The INSTITUTE for

Public Policy & Economic Development

A partnership between College Misericordia, Keystone College,, King's College, Luzerne County Community College, Marywood University, Penn State Wilkes-Barre, The Commonwealth Medical College, University of Scranton, & Wilkes University

Introduction

Inclusionary zoning (IZ) is a policy tool that is used to encourage the construction of moderate and/or low income housing. The Center for Housing Policy and the Furman Center for Real Estate & Urban Development at New York University estimate that "over 300 jurisdictions – cities, towns and counties – have an inclusionary zoning ordinance on the books."[1] States and municipalities often use IZ to combat exclusionary zoning. Exclusionary Zoning (EZ) refers to local laws and ordinances, which encourage or require the construction of single family homes. While municipalities or developments may be attempting to keep a certain esthetic, EZ can put housing out of reach for the average worker. IZ practices aim to bring a variety of housing options to the areas where they are implemented. While there have been some successes, IZ does not always work according to plan. And in some cases, IZ has had disastrous consequences on development as a whole. Here we look at three of the major factors contributing to the success or failure of most IZ ordinances.

Builder's Remedy

The controversial aspect of IZ is often the way it is enforced and what type of housing is required. While most IZ ordinances ask that city and county planners allow for a variety of housing in their original plans, it is difficult for the state to enforce directly. The state may not know of an issue with EZ until a builder brings it their attention by way of the courts. This is where the "builder's remedy" comes into play. In some areas, developers are mandated to follow IZ ordinances. In other areas, developers are given incentives to build affordable housing.

Pennsylvania and New Jersey illustrate this difference well. A 1969 Pennsylvania Supreme Court ruling made it possible for a developer to challenge an EZ ordinance if he believed there was a market for housing beyond what the zoning allowed. If the state found in the developers favor, then he would be allowed to proceed. This type of IZ was based on market economics. The state did not provide any subsidies or take any money from the municipality. The developer

[1] http://www.nhc.org/media/documents/IZ_in_SF,_DC,_Boston.pdf

was responsible for all the costs of the structure because he felt it would be profitable. Developers have to take into consideration the costs of building higher density units, such as adding parking lots. While the Developer was not required to include any low income or section 8 housing, he had to make sure the higher density homes would sell at the price he required. The court's decision in a case like this could not be overturned for any reason, which gave builders another incentive to go after EZ ordinances.

New Jersey took a different approach to IZ. A document called the Mount Laurel Doctrine, which was produced in 1983 after the Court's frustration with continued use of EZ ordinances throughout the state, stated that any developer in New Jersey, who challenged an EZ ordinance and won, "was entitled to proceed with a project provided that at least 20 percent of the units were affordable by low- and moderate income families."[2] New Jersey ruled ordinances to be exclusionary if the municipalities were not meeting their "fair share obligation.[3]" Each municipality's "fair share" was based on an examination of low and moderate income housing data from the region.

A study titled *Will Empowering Developers to Challenge Exclusionary Zoning Increase Suburban Housing Choice?* was published in 2004. The study looked at the outcome of judicial intervention in both Pennsylvania and New Jersey from 1970 to 1990. They found that Pennsylvania ended up with more "less-expensive housing units – townhouses, apartments and mobile homes."[4] Beyond the structure of the builder's remedy, a few significant differences between the states may account for this. The first is that New Jersey's builder's remedy was not fully enforced until 1983 and suspended from 1985 to 1990, while the legislature examined it. This gave New Jersey less time to enforce its Mount Laurel Doctrine. The second difference, which might be the root cause of New Jersey's lack of housing diversity, is that municipalities did everything they could to evade the IZ requirements.

In Pennsylvania, there is evidence that zoning officials bowed to the IZ ordinances because they had no choice. Once the court ruled in favor of a builder, he essentially had control over the zoning of the land being developed. It appears that many Pennsylvania municipalities worked within the IZ guidelines in order to have more control.[5] In New Jersey, court rulings could be overturned based on municipal planning changes, etc. This made the process longer and more difficult for builders. The third important difference between New Jersey and Pennsylvania

[2] http://www.jstor.org/stable/3326194 Will Empowering Developers to Challenge Exclusionary Zoning Increase Suburban Housing Choice? Page 123
[3] http://www.jstor.org/stable/3326194 Will Empowering Developers to Challenge Exclusionary Zoning Increase Suburban Housing Choice? Page 123
[4] http://www.jstor.org/stable/3326194 Will Empowering Developers to Challenge Exclusionary Zoning Increase Suburban Housing Choice? Page 131
[5] http://www.jstor.org/stable/3326194 Will Empowering Developers to Challenge Exclusionary Zoning Increase Suburban Housing Choice? Page 131 -132

came from New Jersey's low income requirement. In the end residents who fell below the income needed for a single family home and above the low income requirements were left without housing. This was not the case in Pennsylvania because there were no income requirements.

