

Clearinghouse REVIEW

May-June 2008
Volume 42, Numbers 1-2

Journal of
Poverty Law
and Policy

Using the Rehabilitation Act
to Obtain Damages

Interplay Among Workers'
Compensation Insurance,
ADA, and FMLA

New Theory Against Mandatory
Welfare Home Visits

Race-Conscious Approach
to Advocacy

SHOULD PUBLIC
BENEFITS BE
ADMINISTERED BY
PRIVATE VENDORS?

Inclusionary Zoning for
Economic and Racial
Integration

Student-Run Banks for
Financial Education and
Community Development

State Court Remedy for
the *Keffeler* Problem

Greening Affordable Housing



SHRIVER
CENTER

Sargent Shriver National Center on Poverty Law

LOCAL LAND-USE ADVOCACY:



Inclusionary Zoning to Achieve Economic and Racial Integration

By Valerie Feldman

Valerie Feldman
Staff Attorney

Legal Services of Northern California
515 12th St.
Sacramento, CA 95814
vfeldman@lsnc.net

When Legal Services of Northern California (LSNC) launched its Race Equity Project in October 2003, land-use advocacy, already a part of LSNC's advocacy for many years, took on an even more significant role. The Race Equity Project's mission is to raise awareness of the continued racial inequities in our region and to apply all of our advocacy tools, including developing data to support our advocacy efforts, to diminish those inequities. Although we may have known that one of the most useful efforts we could make toward racial integration in our region would be a result of land-use advocacy, and more specifically inclusionary zoning, the idea was really cemented when we examined the inequities of how services and housing are dispersed throughout our service area.

Land-use advocacy by legal services attorneys can, and should, take many forms—assisting nonprofit affordable-housing developers in obtaining project approvals, advocating shelters and transitional housing as permitted uses within local zoning laws, educating community members and elected officials about the true impact, as opposed to the feared impact, of multifamily housing in their neighborhoods. Advocates have fair-share housing laws in some states to advocate policies and programs for the creation of affordable housing in every community. Here I focus on the local land-use tool—inclusionary zoning—that can achieve great opportunities for lower-income households. Inclusionary zoning is the only vehicle that provides housing, schools, and amenities to a broad range of income levels and creates the possibility for economic and racial integration from the ground up. Ensuring that new communities include housing for all income levels creates not only shelter but also access to better education, economic opportunity, transportation, and more environmentally sound development patterns.

I. Statewide Land-Use Planning Laws

An earlier CLEARINGHOUSE REVIEW article detailed the statewide fair-housing requirements in New Jersey and Massachusetts.¹ New Jersey law requires a state agency to determine affordable-housing production targets for each township, borough, and city. The production targets are not mandates; the jurisdiction does not have to require the production of target units but does support developers who are denied approval for affordable-housing developments.² Massachusetts has a law dating back to 1969 to overcome neighborhood opposition to affordable-housing development.³

In California, state law requires each jurisdiction to adopt a “housing element.” A housing element describes the program and policies that the jurisdiction will adopt to meet the housing needs for all income groups within the jurisdiction. The housing needs for each jurisdiction are allocated in four income categories: above-moderate, moderate, low-income, and very low-income.⁴ The regional allocation is based on expected growth in that jurisdiction. The jurisdictions do not have to build the housing to meet those respective needs but must zone an adequate number of acres at corresponding densities to accommodate each housing need. Each jurisdiction must identify and remove any governmental constraints that would impede development to meet those housing needs.⁵ A recent amendment to housing-element law requires jurisdictions to

identify sites for homeless shelters and a land inventory—a parcel-specific list of sites available and suitable for residential development to meet all income ranges.⁶

California has other laws to eliminate barriers to developing affordable housing. Neighborhood opposition—often referred to as Nimby (Not in my backyard)—is often a barrier to affordable-housing development. California adopted an anti-Nimby law that requires specific findings before a proposed affordable-housing project may be rejected. This law is intended to limit the effect of neighborhood opposition when a planning commission, city council, or county board considers approval of an affordable-housing development. The community has to have met its regional allocation for affordable housing or, based on objective written standards that are not allowed to be mitigated, find that the proposed project would have specific adverse and unavoidable impact on the health and safety of the community.⁷ California law prohibits discrimination against affordable housing by prohibiting communities from imposing different requirements on affordable developments from those on market-rate developments.⁸

