www.sfgov.org/site/moh_page.asp?id=35416 (last visited Nov. 10, 2008). Generally, households earning less than $33,700 per year are the best candidates for receiving BMRUs. See id. An income of $33,700 is equal to 60\% of median. Id. As of Sept. 11, 2007, the city did not have any available rental units in any new or existing developments. Id.
\item[145] S.F., CAL., PLAN. CODE art. 3, § 315.2(8) (2007). Building standards are relaxed through the conditional use and planned unit development process. Id.
\end{enumerate}
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opments involving more than five units contain BMRUs.\footnote{146 Id. § 315.3(a), available at http://www.municode.com/Resources/gateway.asp?pid=14139&sid=5 (select sec. 315.3).} A developer can choose from four basic plans: (1) on-site construction of BMRUs; (2) off-site construction of BMRUs; (3) compliance through a fee-in-lieu of development; or (4) a combination of on-site construction, off-site construction, and payment of a fee-in-lieu.\footnote{147 Id. § 315.5(g), available at http://www.municode.com/Resources/gateway.asp?pid=14139&sid=5 (select sec. 315.5). There is a fifth option, the discussion of which is beyond the scope of this Comment. A developer may use California tax-exempt bonds to fund its obligation of construction as long as a certain percentage of the units are affordable at specific median income levels. Id. \footnote{148 Id. § 315.4(a)(1)(B). For buildings that are less than 120 feet tall, there is a 15% reservation rate. See id. § 315.4(a)(1). The BMRUs must be completed and ready for occupancy no later than the market-rate units. See id. § 315.4(b). Following the completion of the units, the Mayor’s Office of Housing assumes the obligation of marketing the units for either rent or purchase. See id. § 315.4(d).} A developer of a residential project creating BMRUs on-site—the first plan—must reserve 12% of the units as BMRUs if the project contains more than five units and is taller than 120 feet.\footnote{149 Id. § 315.5(a)(1)(C). This part of the provision for off-site housing applies to buildings over 120 feet in height. Id. A developer must create the equivalent of 20% of the total number of units produced in the principal project off-site, rounded up to the nearest whole unit for projects that are less than 120 feet. Id. § 315.5(a)(1)(B). Moreover, the construction of off-site units must be completed simultaneously with those contained within the principal project and located within one mile of the principal project. Id. § 315.5(b)(c).} Alternatively, a developer selecting the off-site development option—the second plan—must create the equivalent of 17% of the total units produced in the principal project off-site.\footnote{150 Id. § 315.6(a), available at http://www.municode.com/Resources/gateway.asp?pid=14139&sid=5 (select sec. 315.6). \footnote{151 Id. § 315.6(b). For example, if a developer undertook a project with a height above 120 feet and yielding 250 market-rate units, 42.5 units would be created off-site. See S.F., CAL., PLAN. CODE art. 3, § 315.6(b)(1) (unlike the off-site option, the number of units is not rounded up to the nearest unit, but remains a fraction). According to the current affordability gap data, the current price per unit is $179,952 per studio apartment and $248,210 for a one-bedroom unit. Mayor’s Office of Hous., City & County of S.F., Notice of New Inclusionary Housing Fees Effective July 15, 2008 (Sept. 3, 2008), available at http://www.sfgov.org/site/uploadfiles/moh/notices/Inclusionary%20Fee%20Notice%202008%20FINAL%20REVISED%208.28.08.pdf. Thus, if a developer builds twenty studio apartments and 22.5 one-bedroom apartments, a total payment of $9,143,765 will be due from the developer. See S.F., CAL., PLAN. CODE art. 3, § 315.6.} Under the third plan, rather than developing units, a developer may pay a fee-in-lieu of performance.\footnote{152 Id. Depending on the size of the project, there would have been either a 17% or 20% off-site requirement. \footnote{153 Id. § 315.6(2)(C). But see Mayor’s Office of Hous., City & County of S.F., Notice of New Inclusionary Housing Fees Effective July 15, 2008 (Sept. 3, 2008), available at http://www.sfgov.
Alternatively, under the fourth plan, a developer may fulfill the BMRU requirement by any combination of on-site units, off-site units, and fee-in-lieu of development if the total BMRU construction and fees are satisfied for the project.\textsuperscript{154}

