



Building Inclusive Communities

A Review of Local Conditions, Legal Authority and Best Practices for Pittsburgh



BUILDING INCLUSIVE COMMUNITIES

A Review of Local Conditions, Legal Authority
and Best Practices for Pittsburgh

Spring 2015

Prepared for the Housing Alliance of Pennsylvania by

Robert Damewood, Esq.

Produced by Regional Housing Legal Services
710 Fifth Avenue, Suite 1000, Pittsburgh, PA 15219
www.rhls.org

Cover Art ©2015 Ron Janoski

FORWARD FROM THE HOUSING ALLIANCE OF PENNSYLVANIA

Pittsburgh is growing and prospering!

The Housing Alliance founded the Building Inclusive Communities Work Group to ensure that our neighbors who work in the critical, but low-wage jobs that we all rely on - security, maintenance, restaurant/food service, home health, childcare, teacher's aides, to name a few – also benefit from Pittsburgh's growth.

The Building Inclusive Communities Work Group is a group of organizations and individuals who love Pittsburgh and value its history and diversity.

We seek to ensure that the resurgence of Pittsburgh's economy and housing market include person's with low to moderate incomes through the adoption of sensible, win-win policies and programs.

Our goal is to ensure that all residents, especially those with low incomes and communities of color, benefit from housing development in the city, especially where public resources are invested.

We are dedicated to vibrant, diverse communities where parents can spend time with their children, rather than in long commutes, where people with disabilities and senior citizens live safely, affordably and with dignity, close to family, friends and needed services. Where if you work hard and play by the rules, you can afford a decent place to live.

And yet we see tens of thousands of working-class Pittsburghers, people who make up the backbone of this city, paying more than half of their income on housing, living in substandard housing that makes their children sick, involuntarily isolated in areas of concentrated poverty or getting priced out of the city altogether.

We strongly support private market development! It grows the population, the tax base, the local economy and is great for Pittsburgh. But when scarce public resources - land, incentives and flexibility -are invested, we believe that existing residents should benefit, especially those with low and moderate incomes.

With strategies such as inclusionary housing and permanent affordability, we can incentivize the growth of vibrant and inclusive communities that welcome people from all walks of life and levels of income. But it has to be by design.

We have seen too many past examples where the belief that a rising tide will lift all ships has simply left too many people behind.

The purpose of this paper is to provide research, data, evidence on policies and programs to jumpstart the debate about strategies that could be adopted to grow a diverse Pittsburgh.

Thanks to Bob Damewood of Regional Housing Legal Services for his steadfast commitment to this vision of Pittsburgh. Thanks to the members of the Building Inclusive Communities Work Group for their willingness to persevere in the quest for sensible solutions that reflect our values. And thanks to the Falk Foundation for supporting the work of Building Inclusive Communities.

Liz Hersh, Executive Director

Gale Schwartz, Project Specialist

Housing Alliance of Pennsylvania

710 Fifth Avenue, Suite 1000

Pittsburgh, PA 15219

(412) 281-1137

EXECUTIVE SUMMARY

Pittsburgh's strength has long been the diversity and strong work ethic of its residents. From the early days of industrial expansion and immigration, Pittsburgh has been home to a diverse, working class mix of ethnic and cultural traditions that have made the city a unique and vibrant place to live. This rich tapestry has managed to survive deindustrialization and decades of population loss. Due in part to the growth of the city's "eds and meds" economic sectors, Pittsburgh is now seeing a great deal of new housing development, with approximately 8,000 market rate housing units currently in development or in the planning stage. At the same time, tens of thousands of working class Pittsburgh households are paying more than half of their income on housing costs, and Pittsburgh's lowest-income households tend to be concentrated in areas that have low performing schools and few economic opportunities.

If Pittsburgh is to retain its diverse, vibrant urban life, we must ensure that new housing is accessible to people of all income levels. One way to do this is through the use of inclusionary affordable housing or inclusionary zoning (IZ). IZ policies require or encourage real estate developers to make a percentage of units in new housing developments affordable to low-income households in exchange for zoning and land use approval or other public benefits. The primary goals of IZ are to expand the supply of affordable housing and to promote social and economic integration. By linking affordable housing to market rate housing development, IZ laws leverage the private market to help achieve these goals.

The purpose of this paper is to review local conditions, legal authority and national best practices in order to facilitate the development of effective, implementable inclusionary affordable housing policies for the City of Pittsburgh. To that end RHLS reviewed publicly available market data for the City of Pittsburgh, academic studies analyzing the affordable housing supply and demand in Allegheny County and numerous studies and reports evaluating IZ policies and practices throughout the country. RHLS also researched the statutory authority for the City of Pittsburgh to enact IZ legislation, as well as court decisions addressing various constitutional challenges to IZ laws.

Findings

There is a severe shortage of decent, safe and affordable housing in the City of Pittsburgh. County-wide, there is a shortage of about 30,000 homes that are both affordable and available to people living on extremely low incomes (\$24,250 or less per year for a family of four). Pittsburgh's share of this affordability gap is approximately 21,580 units. The failure of the local housing market to meet this demand is creating a domino effect that makes housing unaffordable across all lower income levels.

A well-designed IZ policy can help unlock available subsidies to help address this shortage.

The Housing Authority of the City of Pittsburgh (HACP) has rental subsidy that can help address Pittsburgh's affordability gap, but much of that subsidy is going unused. This is due in part to a lack of decent, safe and sanitary housing with rents at or below HACP's payment standards. An IZ policy that produced rental units within HACP's payment standards would unlock this rental subsidy.

Pittsburgh's housing market appears to be strong enough to support an IZ policy. The City's growth rate has stabilized and housing prices have been increasing at an accelerated rate in the last few years. While many neighborhoods continue to have weak housing markets, others have seen dramatic increases. The City of Chicago, which has similar market conditions, has an IZ policy that has produced hundreds of affordable units in a relatively short period of time. Chicago uses a "strong voluntary" IZ model, in which affordability requirements are tied to the receipt of a concrete public benefit such as city land, a cash subsidy, zoning flexibility or rezoning that allows for increased residential use (so-called "upzoning").

Pittsburgh has the legal authority to enact IZ, and can design an IZ policy that would avoid constitutional challenges. As a home rule municipality, Pittsburgh has the legal authority to enact an IZ law. A well-designed IZ policy with cost off-sets and waiver provisions should have no problem satisfying constitutional requirements. Some typical IZ features, such as "fee-in-lieu" payments and off-site options, may increase the risk of legal challenge.

Summary of Recommendations

Pittsburgh should adopt either a mandatory IZ policy or a "strong voluntary" policy that requires affordable housing whenever a public benefit is provided. Research has shown that mandatory IZ policies are far more effective than voluntary policies at producing affordable units. The overwhelming majority of IZ policies throughout the country are mandatory. Hybrid policies like Chicago's that tie mandatory requirements to the receipt of public benefits have also proven to be effective.

A City IZ policy should set affordability targets at 50% of area median income (AMI), at least for rental housing. The City's Analysis of Impediments to Fair Housing Choice (AI) calls for rental housing that is affordable to households whose income is less than 50% of AMI and for-sale housing that is affordable to households whose income is less than 80% of AMI. The rental target would increase the number of units that are eligible for HACP rental subsidies, which would help address the severe shortage of housing that is affordable to extremely low-income households. (By comparison, Chicago's IZ requirements are 60% AMI for rental units and 80% AMI for for-sale units in developments receiving a city subsidy.)

The City should explore options to help developers produce inclusionary rental units at 50% AMI. This includes maximizing the use of non-monetary development cost offsets (such as density

bonuses and relaxed parking requirements) and exploring the use of 4% Low Income Housing Tax Credits. The City should also require developers to accept available rental subsidies in order to make units affordable to extremely low-income households.

The City should consider forgoing the use of alternative compliance measures like in-lieu fees and off-site development of affordable units. While such tools can help increase the production of affordable units, they can also cause an IZ policy to be less effective at achieving social inclusion and would increase the City's exposure to legal challenge.

The City should consider giving a community land trust (if one is created) and HACP the right to purchase or master lease affordable units. This could drastically reduce the City's administrative burden and help to keep IZ units permanently affordable.

Additional Research

Finally, this paper recommends additional research and evaluation to help the City design an effective inclusionary affordable housing policy. Recommended additional research includes modeling income targets, affordability set-asides, and cost offsets in the context of actual developments in the City; modeling the use of 4% tax credits in the context of actual developments; ascertaining the likely value of upzoning and development cost offsets in Pittsburgh; and evaluating market rate housing developments in the pipeline to ascertain what triggers, incentives and development cost offsets would be effective.

CONTENTS

INTRODUCTION.....	1
Expanding the Supply of Affordable Housing.....	1
Promoting Social and Economic Integration.....	1
Methodology.....	2
IZ POLICY FEATURES.....	3
Mandatory v. Voluntary.....	3
Coverage.....	3
Affordability Set-Aside.....	4
Income Targeting.....	4
Affordability Period.....	4
Developer Incentives and Cost Offsets.....	5
Opt-Out Provisions.....	5
Timing and Outside Appearance.....	6
Administration.....	6
LOCAL CONDITIONS RELEVANT TO THE CREATION OF AN IZ POLICY FOR THE CITY OF PITTSBURGH.....	9
Local Housing Market.....	9
Affordable Housing Supply and Demand.....	9
Affordable Housing Distribution.....	10
Existing Policy Framework.....	10
Existing Resources.....	11

BEST PRACTICES AND PROMISING INITIATIVES	15
Montgomery County, MD	15
Chicago, IL	17
LEGAL FRAMEWORK	20
Pittsburgh’s Legal Authority to Enact IZ Legislation.....	20
Takings Clause	20
Exactions	21
RECOMMENDATIONS.....	24
RECOMMENDED ADDITIONAL RESEARCH.....	27

INTRODUCTION

The purpose of this paper is to review local conditions, legal authority and national best practices in order to facilitate the development of an effective, implementable inclusionary affordable housing policy for the City of Pittsburgh.

Inclusionary Zoning (IZ) policies require or encourage real estate developers to make a percentage of units in new housing developments affordable to low-income households in exchange for zoning and land use approval or other public benefits. The two goals of IZ policies are (1) to expand the supply of affordable housing and (2) to promote social and economic integration. By linking affordable housing to market rate housing development, IZ laws leverage the private market to help achieve these goals.