Illinois recently adopted a state law that mandates a percentage of housing for low- and moderate-income households.⁹ Approved in 2003 and effective in 2004, the law requires all communities in Illinois to ensure that 10 percent of their housing stock is affordable to low- and moderate-income households. If a jurisdiction cannot meet this standard, the

¹Raun J. Rasmussen, *Zoning and Land-Use Laws: Tools to Create Housing and Services for Our Clients*, 37 CLEARINGHOUSE REVIEW 441–460 (Nov.–Dec. 2003).

²N.J. STAT. ANN. § 52:27D-301-329 (West 2008).

³MASS. GEN. LAWS, ch. 40B, §§ 20–23 (2003).

⁴The jurisdictions not only are allocated housing need numbers in those four categories but also now must consider how to meet the needs of extremely low-income households. Jurisdictions can determine their real extremely low-income need or divide their very low-income need in half, allotting 50 percent for very low- and 50 percent for extremely low-income need. CAL. GOV'T CODE § 65583(a)(1) (West 2008).

⁵CAL. GOV'T CODE § 65583.2(a) (West 2008)

⁶*Id.* § 65583(a)(4)(A).

⁷*Id.* § 65589.5.

⁸*Id.* § 65008.

⁹310 ILL. COMP. STAT. ANN. 67/2005 (West 2008).

jurisdiction must draft a plan to solve the shortfall.¹⁰ The Illinois law differs from the other fair-share laws because it not only sets a fair-share target but also requires action if a community does not meet the target. While the targeted income levels and overall percentage are modest, a mandate to build a community's fair share of low-income housing is very progressive.

II. Local Land-Use Planning— Inclusionary Zoning Ordinances

Inclusionary zoning ordinances are defined as “anything that fosters integration of lower-income and market-rate housing and/or uses ‘the power of the marketplace’ to generate resources for affordable housing.”¹¹ Traditionally such results are achieved by requiring every market-rate development to include a percentage of the units priced at levels affordable to lower-income households. The percentage of units set aside and the income levels targeted vary from ordinance to ordinance, and the affordability depends on the area median income (AMI) of the location where the ordinance is adopted. Most ordinances target low-income households, or those earning up to 80 percent of the AMI.¹² By contrast, the Sacramento County ordinance detailed below includes a set-aside for low-income households, for very low-income households, or for those households earning up to 50 percent of the AMI and for extremely low-income households (those earning less than 30 percent of the AMI).

Working to pass such a local ordinance has advantages: allies are close by; advocates are organizing within your own community where you can show familiar examples of the need for racial integra-

tion; and legal aid advocates who may draft the ordinance can educate all willing listeners about the potential results of a well-drafted ordinance.

The first benefit of these ordinances is that all the amenities—schools, retail, and proximity to transportation or jobs—that a new development would offer market-rate purchasers would also be available to the households in the affordable or inclusionary units. The educational benefits of attending schools in economically diverse areas are probably the most significant. Research shows that academic achievement increases in integrated school settings because integrated schools tend not to be impoverished and the resources of the school have a direct impact on student achievement.¹³

Affordable housing in new developments translates into access to the opportunities afforded in newly built quality housing. In California, for example, the project may be conditioned on providing land for parks and other recreational purposes and imposing fees on new development to improve and build new schools.¹⁴

A second benefit is that an inclusionary ordinance removes three barriers that advocates and builders face most often when proposing affordable-housing development—lack of available land, lack of financing, and neighborhood opposition. The lack of land zoned appropriately for multifamily development is clearly an obstacle. Some communities have successfully restricted affordable-housing development in their community by limiting the amount of land where apartments can be located or, in some cases, by not zoning any land for apartment units. Without any land zoned for high-density development (multiple units per acre) affordable units cannot be built.