Although the potential funds that could be raised via San Francisco's mandatory plan could far exceed the funds raised under Seattle's voluntary plan, the number of BMRUs actually created through the San Francisco plan has been relatively modest.\textsuperscript{155} Only 736 BMRUs were created between the years of 2002 and 2006.\textsuperscript{156} This lack of BMRUs is consistent with previous findings,\textsuperscript{157} but some commentators argue that the lack of BMRUs is a clear signal that San Francisco's inclusionary housing plan has failed.\textsuperscript{158}

Nevertheless, in the absence of a reason to believe that the mandatory inclusionary plan will be changed or repealed, affordable housing advocates and inclusionary housing proponents have, at least Momentarily, won the support of the Mayor's Office of Housing over the continued

\textsuperscript{154} Id. \textsection 315.4(o)(3).

\textsuperscript{155} CAL. COAL. FOR RURAL HOUS. & NON-PROFIT HOUS. ASSOC. OF NORTHERN CAL., supra note 61, at 34.

\textsuperscript{156} S.F. Planning Dep't, San Francisco Housing Inventory 22 (2007), available at http://www.sfgov.org/site/uploadedfiles/planning/Citywide/pdf/Housing_Inventory_2006.pdf. From 1973 through April 2004, only 7,000 BMRUs were created in 50 Bay Area cities combined. Powell & Stringham, supra note 134, at 318.

\textsuperscript{157} S.F., CAL., PLAN. CODE art. 3, \textsection 315.2.

\textsuperscript{158} Powell & Stringham, supra note 134. Powell argues that the costs of inclusionary units are passed on, not only to developers, but also to market-rate home buyers who incur an additional $22,000 to $100,000 in costs. Powell also argues that inclusionary housing drives away developers, resulting in less unit development and less home buying. Id. Lastly, he asserts that restrictions on the resale of inclusionary housing units cost cities tax revenue. Id. Instead, Powell posits that inclusionary land use regulations (and other land use regulations) have skewed the supply and demand curve, preventing developers from producing an adequate amount of units, and driving up the price for units that are produced. Id. The proposed solution is a loosening of land use regulations so that developers can build an amount of units commensurate with the market demand. But see Victoria Basolo & Nico Calavita, Policy Claims with Weak Evidence: A Critique of the Reason Foundation Study on Inclusionary Housing Policy in San Francisco Bay Area 4–12 (2004), available at http://www.oaklandnet.com/BlueRibbonCommission/PDFs/Attachment%203%20-%20Critique%20of%20Reason%20Study.pdf. The critique argues that the Reason Foundation Study contains design flaws because the study fails to consider rental units and provides an incomplete analysis of the cities' inclusionary plans. Id. The inability of the inclusionary plan to create enough affordable units on its own is mitigated by the broader comprehensive housing affordability plan, which has also included independent city expenditures in excess of $232 million between 2006 and 2008. S.F., CAL., PLAN. CODE art. 3, \textsection 315.2(14).
objections of developers and some economists.\textsuperscript{159} The city’s ability to
demand particularly strong monetary concessions from developers has
much to do with the higher prices developers may command from pur-
chasers in the accelerated San Francisco housing market.\textsuperscript{160} Property
values and demand for market-rate housing give developers many oppor-
tunities to generate profits, even after the inclusionary housing units or
fees are incorporated into the bottom line.\textsuperscript{161} Therefore, although San
Francisco’s rate of inclusionary unit production may be commendable,
its inclusionary housing plan does not provide an ideal model for cities
whose property values and housing demand levels are closer to the na-
tional norm.