Expanding the Supply of Affordable Housing

Approximately 500 municipalities in 27 states have adopted IZ policies,¹ and as many as 150,000 affordable IZ units have been created since 1974.² This is a relatively small number compared to other affordable housing programs nation-wide, but in some places IZ outperforms other production programs. In Montgomery County, MD, which has the oldest IZ law in the country, more than half of all affordable housing units built between 1974 and 1999 were IZ.³ A study of IZ programs in Los Angeles County and Orange County, CA, found that IZ compared favorably to the Low Income Housing Tax Credit (LIHTC) program and in some cases produced more units than LIHTC.⁴ In the state of New Jersey, IZ programs have created more affordable housing than any other production program except LIHTC.⁵

Promoting Social and Economic Integration

If structured properly, IZ policies can help to deconcentrate poverty and broaden opportunity. A 2012 study by the RAND Corporation of 11 IZ programs across the country found that IZ units tend to be located in low-poverty areas and are assigned to low-poverty schools.⁶ Specifically, RAND found that 75% of the IZ units were located in low-poverty neighborhoods (those with less than 10% of the population below the poverty line).⁷ By comparison, only 34% of LIHTC units, 8% of public housing units, and 28% of housing choice voucher recipients are in low-poverty neighborhoods.⁸ RAND also found that schools with IZ units in their attendance zones had slightly better academic outcomes than non-IZ schools in the same jurisdiction.⁹ A 2010 study of the academic performance of public housing students in Montgomery County, MD, found that those who were randomly assigned to IZ units performed substantially better in math and moderately better in reading than public housing students who were not assigned to IZ units.¹⁰

In order for IZ programs to be effective at achieving these two goals, there must be sufficient demand for market rate housing and the IZ requirements must not be so onerous as to render development unprofitable.¹¹ For this reason, IZ laws tend to be found in “hot” real estate markets. There are, however, examples of IZ programs in cities that have low rates of overall growth and a mix of weak and strong submarkets. One such program (Chicago, which is described below) has been studied and appears to be effective at producing affordable units and moderately effective at social inclusion.

Pittsburgh is experiencing renewed development interest, with more than 8,000 market rate housing units currently in development or in the planning stage. At the same time, there is a severe shortage of housing available to extremely low-income households, and Pittsburgh’s lowest-income households tend to be concentrated in areas that have low performing schools and few economic opportunities. The City is now in a position to consider the use of IZ to address these problems.

Methodology

RHLS was asked by the Housing Alliance of Pennsylvania to undertake the following research and analysis to facilitate the development of effective, implementable inclusionary zoning policies for the City of Pittsburgh:

- identify local conditions relevant to the creation of an IZ policy
- research the legal framework for adopting an IZ ordinance
- review effective IZ policies throughout the country, with a particular focus on cities with residential market conditions similar to Pittsburgh, and
- recommend legally defensible IZ policies that would be responsive to local conditions

To identify local conditions, we reviewed publicly available market data for the City of Pittsburgh, studies analyzing the affordable housing supply and demand in Allegheny County, news articles describing housing developments that are currently under development or are in the pipeline in Pittsburgh, and the City’s adopted plans and policy documents. To identify effective IZ policies throughout the country, we reviewed a number of studies and reports. A complete list of the studies and reports that were relied upon in the preparation of this paper is attached as Appendix A.

IZ POLICY FEATURES

Although IZ policies vary according to the needs of each local jurisdiction, they share common elements. These elements often involve policy choices. The two IZ goals of expanding the supply of affordable units and promoting social and economic integration are somewhat at odds with each other – many program design elements that serve one goal can inhibit another. For example, giving developers the option to develop affordable units off-site can result in a greater number of affordable units but less social inclusion.

The following is a review of the typical IZ policy features:

Mandatory v. Voluntary

IZ laws can either be structured as mandatory, voluntary, or some combination of the two. Mandatory IZ laws require developers to build affordable units in exchange for zoning and land use approval. Voluntary IZ policies provide incentives for developers to produce affordable units. Incentives typically involve zoning or regulatory flexibility that provides some financial benefit to a developer, such as increased building height/density, relaxed parking requirements, expedited permitting and development fee waivers. Most mandatory IZ policies provide similar benefits as a way to offset a developer's cost of compliance. Hybrid policies require affordable units in exchange for rezoning that increases a property's value. Many mandatory IZ policies allow developers to request a waiver or to comply through alternative means (such as in-lieu cash payments or off-site development), particularly where a developer can show that it is not feasible to produce all of the affordable units on-site.

Approximately 83% of IZ policies throughout the country are mandatory.¹² A review of IZ research in 2004 found that mandatory programs are more effective than voluntary programs at producing affordable units,¹³ and that successful voluntary programs tend to be in cities where it is difficult to obtain zoning or development approval without an affordability commitment.¹⁴ Mandatory programs also provide developers with greater predictability.

Coverage

Most IZ laws cover developments that exceed a minimum number of units. Thresholds range from a low of 5 to a high of 50.¹⁵ Some IZ laws are triggered by the award of a public benefit, such as the granting of a zoning change, city land or a public subsidy.¹⁶ Some cities require affordability in all developments, regardless of size.¹⁷ Others apply to developments that exceed a certain square footage,¹⁸ and at least one city requires affordability only when higher-end units are built.¹⁹

According to Business and Professional People for the Public Interest (BPI), where to set a threshold depends on what kind of development is taking place within a jurisdiction and what is

financially feasible to accomplish. Thresholds must not be so high as to effectively exclude most housing developments from coverage, but they must also take the economics of smaller developments into account.²⁰

Affordability Set-Aside

The minimum number of units that are required to be affordable is usually expressed as a percentage of the total number of units in the development. Set-asides range from a low of 5%²¹ to a high of 50%.²² Some municipalities require different set-asides in different situations. For instance, Chicago's Affordable Requirements Ordinance requires a 10% set-aside for projects that receive a zoning increase, are on City land, or are part of a Planned Development; a 20% set-aside for projects that receive City financial assistance, and an additional 10% set-aside for projects receiving a density bonus in the downtown district.²³

Income Targeting

Income targets are usually expressed as a percentage of the HUD-published area median income (AMI). They may also be expressed by reference to the type of households to be served, as follows:

Extremely Low Income (ELI):	30% AMI and below
Very Low Income (VLI):	30%-50% AMI
Low Income (LI):	50%-80% AMI
Moderate Income (MI):	80%-100% AMI

Income targets range from a low of 30% AMI to a high of 120% AMI.²⁴ Many municipalities have tiered income targets. For instance, Davis, CA requires that at least 25% of the units in covered rental developments be affordable to LI households and 10% of the units be affordable to VLI households. Where to set income targets set depends on each municipality's affordability needs and housing policies and what is financially feasible to accomplish.²⁵

Affordability Period

The period of time that affordable units are required to remain affordable ranges from a low of 10 years to a high of 99 years or longer.²⁶ This is usually enforced through deed restrictions. A 2014 review by the Lincoln Institute for Land Policy of 330 IZ laws throughout the country found that 84% of for-sale programs and 80% of rental programs require affordability periods of at least 30 years, and over one-third require perpetual affordability.²⁷ Many programs achieve lasting

affordability through such means as (1) setting control periods at 99 years or for the life of the building, (2) adopting a 30-year control period that resets for an additional 30 years if the unit is sold within that time, or (3) reserving a right to repurchase the unit at a below market price.²⁸

Some programs provide for permanent affordability by allowing public housing agencies or community land trusts to purchase all or some of the affordable units at below market prices. For example, Montgomery County, MD, gives the county public housing authority and other designated non-profits a first-right to purchase or master lease up to 40% of the affordable units in a development at below market prices.²⁹ As a result, 70% of Montgomery County's public housing units are inclusionary.³⁰ Chicago's Affordable Requirements Ordinance (ARO) gives a city-affiliated community land trust the right to purchase affordable for-sale units if they are priced at \$25,000 below fair market value.³¹

Developer Incentives and Cost Offsets

Most IZ policies provide incentives to help offset the cost of producing affordable units.³² This is typically done by providing flexibility in a municipality's zoning and development plan approval processes. Incentives and cost offsets help make it feasible for developers to build affordable units and help insulate IZ policies from legal challenge. Examples include:

- *Density Bonus/Height Bonus.* Allowing more residential units in a district or increasing allowable building heights is the most common type of incentive/offset. It has the effect of increasing the revenue that a developer can earn per square foot of land.
- *Relaxed Parking Requirements.* Reducing the number or size of required on-site parking spaces reduces a developer's overall cost, and it could increase revenue by allowing more of the site to be used for income generating uses.
- *Expedited Permitting.* Speeding up the permitting process could reduce a developer's overall cost by shortening the time it takes to complete a project.
- *Fee Waivers.* Waiving municipal fees reduces development cost, but it also reduces a city's revenue.

A more complete list of developer incentives and cost offsets is attached as Appendix B.

Opt-Out Provisions

Some mandatory IZ policies allow the developer to petition the municipality for a full or partial waiver of program requirements.³³ This can help insulate an IZ law from legal challenge where strict compliance would render a project infeasible. Many IZ policies allow developers to opt out by paying a "fee-in-lieu" or by developing affordable units off-site. A fee-in-lieu is a cash payment that is deposited into a fund that can be used to develop other affordable housing within the

municipality. RAND cautions that allowing developers to build affordable units off-site or setting fee-in-lieu payments too low can cause a policy to be less effective at achieving inclusionary objectives.³⁴ For this reason, many municipalities make opt-outs difficult to obtain and/or require a minimum percentage of on-site units. For example:³⁵

- Boulder, CO, requires that at least half of all affordable units be built on-site, and only allows fee-in-lieu payments for developments with four or fewer units.
- Several municipalities allow in-lieu payments only in “exceptional circumstances” where the developer can show that building the affordable units on-site would render the project infeasible.³⁶ The developer’s documentation is typically reviewed by the municipal housing development agency, which makes a recommendation to the planning board.
- Boston, MA, requires fee-in-lieu payments sufficient to develop 150% of the units that would have been required had the developer built them on-site. The per-unit payment is based on the average public subsidy required to develop affordable units in the city.
- Chicago, IL, is considering changes to its opt-out provisions to take into account differing market conditions within the city. The changes would provide for a range of fees in order to encourage the development of more affordable housing in higher-income areas and more market-rate housing in low-mod areas. In most cases, at least 25% of the required affordable units would have to be built on-site.³⁷

Timing and Outside Appearance

Many IZ laws require that affordable units be constructed concurrently with the market rate units.³⁸ This ensures that the affordable units are actually built and that they are distributed evenly throughout all phases of a development. Many IZ laws also require that IZ units be similar to market rate units in outside appearance, although the units need not be the same size and the interiors may have fewer amenities.³⁹ Some municipalities provide a “compatibility allowance” (a slightly higher sales price for IZ units) to encourage developers to make for-sale units architecturally compatible, and some require minimum unit sizes for affordable units in relation to the size of market rate units in the same development.⁴⁰

Administration

PolicyLink has published an excellent report on the administration of IZ programs.⁴¹ They found that staffing varies greatly among IZ programs (from one full-time staff person in many programs to over six full-time equivalent staff in one of the largest IZ program in the country). They also found that homeownership programs require far more staff time than rental programs. Administrative responsibilities include the following:

- *Overseeing production of IZ units.* This includes helping developers understand their obligations, evaluating feasibility, applying incentives, and monitoring the design, placement and timing of affordable units. Some municipalities require developers to create an affordable housing plan that details how IZ units will be integrated into the project and how they will be maintained as affordable. This plan is then incorporated into an affordable housing agreement that is recorded against the property prior to development approval, which makes IZ requirements easier to enforce.
- *Pricing.* Rental programs need to inform developers of maximum rent limits and of annual revisions to those limits. Homeownership programs need to establish an initial maximum sales price and, if applicable, establish a formula for calculating the maximum resale price and a process to allow the homeowner to recoup the value of any capital improvements.
- *Marketing.* For rentals, some programs help property managers market IZ units and some develop fair marketing standards for them to follow. For homeownership, many programs assume responsibility for marketing the IZ units in order to avoid favoritism, discrimination and other abuses.
- *Home buyer education.* Aside from coordinating general homebuyer education, for-sale programs need to ensure that potential low-income homebuyers understand program requirements.
- *Eligibility determination.* Some programs require developers to collect documentation and determine eligibility, some require developers to forward documentation to them for review, and some handle the application and selection process themselves.
- *Financing and refinancing.* Homeownership programs often require approval of any financing, to ensure that homebuyers don't borrow more than the allowed resale price and to protect them from predatory loans that could lead to foreclosure. Such programs also need to work with mortgage lenders to make sure that they understand restrictions on resale.
- *Monitoring.* Rental programs must monitor projects to ensure that rents do not exceed maximum limits and that occupants continue to be income eligible. For-sale programs must ensure that homeowners continue to occupy IZ units as their primary residence, and must regularly check property records to ensure that no new liens have been recorded against the IZ units.
- *Resale management.* PolicyLink calls this “one of the most time-consuming tasks of post-purchase administration of homeownership units.”⁴² Responsibilities of program staff include responding to the homeowner's notice of intent to sell; ordering home inspections and appraisals; determining the value of any credits for capital improvements or deductions for damage; marketing; and qualifying new homebuyers. Programs can reduce their administrative burden by (1) using shared appreciation loans (where the unit is sold at market value and the program receives a predetermined share of the proceeds) instead of

resale restrictions, and/or (2) exercising an option to purchase the unit.

- *Enforcement.* This can include taking action against a property owner for violating IZ requirements or intervening in a foreclosure process in order to preserve affordability. Enforcement issues are far more common with for-sale housing. PolicyLink recommends that programs invest in the preparation of strong legal documents up front in order to save on enforcement costs down the road.

Some municipalities reduce ongoing administrative requirements by giving public housing authorities and/or community land trusts an option to purchase IZ units. Sample staffing requirements for IZ programs are contained in the PolicyLink report and in the description of best practices below.

LOCAL CONDITIONS RELEVANT TO THE CREATION OF AN IZ POLICY FOR THE CITY OF PITTSBURGH

Local Housing Market⁴³

Pittsburgh has long been considered a weak market city, but that is starting to change. After decades of population loss, Pittsburgh's population appears to have stabilized since 2010.⁴⁴ Housing prices are lower than other cities but are increasing. According to the market data firm CoreLogic, Pittsburgh is one of a few markets in the country to have exceeded its pre-recession peak housing prices,⁴⁵ with average for-sale prices nearly 15% above 2006 levels.⁴⁶ Not only are Pittsburgh's housing prices increasing every year, the rate of increase is accelerating, from 3.8% in 2013 to 8.2% in the first 10 months of 2014.⁴⁷ Rents are also increasing. According to HUDuser, HUD Fair Market Rents (set at the 40th percentile of all rents in a given market) for the Pittsburgh metropolitan area have increased by 7.9% since 2006.⁴⁸

Some areas of the City are appreciating faster than others. In 2013, the local CBS News affiliate reported that the housing demand in some Pittsburgh neighborhoods is "in hyper drive", noting that in 12 years home prices more than doubled in the Southside and nearly tripled in Lawrenceville.⁴⁹ The URA's Market Value Analysis of the City's census block groups shows that Pittsburgh has a mix of weak-market areas and strong-market areas, with average housing prices ranging from a low of \$8,790 in the weakest market block groups to \$333,578 in the strongest.⁵⁰ Any inclusionary affordable housing policy for the City of Pittsburgh must take this variation into account.

There are at least 8,000 market rate housing units currently in development or in the pipeline in the City. A list of those development projects is attached as Appendix C.

Affordable Housing Supply and Demand

Pittsburgh has also long been considered one of the most affordable metropolitan areas in the country, but that is changing as well. The National Association of Home Builders (NAHB) annual Housing Opportunity Index consistently lists the 7-county Pittsburgh metropolitan area as one of the most affordable in the country, but Pittsburgh's ranking has dropped from 40th in 2005 to 63rd in the third quarter of 2014.⁵¹ Notably, NAHB's affordability index is based on home sale prices relative to the area median income (100% of AMI). It doesn't speak to the supply and demand of affordable rental housing or to the supply of for-sale housing that is affordable and available to LI (80% of AMI), VLI (50% of AMI), and ELI (30% of AMI) households.

In 2003, the University of Pittsburgh University Center for Social and Urban Research (UCSUR) studied the supply and demand of affordable housing in Pittsburgh and Allegheny County. UCSUR found a severe shortage (15,080 units) of housing that is affordable to ELI households, based on

2000 census data.⁵² In 2014, the National Low Income Housing Coalition (NLIHC) analyzed data from Allegheny County's 2007-2011 Comprehensive Housing Affordability Strategy (CHAS) and found the deficit to be twice as large.⁵³ The NLIHC analysis revealed that:

- There are 30,480 more ELI households in Allegheny County⁵⁴ than there are housing units that are affordable and available to them.
- 73% of ELI households are cost burdened (paying over 30% of their household income toward housing costs) and 60% of ELI households are severely cost burdened (paying over 50% of their household income toward housing costs).
- The 30,480 ELI households are occupying housing that would otherwise be available to VLI and LI households. As a result, 71% of VLI households are cost burdened and 26% are severely cost burdened.
- Supply and demand are at equilibrium at 80% AMI.

The results of these studies suggest that an effective housing policy for Pittsburgh should strive to produce units that are affordable to ELI households (30% AMI and below).

Affordable Housing Distribution

Pittsburgh's 2012 Analysis of Impediments to Fair Housing Choice (AI) found that housing choice vouchers, public housing, and LIHTC units tend to be concentrated in low- and moderate-income areas of the City, and that this "illustrates an [imbalance] where [publicly] assisted housing is located and a lack of housing choice for those families and individuals who need publicly assisted housing."⁵⁵ The single greatest barrier to fair housing choice identified by Pittsburgh residents was the lack of affordable housing outside of poverty impacted areas.⁵⁶

Existing Policy Framework

The City does not currently have an IZ program, but there have been policy statements that support the creation of such a program:

- Pittsburgh's AI states that it is the City's goal to develop affordable rental housing outside of poverty impacted areas, "especially for households whose income is less than 50% of the median income,"⁵⁷ and to develop for-sale housing outside of areas of low-income concentration "for lower income households."⁵⁸
- The AI also states that the City's Planning Department has been reviewing IZ as a potential tool, and that "The City does not promote a blanket policy requiring affordable housing in

all new housing developments. The City instead is considering using density bonuses as an incentive to include affordable housing in new developments and to tie public funding as an incentive to develop affordable housing.”⁵⁹

- In December, 2013, Mayor Peduto’s transition team recommended the creation of an IZ program by the end of his first term.⁶⁰

There are also two IZ initiatives that are currently under way in Pittsburgh:

- The Preliminary Land Development Plan (PLDP) for the ALMONO Specially Planned District provides for height bonuses in return for commitments to include affordable housing. This IZ feature was written into the ALMONO PLDP by the owner of the site, not the City, and the City does not yet have any policies in place to determine whether an affordable housing commitment has been made and to ensure that it will be honored once a building is occupied.
- The City has recently adopted an ordinance that would create an Affordable Housing Task Force to study the City’s affordable housing issues. This was prompted by a bill that would have required applicants seeking approval of specially planned districts involving public land or a public subsidy to use commercially reasonable efforts to make 30% of the on-site units affordable. The City Planning Commission voted to recommend approval, but the bill was withdrawn to allow for a City-wide study of new programs and initiatives “to promote mixed income development ... and ensure a vibrant mix of housing options for people of all income levels.”

Existing Resources

Like most cities, Pittsburgh is losing affordable housing resources. The City’s HOME allocation has decreased by 57% since 2010 and its CDBG allocation decreased by 22.5% over the same period. Other than approximately \$14.5 million per year in CDBG and HOME, the only significant resources available to the City for new affordable housing production or rent subsidies are Low Income Housing Tax Credits (LIHTCs - both “9%” and “4%”) and Housing Choice Vouchers (both tenant-based and project-based). A significant amount of funding for affordable housing should also be available in the coming years through the Pennsylvania Housing Affordability and Rehabilitation Enhancement Fund (PHARE, commonly known as the State Housing Trust Fund). Each of these programs is described below.

9% LIHTCs

The LIHTC program provides an annual credit against federal income taxes of 9% of the cost to develop affordable rental housing, over ten years.⁶¹ This helps developers raise equity investment in affordable housing developments. At least 20% of the units in a housing development must be affordable to households earning at or below 50% AMI, or at least 40% of the units must be affordable to households earning at or below 60% AMI. As a practical matter, the affordability period for LIHTC projects in Pennsylvania is 30 years. LIHTCs are awarded on a competitive basis by the Pennsylvania Housing Finance Agency (PHFA). PHFA receives an annual allocation of approximately \$29 million in tax credits, and approves an average of three LIHTC developments in the City of Pittsburgh, for an average of 200 units, each year. Many of these projects involve the redevelopment of existing affordable housing, so the actual number of new affordable units created is far less.

4% LIHTCs

4% LIHTCs provide an annual tax credit of 4% of the cost to develop affordable rental housing over ten years.⁶² The basic affordability requirements are the same. 4% tax credits are awarded by PHFA on what is essentially a non-competitive basis. In order to qualify, a housing development must receive tax exempt bond financing and must comply with LIHTC program requirements. To receive the maximum amount of tax credits, bond financing must cover more than 50% of the development cost. Unlike 9% credits, there is no cap on the amount of 4% tax credits that PHFA can award every year. In 2013-2014, PHFA allocated approximately \$140 million in 4% credits. Due to bond financing costs and the lower amount of tax credit equity that 4% LIHTC deals can attract, 4% deals can be difficult, but there has been at least one recent market rate development with an affordable component in Pittsburgh that was financed with 4% credits.⁶³ The relatively non-competitive nature of 4% LIHTCs makes this an attractive – though underutilized – resource for developing inclusionary housing.

Tenant-Based Vouchers

As previously mentioned, an effective IZ policy for Pittsburgh should strive to address the severe shortage of housing that is affordable to ELI households. LIHTCs are a “shallow subsidy” that is only moderately effective at producing units that are affordable at that income level. Housing choice vouchers are a “deep subsidy” that ensures that low-income households do not pay more than 30%-40% of their household income on housing costs. Vouchers could therefore help an IZ program achieve deeper affordability goals.