¹⁰Illinois: *Suburbs Wrestle with State Affordable Housing Mandate*, NIMBY REPORT, Sept. 2004, www.bettercommunities.org/index.cfm?method=nimby.view&nimbyID=14.

¹¹Miriam Axel-Lute, *Zoning for Housing Justice*, SHELTERFORCE ONLINE, Sept.–Oct. 2003, www.nhi.org/online/issues/131/inclzoning.html.

¹²CALIFORNIA COALITION FOR RURAL HOUSING & NON-PROFIT HOUSING ASSOCIATION OF NORTHERN CALIFORNIA, *INCLUSIONARY HOUSING IN CALIFORNIA: 30 YEARS OF INNOVATION* 22 (2003), <http://calruralhousing.org/publications/46-inclusionary-housing-in-ca-30-years-of-innovation>.

¹³JOHN A. POWELL ET AL., KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, *ECONOMIC SEGREGATION: CHALLENGING OHIO'S PUBLIC SCHOOLS* 10 (Nov. 2005), <http://kirwan.gripservers3.com/research/research-projects/economic-segregation-in-ohios-schools.php>.

¹⁴CAL. GOV'T CODE §§ 66477, 65995 *et seq.* (West 2008).

Lack of financing is addressed by spelling out the obligation to pay for the affordable component of any development in the details of the ordinance. In most instances a partnership between the market-rate developer and a local agency helps secure any local, state, or federal funds to build affordable homes.

Neighborhood opposition can present a major barrier to the development of affordable housing even in California, where the state law prohibits a jurisdiction from rejecting an affordable-housing project unless specific findings are made. An inclusionary zoning ordinance requires market-rate units and affordable units to be built concurrently, and this limits the amount of neighborhood opposition.

A. Sacramento County's Inclusionary Zoning Ordinance

The Sacramento County inclusionary ordinance came to fruition due to a combination of local, state, and federal factors. A coalition of local interest groups came together to lobby for the ordinance. The state factor consisted of the California housing-element law requiring the county to develop programs and policies to meet the county's housing needs allocation for all income levels and, due to prior litigation, the county's incentive to commit to an aggressive affordable-housing program. The federal factor was the sudden and detrimental change in the funding formula for the Housing Choice Voucher program.

1. State Factor

The work for the inclusionary ordinance for Sacramento County began in 1995 when LSNC represented a client challenging the county's compliance with the state housing-element law. That litigation resulted in a settlement that required the county to maintain an inventory of land suitable for high-density development and prohibited the county from downzoning any of those sites.¹⁵ As the years passed, maintenance of that inventory was questionable at best; LSNC went back to court to enforce the settle-

ment agreement. As a result, the county self-imposed a moratorium on commercial development. The moratorium benefited our clients because higher-density residential development was permissible on sites zoned for commercial development, and if no commercial development could go forward on these sites, then the sites were available for high-density residential development. The moratorium was imposed until the county adopted a valid housing element for the 2002–2007 planning period.

So from the start the county had an incentive to have a valid housing element as soon as possible in order for commercial development to go forward. The next issue was whether the county would again have a shortfall of land zoned to meet the county's allocated housing needs for low- and very low-income households. Because the county did not have an adequate supply of land zoned and available for multifamily development, the threat of another legal challenge hung over the county. Presumably to avoid further legal challenges, county officials and staff were receptive to the adoption of an affordable-housing program that would "guarantee" development of affordable housing.

2. Local Factor

California housing-element law requires a jurisdiction to engage in a diligent effort to gather input from interested parties when developing housing-element policies. Numerous advocacy groups came together to work for an inclusionary ordinance that would include—for the first time that we knew—a set-aside for extremely low-income households. The next two years involved discussion, stakeholder meetings, and arguments over the specifics of the ordinance and the percentages that would be included.