\textbf{C. Denver}

Like other cities across the country, Denver enacted an inclusionary
housing plan in response to the rapid growth and continued strength of
the city’s housing market.\textsuperscript{162} The limited plan gives developers many
bonuses in exchange for mandatory development of Moderately Priced
Dwelling Units (MPDUs).\textsuperscript{163} The impetus for passing the legislation oc-
curred when developers contributed to the lack of affordable housing by
creating new housing units that were skewed towards households earning
more than 100% of the median income for the area.\textsuperscript{164}

The Denver plan requires the retention of 10\% of the total units in a
project as MPDUs if the project contains thirty or more units for sale.\textsuperscript{165}
When the project is complete, the developer must record a covenant for
each MPDU\textsuperscript{166} that specifies the eligibility requirements for purchase,
including a stated restriction on the resale of the MPDU for fifteen

\textsuperscript{160} \textit{Id.}
\textsuperscript{161} Zillow.com, San Francisco Home Value Information, \textit{http://www.zillow.com/realestate/CA-San-Francisco-affordability} (last visited Nov. 10, 2008). According to Zillow.com, as of No-
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id. § 101.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id. § 105(a), available at} http://www.municode.com/resources/gateway.asp?pid=10257&sid=6 (select 27-105). The strength
\textsuperscript{166} \textit{Id. § 111(a), available at} http://www.municode.com/resources/gateway.asp?pid=10257 &sid=6 (select 27-111).
\textsuperscript{166} in the housing market has inflated construction costs and property values, thereby raising housing costs.
years. A right of first refusal is also integrated into the MPDU covenant. This right enables Denver to buy back any MPDU placed on the market for the first time within ten years of the original purchase date, giving Denver the opportunity to keep MPDUs affordable beyond the fifteen-year control period.

Under the plan, the maximum sales price a developer can charge for a unit depends on both the height of the building and the adjusted median income. For example, a project that contains more than thirty units and is greater than three stories tall must preserve 10% of the units for households earning less than 95% of adjusted median income. Because the current adjusted median income for a one-person household in the city is $50,300, the units must be affordable for households earning $47,785 or less. As such, a developer can sell a studio MPDU for $133,948.

As an alternative to developing MPDUs on-site, a developer may either develop the units at another site within a half-mile of a light rail station or pay into a municipally managed special revenue fund. Denver uses a table to calculate the current for-sale unit prices for each adjusted median income level, which depends on a unit’s total bedrooms. After determining the relevant sale price, the city seeks only 50% of the net price per MPDU from the developer.

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169. Id. § 112(a).
170. Id. § 103(h).
171. Id. § 105(a)–(e).
172. Id. § 105(a). A project containing more than thirty units, but less than three stories tall, is required to keep 10% of the units as affordable for households earning no more than 80% of the adjusted median income. Id.
174. Id.
175. Denver Off. of Econ. Dev., Maximum Prices, Cash In-Lieu Fees, and Income Limits (2006), available at http://www.milehigh.com/resources/custom/pdf/housing/1stHalf-2006Price_List.pdf. As such, using the 80% median income standard a developer can sell a studio MPDU for a maximum of $106,820. It should be noted that although Denver has increased the median-income thresholds for 2008, the sale price for an inclusionary unit has stayed constant at the price set in 2006. See Income Limits, supra note 173.
177. Id. § 106(b)(1)(C).
178. Id.
179. Id. Although the prices vary depending on the size of the MPDUs (from $40,773 for a studio unit at 80% of the adjusted median income to $99,815 for a four bedroom unit at 95% of
Denver also aggressively tries to reduce the cost of its inclusionary housing plan by providing developers with several incentives. First, the city reimburses developers $5,500 per MPDU built, regardless of the size of the unit. If a developer markets its MPDUs at or below 60% of the adjusted median income, the city increases the reimbursement amount from $5,500 to $10,000 per MPDU unit, up to a maximum of 50% of the total units in the development. The reimbursement does not apply to those developments that take advantage of the fee-in-lieu option, and all reimbursement amounts depend on the availability of city funds. Second, the city provides a density bonus that gives developers in many development zones a square footage bonus of up to 10% of the total project. The additional bonus area is not exempt from the 10% MPDU requirement; therefore, the units created in the bonus space are calculated towards the total MPDUs for the project. Third, a developer can also apply for reduced parking requirements of up to 20% of the total spaces generally required by the applicable zoning. The developer must provide more MPDUs at the rate of one MPDU for ten spaces reduced. Finally, a developer providing MPDUs is entitled to expedited development review, including site plan review within 180 days of the of acceptance date of the application.