Pittsburgh’s housing choice vouchers are an underutilized resource. In 2013, HACP received \$41.9 million in voucher funding from HUD,⁶⁴ but spent only \$29.8 million of that on housing assistance

payments (excluding program administration and family self-sufficiency costs) to serve slightly over 5,000 households.⁶⁵ HACP was able to reallocate the \$11 million in unused voucher authority to other purposes, so the funds did not go unused,⁶⁶ but full use of HACP’s voucher funding could have allowed it to serve 1,500-2,000 additional households.

The inability to make full use of HACP’s available voucher authority is due at least in part to the lack of decent, safe and sanitary housing with rents at allowable levels. Vouchers may only be used in housing that meets HUD’s housing qualify standards and, with limited exceptions, have market rents that do not exceed payment standards established by HACP within certain limits proscribed by HUD. According to HACP staff, the most recent lease-up rate for vouchers is only 59% (in other words, 41% of low-income people who were issued vouchers had to return them unused).⁶⁷ Adopting an IZ program with rental affordability targets below HACP’s voucher payment standard could expand the supply of voucher-eligible housing and potentially unlock millions of dollars of unused voucher funding.

The following chart shows HACP’s current voucher payment standards in relation to 2015 maximum rents (including utility costs) at various income levels.⁶⁸

	1 bedroom	2 bedroom	3 bedroom	4 bedroom
30% AMI max. rent	391	502	658	814
50% AMI max. rent	652	783	904	1009
HACP payment standard	693	865	1086	1155
60% AMI max. rent	782	939	1085	1211
70% AMI max. rent	913	1096	1265	1412
80% AMI max. rent	1043	1251	1446	1613

In order to make housing choice vouchers available as a resource to achieve deeper affordability in IZ rental units, the maximum affordable rents will have to be set at or below the HACP voucher payment standard.

Project-Based Vouchers

Housing authorities can “project-base” up to 20 percent of their voucher funding (over \$8 million in the case of HACP) by attaching the subsidy to designated units for up to 15 years, plus extensions.

Like tenant-based vouchers, project-based vouchers are an untapped resource that can help an IZ program achieve deep affordability. Project-based vouchers can also support the development of affordable housing in the first place, since developers can borrow against long-term subsidy commitments to pay off construction financing. Setting affordability targets below HACP's voucher payment standards could therefore unlock both a rental subsidy and a potential resource for development financing.

Pennsylvania Housing Affordability and Rehabilitation Enhancement (PHARE) Fund

PHARE is a state trust fund for the development of affordable housing. It is currently funded through a state impact fee on natural gas wells and is awarded to eligible counties and municipalities on a competitive basis by PHFA. Currently, PHARE may only be used in counties that have adopted impact fees, and half of the funds must be used in rural counties.⁶⁹ The state is poised to receive an influx of funds from Fannie Mae and Freddy Mac that will increase PHARE funding from approximately \$9 million per year to approximately \$44 million per year. These additional funds will be available state-wide, not just in counties with drilling activity. PHFA has not yet adopted guidelines for the award and use of these additional funds.

BEST PRACTICES AND PROMISING INITIATIVES

IZ has been heavily researched, and there are several programs with documented success. This paper will discuss two programs that have been found to be successful at achieving both IZ goals – a long-standing program in a strong residential market that has produced thousands of affordable units over four decades (Montgomery County, MD), and a relatively new program in a relatively weak residential market that has produced a large number of affordable units over a short period of time (Chicago, IL).

Montgomery County, MD

Montgomery County's Moderately Priced Dwelling Unit (MPDU) program is the oldest continuously operating IZ program in the country. It is also the most successful in terms of both housing production and social inclusion. From 1974 through 2010, it created 13,133 units of affordable housing,⁷⁰ and 70% of Montgomery County's public housing units are IZ.⁷¹ The MPDU program is a mandatory ordinance with the following features:⁷²

Applicability: All new developments with 20 or more housing units.

Set-Aside: 12.5%; up to 15% if the developer requests a density bonus.

Income Limits:

- Rental: 65% AMI (garden apartment) to 70% AMI (high-rise); affordable rents are set at 25% of household income, excluding utilities.
- For-Sale: 70% AMI

Affordability Period:

- Rental: 99 years.
- For-Sale: 30 years; if a home is sold during that time, the affordability period renews for an additional 30 years.
- Up to 40% of the affordable units may be purchased or master leased by the housing authority and other designated non-profits, which has the effect of making them permanently affordable. The housing authority can not purchase or master lease more than 1/3 of the affordable units in a given development.

The original MPDU had shorter affordability periods, but Montgomery County adopted these after large numbers of IZ units aged out of use.

Incentives and Cost Off-Sets: In addition to a density bonus for increased affordability, developers may request expedited permitting and a waiver of some fees.

Opt-Out Provisions: In-lieu fees are determined on a case-by-case basis, but the developer must show that environmental costs or an “indivisible package of services and facilities” provided to the residents would render the project infeasible or the units unaffordable. Off-site units can be approved for high-rise buildings in the same “policy area” as the proposed development.

Staffing: As of 2007, the MPDU program was administered by one part-time staff who monitors 853 rental units and six full-time equivalent staff who monitor 1,976 for-sale units.⁷³

Montgomery County and has a very strong real estate market. Median home sales prices are 174% higher than Pittsburgh’s,⁷⁴ and median rents are 70% higher.⁷⁵ Accordingly, it should not be assumed that the basic features of the MPDU program (coverage, set-aside, income targets and incentives) would work in Pittsburgh. However, the right of the housing authority (the Housing Opportunities Commission or HOC) to purchase or master lease affordable units has proven to be extremely successful and could potentially be replicated in Pittsburgh.

HOC Right to Purchase or Master Lease: Before affordable units can be sold or leased to the general public, the developer must submit an offering statement to the County,⁷⁶ which then provides the HOC and other designated housing providers with a 45-day right to purchase or lease the units.⁷⁷ The purchase or rental price is the same as that offered to the general public. The HOC and other providers may not collectively purchase or lease more than 40% of each type of affordable unit in a development, and the HOC may not purchase or lease more than 1/3 of the units.⁷⁸ This provision has had a profound impact on the social inclusion of public housing residents in Montgomery County. 70% of Montgomery County’s public housing units are IZ. Since HOC is limited to 1/3 of the units in a given development, this means that the vast majority of the County’s public housing is located in a mixed-income setting where public housing units are, at most, 5% of the units in a development. As previously mentioned, this has translated into substantial academic gains for public housing students assigned to IZ units.⁷⁹

Chicago, IL

Chicago has an effective IZ program in a market that is only moderately stronger than Pittsburgh's. Like Pittsburgh, Chicago is a low-growth city with a mix of strong and weak housing submarkets. Its population grew by less than 1% between 2010 and 2013 (Pittsburgh's growth rate during that time period was zero).⁸⁰ Its median home sales prices are 62%-70% higher than Pittsburgh's,⁸¹ and its rents are roughly 40% higher.⁸² Median sales prices for new homes in the Chicago metro area are actually lower than new home prices in the Pittsburgh metro area.⁸³ Chicago's median income is 9% higher than Pittsburgh's.⁸⁴

Chicago has three IZ policies, two of which are currently in use:

The **Affordable Requirements Ordinance (ARO)** has produced hundreds of affordable units in a short period of time. It has been described both as mandatory⁸⁵ and as voluntary⁸⁶ – it is voluntary in the sense that it only applies when a developer seeks a public benefit from the city, but those benefits (described below) are of a type that developers are typically able to receive without having to make affordability commitments. The ARO was adopted in 2003 and revised in 2007. By May, 2007, it had produced 857 units, or roughly 200 per year,⁸⁷ although it is not clear how many of those were produced directly and how many were developed through in-lieu-fees.⁸⁸ Since 2007, the ARO produced only 81 units but generated \$8.8 million in in lieu fees.⁸⁹ Because many developers are opting to pay in-lieu fees rather than include IZ units on-site, an ARO Advisory Task Force convened by Mayor Rahm Emmanuel has recommended increasing in-lieu fees for higher-income areas and requiring that a minimum percentage of IZ units be built on-site.⁹⁰

RAND found that 39% of Chicago's IZ units are in low-poverty neighborhoods;⁹¹ that neighborhoods with IZ are more affluent than those without;⁹² and that IZ neighborhoods have more "markers of advantage" (higher incomes, higher educational attainment and more racial diversity) than non-IZ neighborhoods.⁹³ The ARO Advisory Task Force, however, found that the supply of affordable units produced in high-growth areas is "minimal."⁹⁴

The **Downtown Density Bonus** is an incentive-based program that gives housing developers in downtown districts a density bonus in exchange for affordability commitments equal to 10% of the units in a development. Since 2004, the program has resulted in the construction of only 5 on-site units but the collection of \$34 million in in-lieu-fees.⁹⁵ The ARO Advisory Task Force has also recommended increasing the in-lieu fees in the Downtown Density Program.

The **Chicago Partnership for Affordable Neighborhoods (CPAN)** is an incentive-based policy that has not produced any units since the ARO was revised in 2007.⁹⁶ Between 2001 and 2007, CPAN created 420 units.⁹⁷

Affordable Requirements Ordinance (ARO):⁹⁸

Applicability: All developments with 10 or more units and at least one of the following:

- A zoning change that permits greater density or permits residential use where that use was not previously allowed (so-called “upzoning”)
- Includes land purchased from the city (even if it is purchased at fair market value)
- Receives any financial assistance from the city, or
- Is part of a planned development in a downtown zoning district.

Set-Aside: 10%; 20% if there is any city financial assistance in the deal.

Income Limits

- Rental: 60% AMI (1/2 must be affordable at 50% AMI if there is TIF financing).
- For-Sale: 100% AMI (1/2 must be affordable at 80% AMI if there is TIF financing).

Affordability Period: 30 years, although the Chicago Community Land Trust (CCLT) has the right to purchase affordable for-sale units if they are priced at \$25,000 below fair market value, which has the effect of making many of the for-sale units permanently affordable.

Incentives and Cost Off-Sets: There are no cost offsets. Upzoning, city land, city financial assistance and planned development approval are treated as incentives.

Opt-Out Provisions: Developers may pay in-lieu fees of \$100,000 per unit, although those fees are being revised to account for neighborhood variation. There are no off-site options, although this is also being revised to encourage “transit-served” development.

Staffing: Chicago’s IZ laws are administered by one 30% FTE staff who reviews and monitors development agreements, and one 60% FTE staff who assesses income qualifications for all of the city’s affordable homeownership programs.⁹⁹ The CCLT, which is managed by the City, monitors the continued affordability of the for-sale units purchased by the CCLT, and the city law department review sales documents.¹⁰⁰ The vast majority of Chicago’s IZ units appear to be for-sale (RAND found 815 for-sale units as of 2009).

The ARO Advisory Task Force has recommended changes to the ARO and Downtown Density Bonus in order to increase the production of affordable units, especially in high-growth areas. The recommended changes include:¹⁰¹

Range of In-Lieu Fees. Proposed fees would range from \$175,000 per unit downtown, \$125,000 per unit in high-income census tracts, and \$50,000 per unit in low-mod census tracts. 25% of the required affordable units would have to be built on-site, although developers of for-sale housing downtown would be able to opt out of this requirement by paying an enhanced fee-in-lieu of \$225,000 per unit.