Those two years saw the convergence of the efforts of environmentalist groups wanting to stop sprawl to protect local animal species and stop the polluting commutes, disability rights advocates seeking more accessible affordable housing for their constituents, faith groups pur-

¹⁵Stipulated Judgment Pursuant to Settlement, *Coleman v. Sacramento County*, No. 95-CS00574 (Cal. Super. Ct. Sacramento County Feb. 23, 1996).

suing a social justice agenda, civil rights groups striving to end a pattern of racial exclusion in Sacramento, and housing advocates looking to create more housing opportunities for the poor. All of the groups found in common the goals to work together and defeat the developers who opposed any requirements.

3. Federal Factor

The change in the federal funding formula for the Housing Choice Voucher program was important in this timeline. When the county board of supervisors adopted language in the housing element to meet some need for extremely low-income households, the local redevelopment agency, which is also the public housing authority, was reluctant to endorse such an ordinance. Initially the redevelopment agency was convinced that the housing needs of extremely low-income households was best met by existing federal subsidies such as the Housing Choice Voucher program, but then the U.S. Department of Housing and Urban Development (HUD) abruptly changed the formula for reimbursing agencies for such vouchers in use and our local housing authority faced unpredictable budgeting. In 2003 HUD announced that housing authorities would no longer be reimbursed at their actual housing costs.¹⁶ The announcement was made a few months before the end of some housing authorities' fiscal year, and housing authorities suddenly and quickly had to figure out how to reduce their voucher costs. The long-term effect of this formula change has been the loss of 150,000 vouchers nationwide.¹⁷ The loss is attributable not only to a loss in funds but also to housing authorities' underutilization of vouchers to avoid budget surprises that might leave them without federal reimbursement. These drastic measures convinced our local redevelopment agency

that the county needed to invest in local alternatives to produce more housing opportunities for the poor.

The short tale is that these three factors combined to garner support for the local ordinance. We will never know if any two of the three factors would have been enough to drive the political will of our county board of supervisors.

B. Elements of an Effective Ordinance

Charged with creating the details of the ordinance, our coalition of stakeholders benefited from the experiences of the many jurisdictions near and far that already had an inclusionary ordinance. In California alone more than 107 cities have inclusionary requirements. In a survey conducted in 2003 by the California Coalition for Rural Housing and the Non-Profit Housing Association of Northern California only one-third of the jurisdictions that responded to the survey reported the number of affordable units—rental or for-sale units—that were produced due to their inclusionary zoning ordinances. Those jurisdictions that did respond were responsible for 34,000 affordable units over the last thirty years.¹⁸ In other states the production numbers were equally impressive. In the Washington, D.C., area, four county-based programs have created over 15,000 affordable units over the last thirty years; these include 11,500 from the country's oldest inclusionary program in Montgomery County, Maryland.¹⁹ In New Jersey 250 inclusionary programs have produced 15,000 affordable units in the last fifteen years.²⁰

These numbers are especially impressive when one considers how few affordable units would have been produced without a mandate. The argument for inclusionary housing in Chicago was laid out in

¹⁶Douglas Rice & Barbara Sard, Center on Budget and Policy Priorities, The Effects of the Federal Budget Squeeze on Low-Income Housing Assistance (Feb. 1, 2007), www.cbpp.org/2-1/07hus2.htm.

¹⁷*Id.* at 21–22.

¹⁸INCLUSIONARY HOUSING IN CALIFORNIA, *supra* note 12, at 7.

¹⁹Nicholas Brunick & Jessica Webster, Business and Professional People for the Public Interest, Inclusionary Housing: A Policy that Works for the City that Works 23–24 (Dec. 2003), www.bpichicago.org/documents/ih_works_report_000.pdf.

²⁰*Id.*

a study conducted by the Business and Professional People for the Public Interest, which examined the production of affordable units during an eight-year period in Chicago without an inclusionary zoning ordinance. In the new residential developments in Chicago from 1995 until 2003 less than 2 percent of the housing produced was affordable to households earning less than 50 percent of the AMI and about 10 percent was affordable to households earning less than 80 percent of the AMI.²¹ The private market fell far short of providing housing for these households since 44 percent of the city's households earn less than 50 percent of the AMI and 65 percent of the households earn less than 80 percent of the AMI.²²

Our coalition in Sacramento benefited from the experience of other jurisdictions and through our research developed a checklist of requirements we thought the ordinance must have. Interestingly as the process evolved some things that we adamantly opposed initially became attractive options. For instance, at first we advocated no in-lieu fees, the fees that a developer may opt to pay instead of building affordable units. However, as the ordinance evolved, a funding stream clearly became necessary to help pay for affordable units on sites that were dedicated to the county. In-lieu fees and later a fee added to land dedication were necessary to make sure that the county could produce units on the free land received under the ordinance.

