



# Inclusionary Housing: A Challenge Worth Taking

BY JAIMIE ROSS, ESQ., AND UMA OUTKA, ESQ.

**I**nclusionary housing ordinances (often called inclusionary “zoning” ordinances) are land use regulations that require affordable housing units to be provided in conjunction with the development of market rate units. The intent of these ordinances is two-fold: (1) to increase production of affordable housing in general; and (2) to increase production in specific geographic areas that might otherwise not include affordable housing.

In the City of Tallahassee inclusionary housing was recently challenged by the Florida Home Builders Association as an unlawful taking, a violation of substantive due process, and an unlawful tax.<sup>1</sup> On November 20, 2007, the Circuit Court of the Second Judicial Circuit granted summary judgment in favor of Tallahassee on all three counts. The trial court found the inclusionary housing ordinance to be a land use regulation under the City’s police power and not a taking of any type. The court recognized that the inclusionary housing ordinance provides a number of benefits to developers. In exchange for requiring 10 percent of the units to be affordable, the Tallahassee ordinance provides a 25 percent density bonus as well as housing design flexibility, including relief from set back and minimum lot size requirements.

Having lost its challenge, the Home Builders recently appealed the decision to the First District Court of Appeal.<sup>2</sup>



In an amicus curiae brief filed in support of the City of Tallahassee, 1000 Friends of Florida<sup>3</sup> set forth the land use planning context for inclusionary housing ordinances.

## INCLUSIONARY HOUSING IMPLEMENTS PLANNING LAWS

The 1985 Growth Management Act requires every Florida jurisdiction to ensure the provision of housing for its entire current and anticipated population.<sup>4</sup> State law mandates that local governments manage growth through comprehensive land use plans that include “efficient provision of transportation, water, sewage, schools, parks, recreation facilities, housing, and other requirements and services...”<sup>5</sup>

Every comprehensive plan in the state must include a housing element consisting of “standards, plans, and principles to be followed in,” among other things, “the provision of adequate sites for future housing, including affordable workforce housing . . . for low-income, very low-income, and moderate-income families. . . .”<sup>6</sup> In addition, the housing element must address the “creation and preservation of affordable housing to minimize the need for additional services and avoid the concentration of affordable housing units only in specific areas of the jurisdiction.”<sup>7</sup> The policies, goals and objectives in the housing element are to be implemented via land



development regulations, such as zoning or other housing-related ordinances.<sup>8</sup>

Local governments are not expected to build affordable housing, but they are required to create an environment in which the private sector will do so. To that end, local governments frequently provide contributions to developers seeking state and federal funds, reduce, waive or pay impact fees, expedite permitting, and, increasingly, adopt regulatory approaches such as inclusionary zoning. Beyond financing, land use regulations and regulatory incentives are local governments' primary tools for facilitating private sector development of affordable housing. An inclusionary housing ordinance is an example of precisely the sort of land development regulation that localities can and should use to implement housing element requirements.

## LESSONS FROM CALIFORNIA

Over 170 local inclusionary housing ordinances have been adopted in California. A recent report commissioned by the Non-Profit Housing Association of Northern California found that over 80,000 Californians are now living in mixed-income neighborhoods thanks to inclusionary housing.<sup>9</sup>

Like Florida, local jurisdictions in California must have a housing element in their comprehensive plans. In fact, enforcement of the housing element requirement in California has led directly to the adoption of inclusionary housing ordinances. In 2001, the Public Interest Law Project of California brought litigation against the City of Folsom for failing to have adequate sites for affordable housing. To resolve the lawsuit, the City of Folsom entered into a settlement agreement to adopt an inclusionary housing ordinance.<sup>10</sup> Since then, the Public Interest Law Project has resolved litigation via settlement agreements requiring the adoption of inclusionary housing ordinances with the cities of Buellton, Benicia, Healdsburg, Alameda, Winters, Los Altos, and the Town of Corte Madera.<sup>11</sup>

Several lawsuits alleging an inclusionary housing ordinance to be an unconstitutional taking and violation of substantive due process have been filed by California's home builders trade association (Building Industry Association), but none have been successful.<sup>12</sup> The totality of these cases makes clear that inclusionary housing ordinances are not unlawful takings and do not violate substantive due process, provided they are well crafted.