CHA Right to Purchase or Lease. Developers who allow the Chicago Housing Authority or other approved agency to purchase or lease ARO units would be eligible for reduced in-lieu fees.

Transit-Served Locations. Developers who place more than 50% of the required affordable units in “transit-served locations” would be eligible for density bonuses.

Because of Chicago’s relative market similarities to Pittsburgh, its success at producing IZ units, and its ability to account for varying market conditions across different neighborhoods, the ARO would seem to be a good model for a Pittsburgh IZ policy, although Pittsburgh should be cognizant of the ARO’s shortcomings and the recommendations of the ARO Task Force.

LEGAL FRAMEWORK

Pittsburgh's Legal Authority to Enact IZ Legislation

Pennsylvania is a so-called “Dillon’s Rule” state, which means that municipal powers are limited to those expressly granted by state law or necessarily implied from that law.¹⁰² Absent a specific grant of power from the General Assembly, local governments have no power to enact IZ. As of 2009 there were at least 12 IZ laws in Pennsylvania covering 14 municipalities.¹⁰³ All of these laws are voluntary (incentive-based), and each of the municipalities covered by these laws derives its zoning power from the Pennsylvania Municipalities Planning Code (MPC).¹⁰⁴ Pittsburgh is not governed by the MPC.¹⁰⁵

Pittsburgh is a home rule municipality. Home rule is a broad delegation of power from the state that allows municipalities to exercise self-government within specified parameters. The General Assembly has granted home rule municipalities the power to “exercise any powers and perform any function not denied by the Constitution of Pennsylvania, by statute or by its home rule charter.”¹⁰⁶ The delegation of home rule powers is to be liberally construed in favor of the municipality.¹⁰⁷ Pennsylvania’s Home Rule Charter and Optional Plans Law does not impose any restrictions on Pittsburgh’s power as a home rule municipality to enact zoning laws in general or IZ in particular.¹⁰⁸ The Law does limit the power of municipalities that are governed by the MPC to engage in municipal planning, but that limitation does not apply to Pittsburgh as Pittsburgh is not among the “class or classes of municipalities” to which the MPC is applicable.¹⁰⁹ Pittsburgh’s Home Rule Charter claims the full extent of powers permitted under the Law.¹¹⁰ Pittsburgh therefore appears to have the authority as a home rule municipality to enact IZ.

The power to enact zoning laws is an exercise of the police power, and accordingly must bear a reasonable relationship to promoting the health, safety, morals, or the general welfare of the community.¹¹¹ The Supreme Court has held that maintaining a healthy socio-economic balance is a proper exercise of municipal zoning power,¹¹² saying:

*The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual, as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.*¹¹³

Takings Clause

The “takings clause” of the Fifth Amendment to the U.S. Constitution requires the government to pay just compensation when private property is taken for public use.¹¹⁴ This is made applicable to the states by the Fourteenth Amendment. In order to determine whether a local regulation such as

IZ amounts to a Fifth Amendment “taking”, courts prior to 2005 would consider whether the law substantially advances a legitimate state interest and whether it denies the property owner all economically viable use of the property. Under this standard, courts have consistently upheld IZ laws.¹¹⁵

The U.S. Supreme Court altered its regulatory takings analysis in 2005.¹¹⁶ As a result, future regulatory takings cases will most likely be analyzed under the factors set forth in the Supreme Court’s decision in *Penn Central Transp. Co. v. City of New York*:¹¹⁷ (1) the economic impact of the policy (2) the extent to which the policy interferes with investment backed expectations and (3) the nature of the regulation.¹¹⁸ Although there are no reported court decisions applying *Penn Central* in the context of IZ, the Third Circuit Court of Appeals applied it in the context of a rezoning that deprived a property owner of 89% of the value of his property, and held that there was no taking.¹¹⁹ A well-designed IZ policy with cost off-sets and waiver provisions should have no problem satisfying the *Penn Central* factors.

Exactions

An “exaction” is a demand that is made for the performance of a public service in the ordinary course of duty. In *Nollan v. California Coastal Comm'n.*, the U.S. Supreme Court held that government may not require a property owner to provide an easement over property as a condition to approval of a land-use permit unless there is an “essential nexus” between the condition and a public need generated by the proposed development.¹²⁰ The Supreme Court considered a nearly identical situation in *Dolan v. City of Tigard* and added an additional requirement that there be “rough proportionality” between the government’s demand and the effects of the proposed development on the community.¹²¹ In *Koontz v. St. Johns Water Management District*, 570 U.S. ____, 133 S.Ct. 2586 (2013), the Court extended this doctrine to monetary exactions (payment to restore wetlands off-site).¹²²

Where municipalities have imposed impact fees on commercial developments to support the production of affordable housing, some courts have applied an exactions analysis and required the showing of a nexus and rough proportionality.¹²³ Other courts have required that the municipality merely demonstrate a “reasonable relationship”.¹²⁴ In the traditional IZ context, courts have so far rejected exactions challenges.¹²⁵

In the Supreme Court’s land use exactions cases, the conditions that were found to be exactions would have constituted takings if the municipality would have required them through legislation rather than in exchange for a building permit.¹²⁶ The rationale behind the Supreme Court’s exactions holdings was to prevent municipalities from using their land use process to coerce property owners into relinquishing Fifth Amendment rights. As the Supreme Court explained in *Koontz*:

[L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation.¹²⁷

As long as an IZ law is designed to survive a *Penn Central* takings analysis, there is no Fifth Amendment right that housing developers would be “coerced” into giving up, so an exactions challenge should fail.

Some typical IZ features, however, may be vulnerable to an exactions challenge. *Koontz* held that a requirement that a property owner pay for off-site wetlands restoration was subject to an exactions analysis. The California Supreme Court has found that requiring a housing developer to give a city a purchase option is an exaction under California’s Mitigation Fee Act (which requires municipalities to demonstrate a reasonable relationship between a proposed development and the public facility to be financed through an impact fee).¹²⁸ The decision was based solely on the statutory language, and the court did not consider *Nollan/Dolan/Koontz*,¹²⁹ but as this paper is written that court is considering whether in-lieu fees under a mandatory IZ law are an exaction under *Nollan/Dolan/Koontz*.¹³⁰ The lower appellate court held that they are not.¹³¹

There are several precautions that a municipality can take to minimize its exposure to an exactions challenge:

- Make IZ commitments contingent upon the award of a municipal resource that subsidizes an applicant’s development project (e.g., city land, cash subsidy, planned development approval and upzoning).¹³² Governments have the right to determine the purposes for which their resources may be used, as long as they don’t try to affect an applicant’s activities that are unrelated to the subsidized project.¹³³
- Avoid the use of in-lieu fees and off-site development as alternative compliance mechanisms. These are far more likely to be subject to *Nollan/Dolan/Koontz* than requirements that are directly related to the characteristics of the development itself.
- Use nonmonetary cost offsets. If a court finds that IZ requirements are exactions, the developer’s remedy is to be compensated for the taking.¹³⁴ Besides helping to ensure that a project remains viable, cost offsets provide some degree of compensation.
- Document the reasonable relationship between IZ requirements and market rate housing development. In the context of commercial development, this is usually accomplished through a “nexus study” that demonstrates how such development generates a need for affordable housing. A nexus study should not be necessary in the housing development context, where there is a direct connection between the development of market rate housing

and the problems to be addressed through the second IZ goal (social inclusion). Legislative findings based on the well-documented harms caused by concentrated poverty and lack of opportunity should be sufficient.¹³⁵

RECOMMENDATIONS

Applicability

Pittsburgh should adopt either a mandatory policy or a “strong voluntary” approach like Chicago’s ARO. Traditional voluntary policies are not very effective at producing affordable units. Chicago’s approach of linking affordability requirements to the award of a public resource seems to have been successful at producing affordable units in a city with market conditions similar to Pittsburgh. Such an approach also helps to insulate an IZ policy from legal challenge, particularly if the requirements are limited to the development itself and not satisfied through alternative compliance mechanisms.

Market rate housing developments in the pipeline and smaller, URA-funded for-sale housing developments in low-mod areas should be reviewed to ensure that the ARO’s 10-unit threshold would make sense for Pittsburgh.

Affordability Set-Aside

The 10%-30% approach used by the City of Chicago (10% if there is upzoning, planned development approval or City land; 20% if there is City financial assistance; and an additional 10% if a density bonus is requested in certain districts) would seem to be a good starting place.

Income Targeting

A Pittsburgh IZ policy should serve the affordability goals set forth in the City’s Analysis of Impediments to Fair Housing Choice, in other words:

- 50% of AMI for rental developments
- 80% of AMI for for-sale developments

To address the severe shortage of housing affordable to ELI households, the rental income target should be at or below HACP’s Section 8 payment standards (50% AMI would accomplish that), and developers should be required to accept available rent subsidies).

Affordability Period

Pittsburgh should follow Montgomery County’s lead and require lengthy affordability periods, enforceable through deed covenants, with the following provisions to encourage permanent affordability:

- If a community land trust is created,¹ it should have an option to purchase affordable for-sale units at the affordable sale price.
- HACP should have an option to purchase or master lease affordable rental units.
- The for-sale affordability period should “reset” if a unit is sold during that time.

Developer Incentives and Cost Offsets

It is unlikely that typical market rents in Pittsburgh would be high enough to internally subsidize a substantial number of IZ units affordable to households earning 50% of AMI. In order to help achieve the recommended affordability targets, the City should explore the use of 4% Low Income Housing Tax Credits and should maximize the use of non-monetary development cost offsets, such as density bonuses and relaxed parking requirements.

Opt-Out Provisions

Pittsburgh should consider forgoing the use of alternative compliance measures like in-lieu fees and off-site development of affordable units. While such tools can help increase the production of affordable units, they can also cause an IZ policy to be less effective at achieving social inclusion and would increase the City’s exposure to an exactions challenge.

To insulate the IZ policy from a takings clause challenge, the City should provide a mechanism for developers to request a full or partial waiver from IZ requirements if compliance would render the development project infeasible. In such an event, the burden should be on the developer to demonstrate infeasibility; the process should be transparent, with the developer’s financial assumptions made publicly available; the decision to grant or deny the request should be made by a public body after a public hearing; and the decision should be based on project feasibility (including a reasonable rate of return), not on the developer’s ability to maximize a return on investment.

Timing and Outside Appearance

Various phasing requirements should be evaluated using development models and taking into account both the likelihood that an external subsidy is needed and the timing constraints that

¹ There is at least one effort under way to create a CLT in the City of Pittsburgh.

accessing that subsidy would entail. Affordable units should be similar in outside appearance to market rate units in the same development. Various compatibility standards should be evaluated (e.g., minimum unit sizes for IZ units).

Administration

The Department of City Planning, the URA and HACP should be engaged to determine (1) what administrative responsibilities should be taken on by public agencies and which ones should be the responsibility of property owners (for example, verifying income and marketing units), (2) which responsibilities can be assumed by each agency, (3) what their staffing needs would be, (4) how much that would cost, and (5) what potential sources of funding exist to cover that cost.