Although the Denver plan is mandatory, it is less comprehensive than plans in other cities: the Denver plan applies only to residential for-sale units, and these units must remain affordable only for a brief period. More specifically, the Denver plan regulates only residential for-sale units, whereas most other cities regulate both for-sale and rental units. Rental unit developers in Denver may voluntarily choose to create af-

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adjusted median income), the developer can anticipate paying on average $75,000 per unit into the affordable housing pool. See Income Limits, supra note 173.


181. Id.

182. Id. Practically, for a developer to qualify for the larger reimbursement, it would have to price the units as affordable for households earning between $30,100 for a studio unit and $49,900 for a six bedroom unit. Id. Moreover, the incentive is capped at a total of $250,000, per development, per year. Id.

183. Id. § 107(a). The reimbursement is paid out of the same special revenue fund that receives the fees in lieu from developers; thus, the amount of funds available for reimbursement depends on the number of developers that participate in the fee-in-lieu. Id.

184. Id. § 108(c). Id. § 108(d).

185. Id. § 108(b)(2).

186. Id. § 108(c).

187. Id.

fordable units in exchange for a reimbursement of $5,500 per MPDU,190 but they are not required to participate.191

Unlike other inclusionary housing plans, however, the Denver plan applies to both new for-sale residential units and existing buildings re-modeled or converted to contain for-sale units.192 Thus, the Denver plan could at least theoretically reach more buildings in total, depending on the number of major renovation and conversion projects throughout the city.

The Denver plan is also inhibited by a shortened affordability period of fifteen years, which is considerably less than the period in other plans across the country.193 The brevity of the control period casts doubt on the long-term affordability of MPDUs as the units are resold after the control period ends. This brief control period may well have encouraged developers to build under the assumption that purchasers of market-rate units could be convinced that property values would spike when the MPDUs are converted to normal market-rate units. More important, a fifteen-year control period, combined with a marked reduction in new development, will defeat the main goal of the plan because it will likely lead to fewer long-term MPDUs in Denver.

Nevertheless, Denver has achieved a great deal of overall success in a limited amount of time.194 Some urban planners argue that the Denver plan is the most successful inclusionary housing plan in existence today, with a total of 3,392 MPDUs already created or in the pipeline since the enactment.195 Surprisingly, many developers have chosen to build on-site as opposed to taking advantage of the fee-in-lieu option.196 Although the plan’s future success remains uncertain,197 the fact that many developers have built on-site units makes the Denver plan a current success, for having achieved several goals of responsible development such as integration, density, and affordability.198

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190. Id. The rental units must be affordable to households not earning more than 65% of the adjusted median income. Id. The MPDU’s must remain affordable for 15 years. Id.
191. Id.
193. Id. § 103(h). Seattle requires units to remain affordable for 50 years. SEATTLE, WASH., MUN. CODE tit. 23, § 49.015B(2) (2006). In comparison, San Francisco requires units to remain affordable permanently. S.F., CAL., PLAN. CODE art. 3, § 315.7 (2007).
195. Id.
196. Id. In fact, the city reports zero fee-in-lieu contributions since the enactment of the plan in 2002. Id.
197. Id at 3–4. Some experts attribute the success of Denver’s plan to the broader development bubble that has spurred development throughout the country over the past several years. Id.
198. DENVER, COLO., REV. MUN. CODE ch. 27, § 103(h) (2002).
IV. RECOMMENDATIONS FOR SEATTLE’S INCLUSIONARY HOUSING PLAN

The City of Seattle should incorporate elements from the inclusionary housing plans of San Francisco and Denver to better balance developer incentives with the creation of affordable housing.199 Seattle’s municipal leadership has made a strong commitment to the success of its inclusionary housing plan, as shown by the publicity surrounding the enactment of the Downtown Livability Legislation.200 The city should expand on this legislation. First, the plan should be mandatory. Second, the plan should apply to all residential projects that exceed a minimum size. Third, the plan should give more incentives for on-site construction, while deemphasizing the fee-in-lieu option. Finally, both the control period and the efficiency factor should become variable in those projects where the affordable units are constructed on-site.