We are learning from other advocates and cities that not all ordinances are created equal. The effectiveness of these ordinances varies with their applicability and enforceability and possible buyouts contained in the ordinance. The following are the key ingredients to an effective inclusionary ordinance; I am uncertain whether an ordinance that includes all of the recommendations below exists. Some of the elements are necessary for financ-

ing, some to maximize inclusiveness, and some to help the ordinance survive a legal challenge by the local building industry. Other than the first two elements, those on the list are not ranked in order of importance.

1. Mandatory

Whatever ordinance your jurisdiction adopts must be mandatory; voluntary compliance means no compliance. A survey of the top-fifteen producing ordinances in California found that all of the top producers had mandatory programs, most of which allowed for no exceptions.²³

2. Deep Targeting

Including a set-aside for households earning less than 30 percent of the AMI may be the hardest sell because it is costlier than the others. As more and more inclusionary zoning ordinances are adopted and the results can be compared, the political will to create such an ordinance will strengthen. An inclusionary zoning ordinance ought to reach the clients we represent and the people with the least housing options. One concern voiced by market-rate developers is that they are not familiar with the financing available for affordable-housing development. This concern can be allayed by promoting partnerships between market-rate developers and nonprofit affordable-housing builders. The market-rate developer constructs the market-rate units within a project, and the nonprofit partner develops the affordable-housing units required under the inclusionary zoning ordinance. The ideal is to create a housing source for extremely low-income housing in addition to the traditional housing subsidies. Conventional public housing and rental housing subsidies alone do not meet the demand for extremely low-income housing; they do not enable integration into nonpoor areas, and they are continually facing budget reductions. We can no longer rely on traditional housing subsidies to meet the housing needs of our clients.

²¹*Id.* at 18

²²*Id.*

²³INCLUSIONARY HOUSING IN CALIFORNIA, *supra* note 12, at 23.

3. No Buyouts and Minimal In-Lieu Fee Options

An effective ordinance should not permit market-rate developers to write a check for the cost of affordable units rather than construct the units or, in effect, buy their way out of the ordinance. Two equally important goals in an inclusionary ordinance are to increase the number of affordable-housing units and to integrate those units into the market-rate development. If market-rate developers are not required to construct units, at least in a great percentage of situations, the number of affordable units may rise but the chance to increase integration is lost.

In limited circumstances, such as for small projects of perhaps less than five units, an in-lieu fee may be a viable option. In the case of developers who request and receive a waiver of their obligations (see below), a fee should be imposed. The use of those fees should then be restricted to the production of affordable housing, covering land costs.

4. Concurrent Construction

Concurrent construction helps eliminate neighborhood opposition. Building a wide choice of housing options is a desirable step in creating a true community; if a variety of housing choices are available from the beginning, no one would choose an area without expecting some rentals and smaller homes within the greater development. Because technical requirements vary, keeping many options on the table when negotiating the requirements of an ordinance is recommended. One suggestion is to limit the occupancy permits for the market-rate units until the affordable units are under construction or, at a minimum, until the affordable units have financing and project approval.

5. Long-Term Affordability

The rentals and homeownership units created under the ordinance must have covenants protecting their affordability for a minimum of thirty years. The longer the term of affordability, the more clients and the community benefit. The unit becomes a community asset. In California redevelopment law, inclusionary units required by law have a fifty-five-year term of affordability.²⁴ Other examples may be found in other states or localities.