The City's IZ policy should give a community land trust (if one is created) the right to purchase affordable for-sale units. Monitoring for-sale units is the most staff intensive aspect of IZ administration. Giving HACP an option to purchase or master lease affordable rental units could also reduce the City's administrative burden.

RECOMMENDED ADDITIONAL RESEARCH

The following additional research is recommended in order to arrive at an effective IZ policy for the City of Pittsburgh:

- Modeling of recommended income targets, affordability set-asides and cost offsets in the context of actual developments in the City, to evaluate feasibility and the need for external subsidy.
- Modeling the use of 4% LIHTCs in the context of actual developments in Pittsburgh.
- Evaluation of the prevalence of upzoning in the City of Pittsburgh (e.g., decisions on variance applications in areas of the City that have strong housing submarkets) and its value to recently completed development projects.
- Evaluation of parking requirements in areas that are well-served by public transit, and the likely value that relaxed parking requirements would have on housing developments in those areas.
- The developer community should be engaged to determine if there are other cost offsets that should be considered.
- Evaluation of market rate developments in the pipeline to ascertain (1) whether upzoning or planned development approvals are likely to be sought, (2) whether density bonuses or relaxed parking requirements are likely to be of significant value, (3) whether it is likely that the developer will request some other City resource or subsidy, and (4) whether the developments are located in areas that would further the social inclusion goals of IZ.
- Review of market rate housing developments in the pipeline and smaller, URA-funded for-sale housing developments in low-mod areas to evaluate whether a 10-unit threshold would serve IZ goals.

NOTES

¹ Hickey, et al., *Achieving Lasting Affordability Through Inclusionary Housing* (Lincoln Institute of Land Policy, 2014, hereinafter referred to as “Lincoln Institute”), p. 18.

² Schwartz, et al., *Is Inclusionary Zoning Inclusionary?* (RAND, 2012, hereinafter referred to as “RAND”), p. 2, citing Mallach and Calavita, *United States: From Radical Innovation to Mainstream Housing Policy* (2010).

³ Id. at p. 8, citing Brown, *Expanding Affordable Housing through Inclusionary Zoning: Lessons from the Washington Metropolitan Area* (Brookings Institution, 2001).

⁴ Id., citing Mukhija, et al., *Can Inclusionary Zoning be an Effective and Efficient Housing Policy? Evidence from Los Angeles and Orange Counties* (Journal of Urban Affairs vol. 32, issue 2, 2010)

⁵ Lincoln Institute at p. 5, citing Calavita and Mallach, *Inclusionary Housing in International Perspective: Affordable Housing, Social Inclusion and Land Value Recapture* (Land Lines, 2010).

⁶ RAND at pp. 19-20.

⁷ Id. at p. 27.

⁸ Id.

⁹ Id. at pp. 17-19.

¹⁰ Schwartz, *Housing Policy is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*, in Kahlenberg (ed.), *The Future of School Integration* (Century Foundation, 2012).

¹¹ RAND at p. 21, citing Mallach and Calavita, *United States: From Radical Innovation to Mainstream Housing Policy* (2010).

¹² Lincoln Institute at p. 19.

¹³ See, e.g., Brunick, *The Inclusionary Housing Debate: The Effectiveness of Mandatory Programs Over Voluntary Programs* (American Planning Association *Zoning Practice*, Issue 9, 2004).

¹⁴ Id., citing the following examples: (1) Chapel Hill, NC, where “developers construe the inclusionary zoning expectation as mandatory because residential development proposals are

difficult, more expensive and less likely to win approval without an affordable housing component,” and (2) Morgan Hill, CA, where limited growth policies restrict the number of development permits issued each year and make applications extremely competitive.

¹⁵ Anderson, *Opening the Door to Inclusionary Housing* (Business and Professional People for the Public Interest, 2003, hereinafter referred to as “BPI”), p. 9.

¹⁶ See, e.g., Chicago’s Affordability Requirements Ordinance (ARO), Chicago Municipal Code Chapter 2-45-110.

¹⁷ BPI at Id.

¹⁸ Id.

¹⁹ Id., citing the example of Santa Fe’s Inclusionary Housing Program, which applies when at least one unit in a proposed development is priced for households earning more than 120% of AMI.

²⁰ Id. at pp.9-10.

²¹ Id., p. 5.

²² See, e.g., Boston’s Chinatown Planned Development Area.

²³ City of Chicago, *Affordability Requirements Ordinance Proposed Enhancements* (December, 2014), p. 5.

²⁴ RAND at p. 22, citing Mallach and Calavita, *United States: From Radical Innovation to Mainstream Housing Policy* (2010).

²⁵ BPI at p. 23.

²⁶ Lincoln Institute, p. 9.

²⁷ Id. at p. 20.

²⁸ Id. at pp. 25-26.

²⁹ Montgomery County MPDU Executive regulations §25A-8(b).

³⁰ RAND at p. 9.

³¹ Chicago ARO §2-45-110(j).

³² BPI at p. 11.

³³ See *Home Builders Association of Northern California v. City of Napa*, 90 Cal.App.4th 188 (2001).

³⁴ RAND at p. 24.

³⁵ With the exception of Chicago, which is revising its fee-in-lieu policy at the time this paper is being written, all of these examples are from BPI at pp. 17-21.

³⁶ BPI cites Cambridge, MA, Fairfax County, VA, and Montgomery County, MD, but there are numerous other examples.

³⁷ ARO Proposed Enhancements at p. 6.

³⁸ BPI at pp. 14-15.

³⁹ *Id.* at pp. 15-16.

⁴⁰ *Id.*

⁴¹ Jacobus, *Delivering on the Promise of Inclusionary Housing: Best Practices in Administration and Monitoring* (PolicyLink, 2007, hereinafter referred to as “PolicyLink”). All material in this section is derived from that report.

⁴² *Id.* at p. 7.

⁴³ Please note that neither the author nor RHLS has any expertise in housing market analysis. The intent of this section is merely to provide an overview of Pittsburgh’s market conditions based on publicly-available data.

⁴⁴ U.S. Census, American Community Survey population estimates, 2010-2013.

⁴⁵ *CoreLogic Case-Shiller Home Price Indices Confirm 11.3-Percent Increase in Q4 2013* (CoreLogic, May 13, 2014).

⁴⁶ *Another Look at U.S. Housing Market Conditions* (CoreLogic, October 20, 2014).

⁴⁷ *Id.*

⁴⁸ HUDuser, FMR History for Allegheny County,
http://www.huduser.org/portal/datasets/fmr/fmr_il_history.html

⁴⁹ <http://pittsburgh.cbslocal.com/2013/11/15/pittsburgh-region-is-one-of-hottest-real-estate-markets-in-country/>

⁵⁰ <http://pittsburghpa.gov/dcp/mva>

⁵¹ http://www.nahb.org/fileUpload_details.aspx?contentID=34325

⁵² Foster, et al., *A Study of Affordable Housing: Supply and Demand in Allegheny County* (Pitt University Center for Social and Urban Research, 2003).

⁵³ A summary of the NLIHC analysis is attached as Appendix D.

⁵⁴ NLIHC did not estimate the ELI affordability gap for the City of Pittsburgh alone. The 2003 UCSUR study did, and found that 70.8% of cost burdened ELI households reside in Pittsburgh. Applying this same percentage to the 2007-2011 CHAS data would suggest that 21,580 affordable units need to be produced in order to meet ELI demand in the City of Pittsburgh.

⁵⁵ 2012 City of Pittsburgh Analysis of Impediments to Fair Housing Choice, pp. 108-109.

⁵⁶ *Id.* at p. 144.

⁵⁷ *Id.*, pp. 6 & 147, “*Impediment 2: Continuing Need for Affordable Rental Housing*”.

⁵⁸ *Id.*, pp. 7 & 148, “*Impediment 3: Continuing Need for Affordable Housing For Sale*”. In the housing context, the term “lower income” generally refers to households earning at or below 80% of AMI; in the CDBG context, it refers to households earning at or below 50% of AMI. It is not clear which meaning the authors intended.

⁵⁹ *Id.* at p. 124.

⁶⁰ http://apps.pittsburghpa.gov/mayorpeduto/HU_Mixed.pdf

⁶¹ The actual amount is based on an “applicable percentage” published monthly. In November, 2014, the applicable percentage for 9% LIHTCs was 7.55%.

⁶² In November, 2014, the applicable percentage for 4% LIHTCs was 3.24%.

⁶³ Doughboy Apartments in Lawrenceville, a mixed-use development with 45 residential units, 20% of which are affordable to households earning 50% AMI and below. While there was URA gap financing in the deal, the developer (Cindy Picone, Ralph A. Falbo, Inc.) states that it was necessitated by unusual site restrictions, not the inclusion of affordable units.

⁶⁴ HUD FY 2013 Voucher Renewal Funding Awards, <http://portal.hud.gov/huddoc/2013hcvrenewfundawardspha.xls>

⁶⁵ HUD FY 2013 Voucher Management System Summary, http://portal.hud.gov/huddoc/vms_summary_data2013.xls

⁶⁶ HACP FY 2013 Moving to Work Annual Report (pending approval by HUD), p. 50.

⁶⁷ Email from David Weber, December 16, 2014.

⁶⁸ Maximum rent is 30% of the maximum household income for each unit, which in turn is based on the LIHTC formula of 1.5 people per bedroom.

⁶⁹ PHFA 2014 Pennsylvania Housing Affordability and Rehabilitation Enhancement Fund Plan.

⁷⁰ RAND at p. 3, Table 1.1.

⁷¹ *Id.* at p. 9.

⁷² All information is from the Montgomery County Regulation on Requirements and Procedures for the MPDU Program (2005) (“MPDU Regulation”), unless otherwise specified.

⁷³ PolicyLink at p. 12, table 1.

⁷⁴ According to Trulia, the median home sales price in Montgomery County in the fourth quarter of 2014 was \$370,000, while the median price in Pittsburgh was \$135,000. http://www.trulia.com/home_prices/Maryland/; http://www.trulia.com/real_estate/Pittsburgh-Pennsylvania/.

⁷⁵ According to Zillow, Pittsburgh’s median rent in Nov. 2014, was \$1095, while Montgomery County’s was \$1850. <http://www.zillow.com/pittsburgh-pa/home-values/>; <http://www.zillow.com/montgomery-county-md/home-values/>

⁷⁶ MPDU Regulation, 25A.00.06.

⁷⁷ *Id.*, 25A.00.07.

⁷⁸ *Id.*

⁷⁹ Schwartz, *Housing Policy is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*.

⁸⁰ U.S. Census, American Community Survey population estimates, 2010-2013.

⁸¹ According to Trulia, the median home price in Pittsburgh in the fourth quarter of 2014 was \$135,000, while Chicago’s was \$230,000, a difference of 62%.

http://www.trulia.com/real_estate/Pittsburgh-Pennsylvania/;
http://www.trulia.com/real_estate/Chicago-Illinois/. According to HSH.com, Pittsburgh's median home price was \$136,700, while Chicago's was \$221,800, a difference of 70%.
<http://www.hsh.com/finance/mortgage/salary-home-buying-25-cities.html>.