A. Adopt a Mandatory Plan

Under Seattle’s current plan, even during periods of significant growth, developers can opt out by building to the base height in downtown zones without contributing anything to affordable housing.201 Under these circumstances, voluntary inclusionary housing plans become less effective than mandatory plans.202 In fact, the fifteen most productive inclusionary plans in California are mandatory.203 Mandatory plans are more successful at creating affordable housing because they (1) produce more low- and very-low-income units; (2) offer developers more predictability through uniform expectations and requirements; and (3) afford more predictability for cities.204

First, mandatory plans produce more low- and very-low-income housing than voluntary plans because in their absence, cities must give large subsidies to encourage the production of affordable units.205 Under a voluntary plan, even if a developer offers some affordable units, it will offer moderate-income units because moderate-income units enhance the developer’s bottom line and offset the long-term impact that low-income units may have on property values. Certainly, moderate-income units are

199. Press Release, City of Seattle Mayor’s Office, supra note 88.
200. Id.
203. Id. at 4; see also Calavita, supra note 137, at 164-65.
205. Id.
an essential aspect of Seattle’s housing stock. Nevertheless, low- and
very-low-income units are equally essential components to creating a
well-balanced housing stock. Developers, however, are more likely to
avoid building these units because of their higher short-term and long-
term costs.

Second, mandatory plans are more predictable because a developer
knows from the outset the given requirements and incentives. This
predictability allows developers to make economically efficient choices
early in the development process based on their superior information.

Third, rather than leaving a city to guess which developers with a
project in the pipeline might participate in a voluntary inclusionary plan,
a mandatory plan permits a city to plan more effectively for the future.
Conversely, under a voluntary plan, city planning is a reactionary process
whereby the planning allocation can begin only after a developer indicates
that it will participate in the inclusionary plan.

In Seattle, the current inclusionary plan’s voluntary option impairs
the ability to predict how much affordable housing might be created. In
times of slower growth, developers will scale back their projects under
the voluntary plan and produce little affordable housing. The lack of
developer participation in Seattle’s voluntary plan since its enactment in
2006 highlights the unpredictability of voluntary plans. In other cities,
including San Francisco and Denver, the lack of developer interest in
voluntary participation has created a trend toward mandatory plans. The
City of Seattle should switch to a mandatory plan now, rather than wait-
ing to see whether its incentives and bonuses are attractive enough to
entice developers to create the affordable housing that Seattle’s residents
desperately need.

Despite the benefits that a mandatory plan will bring to Seattle,
some housing advocates and local politicians question whether Seattle
could transition to a mandatory plan without attracting lawsuits from
developers who could claim that a mandatory plan results in unauthorized
takings. This concern has some validity. The United States Supreme

206. See Press Release, City of Seattle Mayor’s Office, supra note 88. The addition of moder-
ate-income units is essential as Seattle adds more jobs to the downtown-core. The addition of mod-
erate-income units prevents new workers from seeking housing outside the city-core. See id.
208. Id.
209. Id. at 5.
210. See id. at 4.
211. Hewitt-Walker, supra note 123. There are only three projects in which developers have
agreed to pay into the affordable housing pool in lieu of developing these units themselves. Id.
212. See discussion supra Part III.A.
213. See Draft Incentive Zoning Resolution, Seattle Housing Development Consortium (Dec.
31, 2007) (on file with author). The draft ordinance drafted by Council Member Sally Clark in con-
Court has yet to address whether mandatory affordable housing production in return for the approval of developer projects is an unconstitutional taking. 214 To date, the Court has stated only that a mandatory housing plan is not unconstitutional if there is a nexus between a condition on permit approval and the original purpose of the building restriction and the condition is roughly proportional to the impact of the development. 215

Seattle, however, should not allow the possibility of litigation to restrain its attempt to institute a mandatory plan. Under Washington's Growth Management Act (GMA), a city may enact or expand an affordable housing incentive program, even if the program imposes a tax, fee, or charge on the development of the property. 216 Thus, the GMA implicitly authorizes cities to impose charges on developers if the charges are balanced by incentives. Although current law does not foreclose the possibility of litigation in the event that a mandatory plan is instituted, the GMA should, to some extent, protect a mandatory plan against attack.