6. Universal Design

The ordinance should require that the affordable units meet universal design requirements.²⁵ First, although affordable housing is a scarce commodity, accessible affordable housing is even scarcer and our clients with disabilities are counting on us to provide opportunities for them.²⁶ Second, in a coalition to lobby for your local ordinance the needs and goals of housing advocates and advocates for persons with disabilities are closely entwined and the ordinance should accomplish both groups' goals. Use the strength of both groups to get the ordinance passed.

7. Recording Restrictions on Sale and Recapturing Some of the Equity

Record the deed restrictions for affordable homeownership units so that the affordability cannot be lost at the first or subsequent sale of the property. Find a thoughtful way to share the equity in the home at resale. A homeowner should not be deprived of all of the equity, or the benefit of homeownership is lost. One suggestion is to establish a sliding scale to distribute the equity earned on affordable for-sale units between the jurisdiction and the homeowner. The longer a household owns the property, the greater

²⁴CAL. HEALTH & SAFETY CODE § 33334.3(f)(1)(A)(West 2008).

²⁵The design should be so universal as to be accessible to a broad spectrum of people. The features of the unit are designed to be usable by a wide variety of tenants. E.g., light switches and bathroom fixtures are designed to be used by people of every age and every ability.

²⁶See, e.g., Susan Ann Silverstein, *Expanding and Preserving Affordable Housing Opportunities for Persons with Disabilities*, 41 CLEARINGHOUSE REVIEW 388 (Sept.–Oct. 2007); Fred Fuchs, *Using the Reasonable-Accommodation Provision of the Fair Housing Act to Prevent the Eviction of a Tenant with Disabilities*, *id.* 272.

the percentage of the equity the homeowner receives at the time of sale and the smaller the percentage the jurisdiction retains. This lesson was learned the hard way in Irvine, California. Irvine had no resale controls on the homeownership units created under its inclusionary zoning ordinance before 2001 and lost almost all of the 1,600 units created before that time because the units were resold at market rate without any limits on the buyers or equity.²⁷

8. Publicizing Unit Availability Widely

When new affordable units are ready, their availability must be broadcast to all who seek safe, affordable housing. In the jurisdiction where I work, our concern is that only residents in the areas surrounding the new development are aware of the available affordable units; this closes out the opportunity for people in other parts of our community. In Sacramento the new development areas are not adjacent to the most impoverished area of our city. Housing advocates and the redevelopment agency that monitors the inclusionary program must advertise the availability of inclusionary units throughout the community. For lack of a better template, mimic the HUD requirements for when a waiting list is opened for conventional housing or for the Housing Choice Voucher program: advertise units in the mainstream and minority media—newspapers, radio stations, and community service organizations. In the meantime continue to learn how other communities have effectively reached out to all potential tenants or purchasers.

9. Incentives to Builders

Crucial to getting an inclusionary ordinance adopted and to its survival in the courts if challenged is the jurisdiction's effort to assist the developer who is required to build inclusionary units. The

most common incentive for developers is a density bonus. This allows the developer to build the same number of market-rate units as it would have if not for the affordable obligation. Consider the following example with a ten-acre parcel zoned at seven units to the acre with and without a 10 percent set-aside for affordable units:

Market-rate units without inclusionary requirement: 70 units

Market-rate units and affordable units: 63 market-rate and 7 affordable units

Market rate with density bonus and affordable units: 70 market-rate units and 7 affordable units

At a recent presentation in San Francisco a city planner from Washington, D.C., explained the district's new inclusionary ordinance, which requires a 10 percent set-aside for units affordable for low- to moderate-income households. The density bonus actually increases the developer's profits from the overall project despite the 10 percent set-aside.²⁸

Some ordinances offer certain fee waivers or deferments for development and expedited processing. If the ordinance applies to all development within a jurisdiction, expedited processing can be problematic because the planning department cannot expedite each project that comes through the door.

10. Applying the Ordinance to All Development

The ordinance should apply to all developments, ones with a few units as well as ones with hundreds of units. Some jurisdictions apply a lesser requirement to condominium conversions because the units are already constructed and the developer cannot take advantage of the density bonus usually offered in the ordinance.²⁹

²⁷INCLUSIONARY HOUSING IN CALIFORNIA, *supra* note 12, at 19.