⁸² According to Zillow, Pittsburgh's median rent in November, 2014, was \$1095, while Chicago's was \$1530, a 40% difference. <http://www.zillow.com/pittsburgh-pa/home-values/>;
<http://www.zillow.com/chicago-il/home-values/>. HUD's 2015 fair market rent for a 2-bedroom in Pittsburgh is \$786, and for Chicago is \$1093, a difference of 39%.
<http://www.huduser.org/portal/datasets/il/il14/index.html>.

⁸³ According to NAHB, the median new home sales price in the Pittsburgh metro area is \$383,844, while the Chicago Metro Area's is \$308,424, a difference of 24%. Metro Area Median Single Family Home Prices, 2014, <http://eyeonhousing.org/2015/01/top-posts-of-2014-new-home-prices-by-metro-area-and-state/>

⁸⁴ Chicago's median family income is \$76,000, compared to \$69,700 for Pittsburgh.
<http://www.huduser.org/portal/datasets/il/il15/index.html>

⁸⁵ RAND at p. 40.

⁸⁶ ARO Proposed Enhancements at p. 12.

⁸⁷ Wellesley Institute, *Inclusionary Housing Case Studies: Chicago* (2010).

⁸⁸ Wellesley found that 857 units were produced by May, 2007, and RAND (at p. 40) found 815 homeownership units by the end of 2009, but the City of Chicago reports only 189 hard units by December, 2014, with the rest being generated through in-lieu fees (ARO Proposed Enhancements at p. 2).

⁸⁹ Email from Kara Breems, Chicago Department of Planning and Development, May 6, 2014.

⁹⁰ ARO Proposed Enhancements at p. 6.

⁹¹ RAND at p. 13, figure 2.1.

⁹² Id. at p. 14.

⁹³ Id. at p. 17.

⁹⁴ ARO Proposed Enhancements at p. 2.

⁹⁵ ARO Proposed Enhancements at p. 5.

⁹⁶ Email from Kara Breems.

⁹⁷ RAND at p. 40.

⁹⁸ All information is from the ARO, Chicago Municipal Code Chapter 2-45-110, unless otherwise specified.

⁹⁹ Wellesley Institute.

¹⁰⁰ Id.

¹⁰¹ ARO Proposed Enhancements at p. 6.

¹⁰² Philadelphia v. Fox, 64 Pa. 169 (1870); Commonwealth v. Ashenfelder, 198 A.2d 514, 515-16. (1964).

¹⁰³ Linda Marshall, Centre County Housing Coordinator, *Inclusionary Regulations: Pennsylvania Examples* (January 10, 2009).

¹⁰⁴ See Id. See also, Lehigh Valley Planning Commission, *Inclusionary Zoning Guide/Model Regulations* (December, 2008) at p.2.

¹⁰⁵ 53 P.S. § 10107 states that the terms “city” or “cities” as used in the MPC refer to cities of the second class A and third class. Under 53 P.S. § 101 Pittsburgh is a city of the second class.

¹⁰⁶ 53 Pa.C.S.A. § 2961.

¹⁰⁷ Id.

¹⁰⁸ 53 Pa.C.S.A. § 2962.

¹⁰⁹ 53 Pa.C.S.A. § 2962 states, in relevant part: “With respect to the following subjects, the home rule charter shall not give any power or authority to the municipality contrary to, or in limitation or enlargement of, powers granted by statutes which are applicable to a class or classes of municipalities ... (10) Municipal planning under the act of July 31, 1968 (P.L. 805, No. 247), known as the Pennsylvania Municipalities Planning Code.” (Emphasis added.) Since Pittsburgh does not derive its planning and zoning power from the MPC, it is not subject to this limitation. .

¹¹⁰ Home Rule Charter of the City of Pittsburgh, Pennsylvania, § 101.

¹¹¹ *Euclid v. Amber Realty Company*, 272 U.S. 365, 395 (1926).

¹¹² *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

¹¹³ Id. at p. 6 (1974), quoting *Berman v. Parker*, 348 U.S. 26, 31 (1954). The property owner in *Berman* had argued that taking property by eminent domain "merely to develop a better balanced, more attractive community" was not a proper exercise of the District of Columbia's police power.

¹¹⁴ "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

¹¹⁵ See, e.g., *Park Ave. Tower Associates v. City of New York*, 746 F.2d 135, 138 (2^d Cir. 1984), *Home Builders Association v. City of Napa*, 90 Cal App. 4th 188, 195 (Cal. Ct. App. 2001). *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4th 643, 675 (Cal. 2002).

¹¹⁶ *Lingle v. Chevron*, 544 U.S. 528, 528 (2005).

¹¹⁷ *Lingle* affirmed the regulatory taking tests used in three prior cases: *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Loretto* is inapplicable in the IZ context because it concerns a "permanent physical invasion." *Loretto* at 434. *Lucas* is inapplicable because it is solely applied in situations where the government completely deprives the property owner of "all economically beneficial investment." *Lucas* at 1016.

¹¹⁸ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978).

¹¹⁹ *Pace Resources v. Shrewsbury Twp*, 808 F.2d 1023, 1023 (C.A.3. 1987).

¹²⁰ *Nollan v. California Coastal Comm'n*, 483 U. S. 825, 837 (1987).

¹²¹ *Dolan v. City of Tigard*, 512 U. S. 374, 391 (1994).

¹²² *Koontz v. St. Johns Water Management District*, 570 U.S. ___, 133 S.Ct. 2586 (2013).

¹²³ See, e.g., *California Building Industry Association v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) (Impact fee was an exaction but Sacramento met its burden by basing its fee on the results of a "nexus study").

¹²⁴ See, e.g., *Holmdel Builders Ass'n. v. Twp. of Holmdel*, 583 A.2d 277, 288 (N.J. 1990) (A "reasonable relationship," not a strict "but-for" nexus, is the appropriate standard for reviewing impact fees; the Court took judicial notice of the fact that there is a reasonable relationship between unrestrained nonresidential development and the need for affordable residential development); *San Remo Hotel L.L.P. v. City & County of San Francisco*, 27 Cal. 4th 643 (2002) (Impact fee imposed on the conversion of residential units to hotel use must bear a "reasonable relationship," in both intended use and amount, to the deleterious public impacts of the development; the city had demonstrated that relationship through a nexus study).

¹²⁵ See, e.g., *Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170, 1178-89 (10th Cir. 2011) (Exactions analysis held not to apply to a typical IZ law because the requirement would not amount to a “per se” taking).

¹²⁶ See *Id.* A regulation that results in a permanent physical occupation of property (as would have been the case in *Nollan* and *Dolan*) is a “per se” taking. *Loretto* at 435. A demand for money linked to a specific property interest is also a *per se* taking. *Koontz* at 133 S.Ct. 2600.

¹²⁷ *Koontz* at 133 S.Ct. 2594.

¹²⁸ *Sterling Park, L.P. v. City of Palo Alto*, 57 Cal. 4th 1193, 1207 (2013); Mitigation Fee Act, Cal. Gov. Code §§66000-66025.

¹²⁹ *Sterling Park* at *Id.*

¹³⁰ *California Building Industry Association v. City of San Jose*, Cal.S.Ct., #S212072.

¹³¹ *California Building Industry Association v. City of San Jose*, 216 Cal.App.4th 1373 (2013).

¹³² A good case can be made for treating rezoning as a public resource. See Calavita and Mallach, *Inclusionary Housing, Incentives and Land Value Recapture* (Lincoln Institute, 2009).

¹³³ *Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

¹³⁴ See *Alto Eldorado* at *Id.*; *Kamaole Pointe Development L.P. v. County of Maui*, 573 F. Supp. 2d 1354, 1371 (D. Hawaii, 2008).

¹³⁵ Developers have also challenged IZ laws on Equal Protection and Substantive Due Process grounds. These issues are not addressed here because they have an extremely small likelihood of success. To survive the kind of challenge that a housing developer could bring against a typical IZ law under the Equal Protection clause of the 14th Amendment, a city merely needs to demonstrate that the IZ policy bears a reasonable relationship to a legitimate governmental purpose. (*City of New Orleans v. Duke*, 427 U.S. 297, 303-04 (1976)). To defeat a Substantive Due Process challenge, a city needs to make a similar showing, that the policy is not arbitrary and unreasonable. (*Village of Euclid v. Amber Realty*, 272 U.S. 365, 395 (1926)). Legislative findings citing the harms caused by concentrated poverty and lack of opportunity, and a policy that can reasonably be expected to help alleviate those conditions, should be sufficient to overcome these legal challenges.

APPENDIX A: RESOURCES

- Anderson, *Opening the Door to Inclusionary Housing* (Business and Professional People for the Public Interest, 2003)
- Beard, *Planning and Takings in the Aftermath of Koontz v. St. Johns River Water Management District* (Pacific Legal Foundation, 2013)
- Brunick, *The Inclusionary Housing Debate: The Effectiveness of Mandatory Programs Over Voluntary Programs* (American Planning Association *Zoning Practice*, Issue 9, 2004)
- Calavita and Mallach, *Inclusionary Housing, Incentives and Land Value Recapture* (Lincoln Institute, 2009)
- California Affordable Housing Law Project, *Inclusionary Zoning after Palmer & Patterson—Alive & Well in California* (2010)
- City of Chicago, *Affordability Requirements Ordinance Proposed Enhancements* (2014)
- Foster, et al., *A Study of Affordable Housing: Supply and Demand in Allegheny County* (Pitt University Center for Social and Urban Research, 2003)
- Hickey, et al., *Achieving Lasting Affordability through Inclusionary Housing* (Lincoln Institute of Land Policy, 2014)
- Hickey, *Inclusionary Upzoning: Tying Growth to Affordability* (NHC Center for Housing Policy, 2014)
- Hollister, et al., *National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances* (National Association of Home Builders, 2007)
- Jacobus, *Delivering on the Promise of Inclusionary Housing: Best Practices in Administration and Monitoring* (PolicyLink, 2007)
- Lehigh Valley Planning Commission, *Inclusionary Zoning Guide/Model Regulations* (2008)
- Lerman, *Mandatory Inclusionary Zoning--The Answer to Affordable Housing Problem*, 33 *Boston College Environmental Affairs Law Review* 383 (2006)
- Linda Marshall, Centre County Housing Coordinator, *Inclusionary Regulations: Pennsylvania Examples* (2009)
- PolicyLink, *Equitable Development Toolkit - Inclusionary Zoning* (2003)
- Read, *Inclusionary Zoning: A Framework for Assessing Advantages and Disadvantages* (Homes for Working Families, 2008)
- Schwartz, et al., *Is Inclusionary Zoning Inclusionary?* (RAND, 2012)
- Wellesley Institute, *Inclusionary Housing Case Studies: Chicago* (2010)

APPENDIX B: DEVELOPMENT COST OFFSETS

From PolicyLink's *Equitable Development ToolKit – Inclusionary Zoning* (2003) (*with permission*):

Type of Cost-offsets	What It Does and Why It Helps Developers	Example
Density bonus	Allows developers to build at a greater density than residential zones typically permit. This allows developers to build additional market-rate units without having to acquire more land.	Most jurisdictions offer density bonuses. Typically they are equivalent to the required set-aside percentage. For example, Santa Fe , which varies its set-aside from 11 to 16 percent depending on the character of the market-rate units, matches its density bonus accordingly.
Unit size reduction	Allows developers to build smaller or differently configured inclusionary units, relative to market rate units, reducing construction and land costs.	Many programs allow unit size reduction while establishing minimum sizes. Burlington, Vermont , requires that inclusionary units be no smaller than 750 sqft. (1-bedroom), 1,000 sqft. (2-bedroom), 1,100 (3-bedroom) or 1,250 sqft. (4-bedroom).
Relaxed Parking Requirements	Allows parking space efficiency in higher density developments with underground or structured parking: reducing the number or size of spaces, or allowing tandem parking.	Denver, Colorado , waives 10 required parking spaces for each additional affordable unit, up to a total of 20 percent of the original parking requirement.