B. Apply the Inclusionary Plan to Projects that Meet a Minimum Unit Threshold

Seattle should institute a mandatory inclusionary plan that affects only projects greater than a certain unit threshold. Under the current legislation, Seattle allows any project up to the baseline height the leeway to develop as many units as feasible under the particular project plan. 217 In contrast, the inclusionary plans in San Francisco and Denver apply only when a project exceeds a minimum number of units, generally between five and thirty units. 218

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216. WASH. REV. CODE § 36.70A.540 (2006); see also H.B. 3213, 60th Leg., Reg. Sess. (Wash. 2008) (stating that a city or town may collect a reasonable fee from affordable housing incentive applicants to cover administrative costs associated with the program).

217. See SEATTLE, WASH., MUN. CODE tit. 23, § 49.015 (2006). The calculation is based off of square footage, not units.

218. In San Francisco, a development as small as one involving five units must include inclusionary units. See S.F., CAL., PLAN. CODE art. 3, § 315.3(a) (2007). Conversely, in Denver, a project must involve 30 units or more before it is required to include inclusionary units. See DENVER, COLO., REV. MUN. CODE ch. 27, § 105(a) (2002).
Arriving at the minimum number of units that would trigger the inclusionary provision poses challenges. On one hand, if the minimum unit threshold is set too low, the city runs the risk of harming small builders who do not have the unit margin to recover the costs of the inclusionary units. On the other hand, if the threshold is set too high, the city might see an increased amount of development proposals configured to avoid the inclusionary requirements. For example, in Denver where the minimum is thirty units, some developers have purposely built twenty-nine units to escape the requirements of the inclusionary plan. Because Seattle calculates payments by developers based on square footage rather than per unit, the city would have to either remove the square footage calculations or come up with a benchmark unit size to convert the square footage into an estimated number of units. To avoid some of the problems Denver has experienced in preventing developers from building below the unit minimum, the Seattle Office of Housing should establish a unit minimum that fluctuates from zone to zone throughout the city. The unit minimum for each zone could be adjusted on a quarterly basis to give continued predictability for developers while also correcting for changing market conditions.

C. Increase Developer Incentives for On-Site Construction of Affordable Units

To offset the greater costs associated with mandatory inclusionary plans, Seattle should increase incentives and bonuses for on-site construction of affordable units, while reducing the availability of the option to pay a fee-in-lieu of development. First, borrowing from the Denver plan, Seattle should reimburse developers at a flat rate per affordable unit. Because Seattle’s current plan calculates the amount due based on square footage, the city could reimburse the developer at the close of the project, based on the total realized number of units. Expanding on

219. E-mail from Brian Phetteplace, Housing Program Manager, Downtown Denver Partnership, to author (Nov. 29, 2007, 11:45 PST) (on file with author) (explaining that Denver has seen developers construct projects with exactly 29 units, one short of the inclusionary housing plan minimum, to avoid compliance with the statute).

220. For a developer to gain permission to build the market-rate units, a mandatory plan requires that the developer build a set number of units in each development below the market rate. Therefore, the developer will necessarily sell the below market-rate units at a loss. As a result, the developer may suffer a variable loss on the entire project that depends on the number of below-market rate units a city’s inclusionary housing plan requires, less any methods a developer institutes to mitigate that loss—such as incrementally raising the for-sale prices of the market-rate units. See Powell, supra note 134, at 9.


the Denver plan, Seattle could make reimbursements out of the fee-in-lieu revenue pool if units are constructed on-site to defray the costs attributable to developing these on-site units.\footnote{223}{DENVER, COLO., REV. MUN. CODE ch. 27, § 107.}

Second, expanding on the San Francisco plan, Seattle should offer developers a marginal reduction in the number of inclusionary units needed to be built if those units are built on-site.\footnote{224}{Compare S.F., CAL., PLAN. CODE art. 3, § 315.4(b) (2007), with id. § 315.5(a)(1)(c), and id. § 315.6(b)(1).} The marginal reduction in units would make off-site development or payment of the in-lieu fee comparatively more expensive than building on-site.\footnote{225}{See, e.g., id. §§ 315.4, 315.5, 315.6.} A fee-in-lieu of development is now the easiest option for the developer because none of its time is spent actually building inclusionary units. If the cost of this transaction increases enough, however, the fee-in-lieu option becomes less attractive, and producing units on-site becomes a more viable option.

