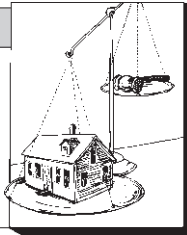


Is Inclusionary Zoning Lawful?

by Linda W. Alderman, Esq.



New England has a housing crisis as a result of the economic prosperity this region has enjoyed over the past decade. While many New England residents have seen the value of their real estate increase, a great number can no longer afford to pay the rising cost of housing and find, as home prices and interest rates rise, that purchasing a home is an impossibility. The lack of affordable housing is not only preventing many from remaining in their home towns, but it is also causing industry to leave New England, since its labor pool can no longer afford to live here.

Municipal reactions to the need have varied from community to community. Most of us are familiar with the negative response of the City of Yonkers, N.Y. to the court-ordered plan making 800 affordable housing units available to people in Yonkers who earn between \$15,00 and \$35,000 per year. I am pleased to report that Connecticut residents are more supportive of the need for affordable housing. According to a poll commissioned by the State

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Department of Housing and the Connecticut Housing Finance Authority, 62 percent of those polled said they would not object to low income housing in their neighborhood. ("Poll Finds Most Believe State Has Shortages of Affordable Housing," The Hartford Courant, October 21, 1988.)

Inclusionary zoning is a term that may not be familiar to most Americans, but developers and builders in New England are colliding head on with inclusionary zoning programs. Municipalities are dealing with this

crisis with either the use of a "carrot"—a regulation that encourages affordable housing; or through the use of a "stick"—a regulation that mandates the building of affordable housing. By implementing one or both of these methods a municipality can help alleviate the affordable housing shortage.

The "carrot," more widely known as a density bonus, entitles a developer to build more dwelling units than zoning provisions allow in exchange for his building affordable units on the parcel. Developers, however, are reluctant to put more units than the zoning permits, for fear that overcrowding will discourage sales. The "stick" is a regulation requiring developers to designate as affordable a percentage of the units in any new complex. Both of these methods allow developers to keep the prices of the affordable units down by charging the buyers of high-priced units for the cost of land improvements and amenities. Usually purchasers of the affordable units have less square footage than the more expensive units but they are given unlimited use of all recreational facilities.

Both of the above state zoning methods have legal implications that have been raised by opponents of inclusionary zoning. These opponents have stated that inclusionary zoning denies developers their right to substantive due process of law and to equal protection and constitutes a "taking" under the 5th amendment. (See "Land Decisions. What Do They Mean?" April 1988, page 7, for more details on taking.)

Due Process

The source of local regulatory authority, including the authority to regulate zoning, emanates from the state's "police power." This police power allows a state to promote public health, safety, and general welfare of a community. Opponents argue that it violates the developers' rights to substantive due process because the effects of inclusionary zoning are socioeconomic rather than being rationally related to the health, safe-

ty, or general welfare of the municipality's residents. Supporters of inclusionary zoning have argued that it is not violative because most existing zoning regulations have implicit socioeconomic effects. Examples of such regulations include ordinances that regulate density as well as ordinances that exclude multi-family dwellings.

Equal Protection

Opponents of inclusionary zoning have also queried why a municipality should be able to require the housing industry to meet the economic needs of the community while not requiring other industries to sell at below-market rates. This concern touches upon a developer's right to equal protection of the law under the Constitution. Proponents of inclusionary zoning have responded that developers and those involved in the housing industry are not what the Supreme Court has labeled to be a "suspect class," deserving stringent protection under the Constitution. Because the developers are not a "suspect class" a municipality need only provide a "rational relationship," e.g. economic necessity, for the regulation.

Taking

Federal and state constitutions prohibit the taking of property without just compensation. Developers who have been affected by regulations mandating affordable units, claim that the regulation denies them the full profit they would receive if they sold all the units at market price. But proponents of inclusionary zoning argue that the effect on the developer's return is minimal. Further, in order for a court to find a taking, the developers must prove that they can make no reasonable use of the land if they comply with the inclusionary zoning requirements.

In summary, the need for affordable housing in New England has led municipalities to enact inclusionary zoning regulations that have taken the form of density bonuses and mandatory designations. The constitutionality of inclusionary zoning has been and continues to be debated both in and out of the courtroom. Many believe, based on established principles of constitutional law, that it will overcome these constitutional attacks. ■

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