²⁸Art Rodgers, *Affordable to Whom?*, Presentation at the National Inclusionary Housing Conference, San Francisco, Cal. (Oct. 30, 2007).

²⁹FOLSOM, CAL., MUNICIPAL CODE, tit. 17, ch. 17.104.030 (2008).

11. Adding a Fee and Strict Criteria for Donated Land if Land Dedication Is an Option

Where available land for residential development is little, a jurisdiction may choose to allow developers to give land, often referred to as dedicating land, for affordable-housing development. Two criteria should be met before adopting this alternative: (1) the land should come with some fee requirement to assist in the development of the units on the dedicated sites, and (2) the dedicated site must meet certain strict requirements (such as proximity to services, transportation, freedom from environmental barriers to development, and an appropriate size for an affordable-housing project) to make the site competitive for financing bids. Advocates should work with nonprofit affordable-housing developers to draw up necessary criteria.

12. Waiver Provision

The ordinance should include a waiver of the obligation to build affordable units to the extent that compliance with the inclusionary zoning ordinance would amount to a taking under state or federal constitutional law. The waiver provision was key in recent, and one not so recent, legal challenges to local inclusionary zoning ordinances since all the facial challenges to the ordinances were unsuccessful if a waiver provision was sufficient.³⁰ The potential for a waiver makes it impossible to show that in all applications the ordinance would effect a taking because the waiver may be applied to some or all of the obligation.³¹

C. Getting the Ordinance Passed

Since I am fairly convinced that the Sacramento County ordinance resulted from the alignment of the stars on a particular April afternoon, I am reluctant to pass on handy how-to steps. In retrospect here are some key suggestions for Legal Services Corporation-funded program ad-

vocates. First, educate, educate, educate! Let your organizational and individual clients know about tools to accomplish increased economic opportunity. Give them the hard facts about poverty in their area and the housing needs of their constituents. Using GIS (geographic information system) maps and poverty statistics, my colleagues put together a very direct and informative presentation for the Asian/Pacific Islander community in Sacramento; the information surprised and inspired a local advocacy group representing the interests of Asian/Pacific Islanders.

Second, introduce, introduce, introduce! Introduce your organizational clients who have similar interests and agendas. Act as a resource to find their common ground. Make yourself available if your elected officials want information; be willing to supply a road map when you are asked for one.

Third, Enforce! Enforce the land-use laws that your jurisdiction has in place. LSNC and cocounsel have used state housing-element litigation to leverage the adoption of local inclusionary zoning ordinances as part of settlement.

And, fourth, commit for the long haul! Not only will it take time for the policy choice to become acceptable to your elected officials, but also it may be years between the adoption of the ordinance and the pouring of the concrete foundations of the affordable homes. My organization worked on ordinances either through settlement or by invitation. It was years after the first ordinance was adopted in our area that Sacramento County was willing to require the units set aside as affordable to be affordable to households, such as our clients, earning less than 30 percent of the AMI and to households earning 50 percent to 80 percent of the AMI. Most inclusionary ordinances require affordability levels from moderate income to very low in-

³⁰*Home Builders Association of Northern California v. City of Napa*, 108 Cal. Rptr.2d 60 (2001); *Florida Home Builders Association v. City of Tallahassee*, No. 37 2006 CA 000579, slip op. (Fla. Leon County Ct. Nov. 20, 2007); *Building Industry Association of San Diego County v. City of San Diego*, No. GJC817064, slip op. (Cal. Super. Ct. San Diego County May 24, 2006); Judgment on the Pleadings, *Building Industry Association of Northern California v. County of Sacramento*, No. 05AS00967 (Cal. Super. Ct. Sacramento County March 20, 2006). You may contact me for any of these decisions.

³¹*Home Builders Association of Northern California*, 108 Cal. Rptr.2d at 64.

come, and this has minimal benefit for legal services clients. The long-term goal was to get an ordinance that provided opportunity for our clients, and although the long-term commitment succeeded, it took a decade.