APPENDIX B: DEVELOPMENT COST OFFSETS

Design Flexibility

Grants flexibility in design guidelines—such as reduced setbacks from the street or property line, or waived minimum lot size requirement—utilizing land more efficiently.

Boston, Massachusetts, grants inclusionary housing projects greater floor-to-area ratio allowances.

Sacramento, California, permits modifications of road width, lot coverage, and minimum lot size in relation to design and infrastructure needs.

Fee waivers or reductions

Reduces costs by waiving the impact and/or permit fees that support infrastructure development and municipal services. A jurisdiction must budget for this, since it will mean a loss of revenue.

Longmont, California, waives up to 14 fees if more affordable units (or units at deeper levels of affordability) are provided. Average fees waived are \$3,250 per single family home, \$2,283 per apartment unit.

Fee deferrals

Allows delayed payment of impact and/or permit fees. One approach allows developers to pay fees upon receipt of certificate of occupancy, rather than upon application for a building permit, reducing carrying costs.

San Diego, California, allows deferral of Development Impact Fees and Facility Benefit Assessments.

Fast track permitting

Streamlines the permitting process for development projects, reducing developers' carrying costs (e.g., interest payments on predevelopment loans and other land and property taxes).

Sacramento, California, expedites the permitting of inclusionary zoning projects to 90 days from the usual time frame of 9-12 months. The City estimates an average savings of \$250,000 per project.

APPENDIX B: DEVELOPMENT COST OFFSETS, CONT'D

From BPI, *Opening the Door to Inclusionary Housing* (2010) (*with permission*):

Boston, Massachusetts

- tax break for developer
- increased height or FAR allowance

Boulder, Colorado

- waiver of development excise taxes

Cambridge, Massachusetts

- 30% density bonus (15% market-rate, 15% affordable)
- increased FAR for affordable units
- decreased minimum lot area requirements
- no variances required to construct affordable units

Davis, California

- 25% density bonus (California state law)
- one-for-one density bonus for on-site for-sale affordable units
- 15% density bonus for affordable rental units
- relaxed development standards

Denver, Colorado

- 10% density bonus
- cash subsidy
- reduced parking requirement
- expedited permit process

Fairfax County, Virginia

- 20% density bonus for single-family units
- 10% density bonus for multi-family units

Irvine California

- 25% density bonus (California state law)
 - reduced parking requirement
 - reduced fees
 - reduced park land set-aside requirement
 - expedited permit processing
-

APPENDIX B: DEVELOPMENT COST OFFSETS, CONT'D

Longmont, Colorado	<ul style="list-style-type: none">▸ negotiated density bonus▸ expedited development review process▸ relaxed development standards▸ fee waivers▸ marketing assistance
Montgomery County, Maryland	<ul style="list-style-type: none">▸ up to 22% density bonus▸ fee waivers▸ up to 40% attached unit development in detached unit development area▸ decreased minimum lot area requirements▸ 10% compatibility allowance
Newton, Massachusetts	<ul style="list-style-type: none">▸ up to 20% density bonus
Sacramento, California	<ul style="list-style-type: none">▸ 25% density bonus (California state law)▸ expedited permit process for affordable units▸ fee waivers▸ relaxed design guidelines▸ priority for subsidies
Santa Fe, New Mexico	<ul style="list-style-type: none">▸ 11 – 16% density bonus▸ fee waivers▸ relaxed development standards

APPENDIX C: LIST OF CURRENT AND PLANNED MARKET RATE HOUSING DEVELOPMENTS (FEBRUARY, 2015)

ALMONO	1398 units ²	(SP District approved)
Lower Hill	1188 units ³	(SP District approved)
Downtown	2400 units ⁴	
Strip District	600-1200 units ⁵	
Oakland Skyvue	389 units ⁶	
East Liberty Transit Center	360 units ⁷	(under construction)
Bakery Square 2.0	350 units ⁸	(under construction)

² ALMONO Overview, RIDC (2013)

http://cbstpittsburgh.files.wordpress.com/2013/03/almono_overview_2-11-13.pdf

³ Lower Hill PLDP, UDA (2014)

http://apps.pittsburghpa.gov/dcp/Lower_Hill.PLDP.as_submitted.9_19_2014.pdf

⁴ <http://www.post-gazette.com/business/businessnews/2013/06/02/Bill-Peduto-looks-for-county-s-help-in-creating-a-mini-Manhattan-in-Downtown-Pittsburgh/stories/201306020171>

⁵ <http://www.pghcitypaper.com/pittsburgh/strip-living-will-more-residents-change-the-strip-districts-historic-landscape/Content?oid=1773968&storyPage=2>

⁶ <http://www.bizjournals.com/pittsburgh/blog/the-next-move/2014/09/georgia-developer-to-present-389-apartment-skyvue.html?ana=tw>

⁷ <http://www.cpexecutive.com/cities/pittsburgh/mosites-selects-morgan-management-to-operate-upcoming-apartments-on-pittsburghs-eastside-larimer-lands-30m-hud-grant-for-housing-redevelopment/1004099813.html>

⁸ <http://www.nextpittsburgh.com/neighborhoods/east-liberty/local-leaders-break-ground-bakery-square-2-0/>

APPENDIX C: LIST OF CURRENT AND PLANNED MARKET RATE HOUSING DEVELOPMENTS (FEBRUARY, 2015)

One Grandview	300 units ⁹	
Station Square	300 units ¹⁰	(PLDP amendment approved)
North Shore	200-300 units ¹¹	
Morrow Park	213 units ¹²	
Schenley School Bldg.	178 units ¹³	
Southside Works	170 units ¹⁴	
Prospect School	67 units ¹⁵	
Total:	8,113-8,813	

Also McCleary School, Rogers School and Hunt Armory.

⁹ <http://www.sopghreporter.com/story/2013/09/17/front-page/developer-changes-plans-for-mounts-one-grandview/13847.html>

¹⁰ <http://www.post-gazette.com/business/development/2015/01/28/Commission-clears-way-for-Station-Square-housing-deal/stories/201501280068>

¹¹ <http://www.post-gazette.com/local/city/2015/01/28/Developer-wants-to-build-apartments-between-PNC-Park-Heinz-Field/stories/201501280200>

¹² <http://www.post-gazette.com/business/2014/05/14/Michigan-housing-developer-expands-Pittsburgh-plans/stories/201405140036>

¹³ http://www.post-gazette.com/hp_mobile/2013/02/28/Schenley-High-School-building-in-Oakland-sold-to-developer/stories/201302280623

¹⁴ <http://www.multiphasingnews.com/cities/pittsburgh/developers-plan-more-apartments-in-pittsburghs-southside-works/1004077272.html>

¹⁵ <http://www.amrodriguezassociates.com/mt-washington.php>

APPENDIX D: SUMMARY OF NLIHC AFFORDABILITY GAP ANALYSIS

All Income Level Renter Households	175,820
------------------------------------	---------

Extremely Low Income (less than or equal to 30% of AMI) Households								
Total ELI Renter Households	Affordable Units	Surplus or Deficit of Affordable Units	Affordable Units per 100 Renter Households	Affordable and Available Units	Surplus or Deficit of Affordable and Available Units	Affordable and Available Units per 100 Renter Households	Households with Cost Burden ¹	Households with Severe Cost Burden ²
49,425	31,260	(18,165)	63	18,945	(30,480)	38	73%	60%

Very Low Income (greater than 30% and less than or equal to 50% of AMI) Households								
Total VLI Renter Households	Affordable Units	Surplus or Deficit of Affordable Units	Affordable Units per 100 Renter Households	Affordable and Available Units	Surplus or Deficit of Affordable and Available Units	Affordable and Available Units per 100 Renter Households	Households with Cost Burden	Households with Severe Cost Burden
32,025	56,955	24,930	178	37,330	5,305	117	71%	26%

Low Income (greater than 50% and less than or equal to 80% of AMI) Households								
Total LI Renter Households	Affordable Units	Surplus or Deficit of Affordable Units	Affordable Units per 100 Renter Households	Affordable and Available Units	Surplus or Deficit of Affordable and Available Units	Affordable and Available Units per 100 Renter Households	Households with Cost Burden	Households with Severe Cost Burden
34,375	75,930	41,555	221	59,425	25,050	173	36%	5%

Source: National Low Income Housing Coalition analysis of Allegheny County Comprehensive Housing Affordability Strategy (CHAS) data, 2006-2010

¹Cost Burden means the household spends over 30% of its income on housing costs (including utilities)

²Severe Cost Burden means the household spends over half of its income on housing costs



Housing Alliance
of Pennsylvania

The Housing Alliance of Pennsylvania is a non-partisan, not-for-profit, statewide public interest advocate working to help increase the supply of safe, affordable and accessible homes available to all Keystone State residents – especially those with low incomes, including veterans, children, elderly and disabled individuals. By serving as a central information hub for housing advocates, providers and the media and seeking ways to collaborate with local, state and federal policy makers, the Housing Alliance helps Pennsylvania's most vulnerable residents find stable, secure homes and use it as the foundation of prosperity. For more information, visit www.HousingAlliancePA.org



Regional Housing Legal Services is a nonprofit law firm with unique expertise in affordable, sustainable housing and its related components — community and economic development, utility matters and preservation of home ownership. Our mission is to create housing and economic opportunities in under-served communities and to effect systemic change for the benefit of lower-income households throughout Pennsylvania. RHLS provides free organizational and transactional legal services to community-based non-profits that are engaged in housing development or community and economic development activities that benefit low-income people or improve the neighborhoods in which they live. RHLS also provides innovative project and policy solutions to maximize the efficacy of Pennsylvania's affordable housing and community development programs.



Produced by

REGIONAL HOUSING LEGAL SERVICES

Robert Damewood, Esq.

710 Fifth Avenue, Suite 1000, Pittsburgh, PA 15219

www.rhls.org

Prepared for



Housing Alliance
of Pennsylvania