Two key provisions for a well-crafted ordinance are (1) developer incentives to offset costs associated with requiring the development of affordable housing and (2) a process for obtaining relief from application of the ordinance based on a showing that unreasonable hardship will result, despite the incentives. To date, there are no reported cases finding that a particular development was entitled to relief from an inclusionary ordinance, but the opportunity for the local government to grant a waiver, reduction, or some relief from the operation of the ordinance is considered key to surviving an unlawful takings claim.

## OFF-SETTING DEVELOPER COSTS

The monetary value of land is in large part determined by local land use laws. When land is zoned agricultural, for example, it has far less monetary value than if it were rezoned to respond to the market demand for residential or commercial use. Whether to rezone, and how to rezone, is the province of local government. So, for example, when local government rezones a mobile home park for more intensive residential or commercial uses, it creates wealth for the owner of the property by virtue of the land use change. The same goes for any "greenfield" development in need of a land use or zoning change to be developed for profitable uses.

When the inclusionary housing requirement is tied to the land use change, the costs to the developer for delivering the affordable unit must be evaluated by first recognizing the value added from the change in land use and then deducting additional costs, if any, from including affordable units within the mix of housing which can now be developed. This analysis should make clear that when tied to a rezoning for more profitable use of the property, the inclusionary requirement creates no economic deprivation for the developer.

If, however, the inclusionary housing requirement is to apply to land that is already zoned for residential use, the local government will need to provide developer incentives to offset additional costs for providing the affordable housing. Typically, an increase in density is that economic incentive. An increase in density is of particular value when the developer is permitted to develop additional market rate units as well as the affordable units on the same land that would otherwise have not permitted the additional units, but for the density bonus. The density bonus in effect creates free land for the owner/developer.



# INCLUSIONARY HOUSING FACT SHEET



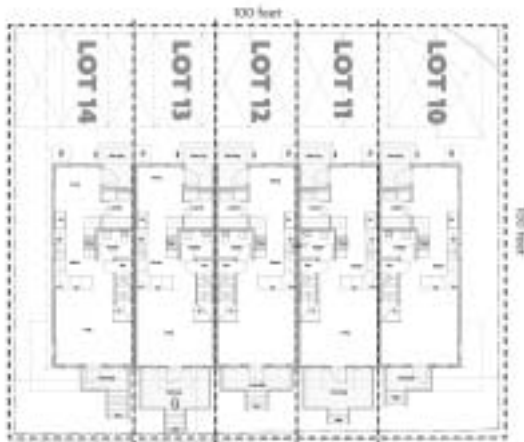
THIS EXHIBIT WAS DEVELOPED BY K2 URBANCORP  
IN SUPPORT OF 1000 FRIENDS OF FLORIDA'S AMICUS BRIEF

## INCLUSIONARY HOUSING

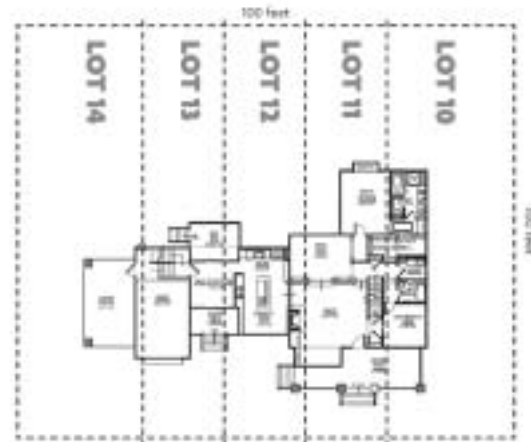
## ESTATE HOME



K2 - INCLUSIONARY HOUSING  
TALLAHASSEE, FLORIDA



5 inclusionary lots on 1/4 acre



1 estate lot on 1/4 acre

### INCLUSIONARY HOUSING

#### Lot

Land Size (1/4 acre)	5 units @ \$30,000	\$150,000.00
Net Profit	20%	\$30,000.00

#### Inclusionary House Product

Total Sq Ft	5 units @ 1100 Sq Ft Ea	5500 Sq Ft
Cost per Sq Ft	\$117.00	\$643,500.00
Net Profit	10%	\$64,350.00