D. Potential for Meeting Housing Needs

Inclusionary zoning ordinances offer great potential for meeting the housing needs of our clients. They offer much needed affordable housing and do so in a way that may create economically and racially mixed neighborhoods. Statistics about the racial and economic demographics of the people who purchase and rent units created under an inclusionary zoning ordinance show promise. In Montgomery County, Maryland, which has the oldest inclusionary policy in the country, a study of the families that purchased affordable homes through its program found that the inclusionary zoning ordinance accomplished many of its goals. The units were affordable to lower-income households, the purchasers were racially and ethnically diverse, and the units were spread throughout the county.³² Of the 130 purchasers surveyed, 45 percent were Asian, 23 percent were African American, 20 percent were white, and 11 percent were Latino.³³ The units were located in all but one of the planning areas in the county and offered homeownership opportunities to families with incomes ranging from \$20,000 to \$49,000, with only 16 percent of the purchasers at the high end of that income range.³⁴

As inclusionary zoning ordinances become more common and more effective and develop a track record, we hope that more statistics demonstrating their

effectiveness will become available. In the meantime, local land-use advocacy should become part of a legal services repertoire. At a minimum new affordable housing is created with potential for so much more—economically and racially integrated communities where all residents share the same access to transportation, schools, parks, jobs, and acceptable living conditions.



Based on the development practices of the past twenty years in Sacramento County that largely ignored the housing needs of low-income residents and the proposed affordable-housing plans that now accompany every market-rate development proposal, I am confident that LSNC's long-term commitment to land-use advocacy will benefit our community for many years to come. The change will not happen overnight, but with the construction of 24,000 market-rate units expected in the next ten years the housing patterns will change.

I used to count progress on the inclusionary zoning ordinance in terms of my son's age. I was six months pregnant when Sacramento County invited me to participate in a focus group to recommend housing-element programs and policies. He was 2½ when the ordinance was adopted. He was almost 3 when we intervened in the lawsuit challenging the ordinance on behalf of several individuals and local, regional, and statewide housing advocacy groups. He was almost 4 when the intervenors' motion for judgment on the pleadings was granted and the lawsuit dismissed. He was 5 when the first for-sale affordable units were issued project approval. And in about ten years he will understand what I do for a living.

³²KAREN DESTOREL BROWN, BROOKINGS INSTITUTION CENTER ON URBAN AND METROPOLITAN POLICY, EXPANDING AFFORDABLE HOUSING THROUGH INCLUSIONARY ZONING: LESSONS FROM THE WASHINGTON METROPOLITAN AREA 14–16 (Oct. 2001), www.brookings.edu/reports/2001/10/metro-politainpolicy-brown.aspx.

³³*Id.* at 14

³⁴*Id.*

Subscribe to CLEARINGHOUSE REVIEW

Annual subscription price covers

- six issues (hard copy) of CLEARINGHOUSE REVIEW and
- www.povertylaw.org access to current issues of CLEARINGHOUSE REVIEW and all issues from 1990

Annual prices (effective January 1, 2006):

- \$250—Nonprofit entities (including small foundations and law school clinics)
- \$400—Individual private subscriber
- \$500—Law school libraries, law firm libraries, other law libraries, and foundations (price covers a site license)

Subscription Order Form

Name _____

Fill in applicable institution below

Nonprofit entity _____

Library or foundation* _____

Street address _____ Floor, suite, or unit _____

City _____ State _____ Zip _____

E-mail _____

Telephone _____ Fax _____

*For Internet Provider-based access, give your IP address range _____

Order

Number of subscriptions ordered _____

Total cost (see prices above) \$ _____

Payment

- My payment is enclosed.
*Make your check payable to **Sargent Shriver National Center on Poverty Law.***

- Charge my credit card: Visa or Mastercard.

Card No. _____ Expiration Date _____

Signature _____

We will mail you a receipt.

- Bill me.

Please mail or fax this form to:
Sargent Shriver National Center on Poverty Law
50 E. Washington St. Suite 500
Chicago, IL 60602
Fax 312.263.3846

CUT HERE