To raise the costs of the off-site development and fee-in-lieu options, Seattle should reduce the efficiency factor from 80% to a lower percentage in exchange for on-site construction.\footnote{226}{See SEATTLE, WASH., MUN. CODE tit. 23, § 49.015(B). Under Seattle’s current plan the gross bonus square footage sought is multiplied by an efficiency factor of 80% to achieve the net bonus square footage chargeable to the developer. Id. § 49.015. Although the statute does not define the efficiency factor, implicit in the calculation is the notion that a portion of the square footage of each floor plate is lost or unusable as living space as a result of the construction process, and therefore should not be chargeable to the developer. See id.; see also discussion supra Part III.A.2.} The efficiency factor would then operate as a variable indicator of the more general economic health of the housing market for those developers constructing units on-site. The efficiency factor would increase during times of economic prosperity when developers are likely to command higher per unit prices, and conversely, it would decrease when the housing market cools off, so as not to disincentivize continued development. Instituting a variable efficiency factor necessarily requires the city to engage in a fiction: although gross square footage is constant regardless of the efficiency factor, a developer gains more usable square footage to shift into market-rate units at no additional charge. Manipulating the efficiency factor, however, is worth the cost of the resulting marginal reduction in units because on-site development better achieves the goals of responsible development: Seattle’s balancing of density and affordability across a broad-spectrum of socio-economic levels coupled with continued developer profitability.\footnote{227}{See discussion supra note 15. Responsible development is satisfied when a city successfully balances density and affordability across a broad spectrum of socio-economic levels with continued developer profitability.}
Although the fee-in-lieu option gives a developer flexibility and protects the value of market-rate units by moving affordable units to some other area within the city, it is contrary to sound principles of responsible development. The collected fees are apportioned to different projects around the entire city and may be used for single-family or small multi-family affordable developments, both far from the original project and in outlying neighborhoods away from the major business and service centers. As a result, in many instances low-income citizens must still commute back into the city core for work. This decreases density, perpetuates greater urban sprawl, and adds to traffic congestion.

In addition, because the payment in lieu of development fund does not have enough cash to fund new projects on its own, the city is unlikely to do anything more than supplement the cost of affordable housing projects that are partly funded and built through other city programs. With only three current projects enlisted in the bonus program, unless developer participation in the program increases exponentially, it will be years before the city gathers sufficient funding to construct an entire project.

The fee-in-lieu option will also lead to gentrification in some of the key development areas throughout Seattle’s core. For example, historically, areas surrounding the Denny Triangle, one of the centers of recent development in Seattle, comprised warehouses and small storefronts. The combination of developers choosing to build expensive housing units, coupled with the city’s promotion of the fee-in-lieu, has initiated the gentrification of the Denny Triangle. Seattle should have a goal to create the affordable density where it is needed most. San Francisco explicitly recognized that new market-rate housing developments increase the need for affordable developments in the same localized area, so that service industry professionals can efficiently serve the new market-rate residents. New market-rate development in Seattle will increase the demand for service industry citizens in and around the

228. Proceeds from the Commercial Bonus Program have been used to supplement the construction of affordable housing units. WSHFC NEWSLETTER, supra note 124, at 11.

229. Gentrification occurs when affluent citizens move into traditionally lower-income areas, raising property values and rents, and thereby causing a proportional decline in racial and socioeconomic minorities as those citizens are priced out of the area. See Dura K. Newman, Comment, If You Can’t Build It, They Won’t Come: Condominium Moratoria and Gentrification, 35 B.C. ENVTL. AFF. L. REV. 593, 596 (2008).