Density Bonuses

In areas like San Francisco, IZ has been moderately successful. In *The Effects of Inclusionary Zoning on Local Housing Markets: Lessons from the San Francisco, Washington, DC and Suburban Boston Areas*, The Center for Housing Policy and The Furman Center for Real Estate & Urban Policy attributes the success of certain programs in San Francisco in part to "density bonuses."[6] Density bonuses are incentives provided to developers who agree to build low and moderate income multi-family housing. The most common incentive is to allow a developer to build more units on a site than the zoning allows. This reduces land and administrative cost per unit for the developer. Generally, density bonuses are offered to developers who include affordable units, green space or infrastructure improvements. The report also says that the longer an IZ program is on the books, the more affordable housing units are built. This shows that IZ ordinances do not work overnight. One of the most popular examples of successful IZ has both of these elements. Montgomery County, MD, which is a suburb of Washington, DC, enacted mandatory IZ in the early 1970's, which included density bonuses. The law requires "12.5 and 15 percent of the total number of units in every subdivision or high-rise building of 20 or more units be moderately priced."[7] Bonuses are then calculated based on the amount of density that the developer achieves. Montgomery County estimates that it produces 250 affordable units per year.[8] The County also retains the ability to control resale on certain properties, giving it up to 30 years.

Economic Conditions

One of the biggest factors in the success or failure of IZ is the economic climate. Madison, WI repealed its IZ ordinance after 5 years on the books.[9] The ordinance was adopted in 2004. Between 2004 and 2009 173 affordable homes were produced. As of May 2011, only 33 of those homes have sold. [10] The glut of homes currently on the market has brought the price of average homes down. This allows those who are qualified to purchase a home that may have been $20,000-$40,000 above their price range before the economic downturn. The banks have

---

[6] http://www.nhc.org/media/documents/IZ_in_SF,_DC,_Boston.pdf
[7] http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing_P/mpdu/summary.asp
[8] http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing_P/mpdu/summary.asp
[9] www.nahb.org/housingaffordability Update on Inclusionary Zoning, May 2011
[10] www.nahb.org/housingaffordability Update on Inclusionary Zoning, May 2011

gone through a period of tightening up requirements for mortgages as well. This leaves many with low or moderate income without the ability to purchase even the most affordable home. On the other hand, developers do not want to work in areas with IZ on the books knowing that their low income properties will likely not sell. This can mean little to know development takes place.

Policy Guidelines

The Institute for Public Policy and Economic Development supports the use of fair zoning practices on the local level. While the state of Pennsylvania does not have a law on the books which mandates the use of inclusionary zoning, the State Supreme Court has set a precedent allowing the builder's remedy. If counties and municipalities do not adopt fair zoning practices, developers have the right to challenge and potentially change the zoning of particular areas. In order to spur development, The Institute supports the use of "workforce housing bonuses," to encourage developers to build high density, low cost housing in areas close to transportation, schools, and work to support more transit oriented development, infill and reduction in sprawl. The Institute feels that the term "workforce housing bonus" illustrates the goal of the incentive more clearly than "density bonus."

Policy Statement

While the Marcellus Shale Counties are experiencing the most growth in the region, shortages of affordable housing are affecting Lackawanna and Luzerne Counties as well. Some evidence suggests that residents of shale counties who have been priced out of the housing market are moving into Lackawanna and Luzerne Counties. The imbalances in salaries between gas workers and average residents have caused many, who may have lived comfortably two or three years ago, to be priced out of rental properties , coupled with migration from the west influencing cost of living, the housing crisis, and the recession – the cost of housing compared to incomes is problematic for many. Those who own land in the shale counties are hesitant to sell or want to sell the surface property, while retaining the mineral rights. This has led to stagnation in land sales. Data also shows there was a shortage of low income housing in the shale counties before Marcellus development. As development continues, the problem is likely to worsen and push more residents to surrounding counties.

There are some elements that can be taken from successful IZ ordinances. Counties and municipalities, which may be unaware of potential exclusionary zoning ordinances on their books, should be made aware of how to make changes that would benefit low and middle income residents. In the cases where counties and municipalities do not work to improve the diversity of housing options through zoning, developers should be made aware of the builder's remedy. Information and support should be provided to guide them through the process. This will not be the key to spurring high density workforce housing but it will ensure that it can continue.

Because much of the population growth has come from temporary or out of state workers, developers have hesitated to commit time and money in the shale counties. The high density bonus should be used with the title "workforce housing bonus," since the goal would be to build housing that is affordable for the average working adult/family. This would give developers an incentive to build middle income housing for those who have been priced out of the market, while sparking some development. Counties can use the money set aside in county trust funds to fund the bonuses. Additionally, the Act 13, the Marcellus Impact fee legislation has provisions to assist communities with increased housing costs and currently there is proposed legislation in the state to fund land banks which could serve as another vehicle to assist with the development of affordable housing.