231. Hewitt-Walker, supra note 123. The Denny Triangle is a triangle of blocks that runs from Northwest to Northeast along Denny Way to Court Place, South from Court Place along Interstate 5 to Convention Place, and Northwest along 6th Avenue.

new development. Yet, because of the lack of affordable housing in those areas, those citizens will have to commute from outside the key residential development areas, worsening congestion. The affordable units should instead be built where they are needed: within a short distance of where the bulk of the residential growth is, like the Denny Triangle. Integrating affordable units into these neighborhoods will also promote socio-economic and racial diversity by guaranteeing that new neighborhoods attract people from all walks of life as the area transforms into a residential space.

**D. Reduce the Control Period**

The City of Seattle should reduce the control period for affordable housing units from fifty years to a more favorable variable control period. The variable control period would apply only to units actually constructed on-site, while those units created via the fee-in-lieu of development would remain permanently affordable. Suggesting a reduction in the control period for affordable units will raise concerns from housing advocates that a reduction in the control period will result in a corresponding reduction in the affordable housing stock and thus completely defeat the purpose of an inclusionary plan.

When inclusionary plans, however, encourage the consistent creation of new units, units that revert back to market-rate are simply replaced by an incoming supply of new affordable units. Like the efficiency factor, the control period should be variable so that the city can adjust it as the need for affordable housing waxes and wanes. For example, the Seattle Office of Housing could make a quarterly control period determination based on an evaluation of the current housing market, the affordable housing stock, and other economic indicators that impact construction. A variable control period will allow the city to respond more quickly and effectively to housing needs based on the rate of residential development, rather than adhering to a rigid, arbitrary period. A variable control period may also encourage developers to undertake projects during leaner economic times with the knowledge that the control period for affordable units will be correspondingly reduced.

A reduced control period will also increase property values by capping the time market-rate unit values are suppressed because of the pres-

233. The downtown core and Belltown are other areas where the affordable housing units are needed in Seattle.

234. Calavita, supra note 137, at 164.

235. A reduced control period would have particular appeal to residential developers and property managers of rental units who could increase rents more quickly if the control period for units were reduced.
ence of the inclusionary units within the broader market-rate development. Reducing the control period will induce development of on-site units as developers are better able to plan, price, and market the units to buyers. It will also bolster development of residential rental units as landlords are better able to predict anticipated rents and plan for the tangible increase in rents earned as affordable units are converted to market-rate units.

The City of Seattle needs to make several immediate changes to its inclusionary plan to maximize the creation of affordable housing units. By moving to a mandatory plan that deemphasizes the fee-in-lieu of development option and applies to all residential projects that exceed a minimum size, more affordable housing units will be constructed in the long term throughout the city. To defray some of the financial impacts developers will face under the revised plan, Seattle should both increase developer incentives for on-site construction and implement variable efficiency factors and control periods. These changes will effectively draw Seattle towards its goal of achieving a spectrum of residential development that is dense, varied, affordable, and profitable.

V. CONCLUSION

Not all inclusionary housing plans are created equal. Seattle’s plan focuses primarily on encouraging developers to voluntarily contribute funds to an affordable housing pool. Consequentially, the more traditional notion of mandating on-site inclusionary units has fallen by the wayside in Seattle. In contrast, San Francisco has a comprehensive mandatory plan that seeks both to reach smaller developments and to maximize the number of inclusionary units per project by making it more costly for developers to undertake development off-site or via a payment in lieu of development. On the other hand, Denver has instituted a less demanding mandatory plan that seeks inclusionary units only from larger residential developments and then requires only that those inclusionary units remain affordable for fifteen years.

An amended, improved inclusionary housing plan in Seattle is essential to the long-term development of affordable housing units. To maximize results from the plan, Seattle must follow in the footsteps of both San Francisco and Denver by mandating developer participation. The city must move away from promoting the fee-in-lieu of development option and must instead move towards on-site development. In addition to the existing density bonuses, the city should offer other incentives, such as reimbursements and modifications to the control period for affordable units, to make the transition to mandatory on-site development more feasible for developers. Ultimately, a mandatory plan that offers
broader incentives to developers will increase production of affordable housing units within Seattle’s expanding core; this, in turn, will generate greater long-term density and affordability for low- and moderate-income residents, while ensuring continued profitability for Seattle’s developers.