Selling Price	(5 x \$159,900.00)	\$799,500.00
Land Profit	20%	\$30,000.00
House Profit	10%	\$64,350.00
<b>Total Profit*</b>		<b>\$94,350.00</b>

### ESTATE HOME

#### Lot

Land Size (1/4 acre)		\$150,000.00
Net Profit	20%	\$30,000.00

#### Estate Home

Total Sq Ft		3500 Sq Ft
Cost per Sq Ft	\$184.00	\$643,500.00
Net Profit	10%	\$64,350.00

Selling Price		\$819,000.00
Land Profit	20%	\$30,000.00
House Profit	10%	\$64,350.00
<b>Total Profit*</b>		<b>\$94,350.00</b>

\*Both scenarios yield a \$30,000 profit on the land and \$64,350 profit on the vertical construction.

Expedited permitting, flexibility in design, and relief from standard set-backs, may also off-set developer costs.

K2 Urbancorp, a market rate developer in Tallahassee, provided an example from its “Evening Rose” development to support the amicus brief filed by 1000 Friends of Florida in the Home Builders’ case against the City. Although K2 Urbancorp received its development approvals prior to the ordinance taking effect, the company voluntarily agreed to comply with the inclusionary housing ordinance. In fact, K2 Urbancorp went further to include more than the 10 percent affordable units called for by the ordinance. If the City ordinance is so detrimental to developers, why would K2 Urbancorp voluntarily participate, and at a level that exceeds what the ordinance requires?


There are two reasons: First, the ordinance provides significant benefits for developers. K2 Urbancorp realized economic benefits in the form of expedited processing, density bonuses, and other entitlements that helped it achieve its development goals. Second, with a little creativity, K2 Urbancorp was able to design the inclusionary units so that, despite the price restrictions on those units, the company will suffer no economic loss. K2 Urbancorp can build an estate home on one lot and five (5) inclusionary units on a lot of equal size for the same overall cost and maintain the same overall profit margin. K2 Urbancorp has not had to raise prices on its market-rate units in order to incorporate the inclusionary units and is able to offer an attractive and varied assortment of sizes and price points. K2 Urbancorp considers this variety, intermingling large estate designs and smaller inclusionary units, as a selling point – Evening Rose will be a more genuine “neighborhood” than the cookie-cutter housing developments that have become commonplace in Florida. K2 Urbancorp’s compliance with the inclusionary housing ordinance has been a net positive economic benefit and reinforces the trial court’s conclusion in the Tallahassee case that “the density bonuses and other incentives received by developers may increase rather than decrease the value of the developer’s property.”<sup>13</sup>

## CONCLUSION

Adequate housing for all Floridians, from those who have extremely low incomes to low paid professionals is essential for the health, safety, and welfare of Florida’s residents and its economy. Land use laws can and should

be used to encourage the development of affordable housing so that businesses are able to recruit and retain employees by boasting vibrant communities with a range of housing choices.

Adoption of inclusionary housing ordinances logically flows from the implementation of the housing element of Florida’s comprehensive plans and the authority and responsibility that lies with our local governments for regulating land use. Inclusionary housing ordinances will withstand legal challenge provided they are well crafted. A well crafted ordinance includes developer incentives to offset potential financial burden, and the opportunity to obtain a waiver from the application of the ordinance.

It is time for blanket opposition to inclusionary housing to end and for the public and private sectors to come together on this important issue. Characterization of these policies as “takings” obscures the fact that inclusionary housing ordinances can balance competing interests and in fact allow for compliance by a developer without economic deprivation of any kind. Local governments should have no fear of a takings challenge. On the contrary, adoption of an inclusionary housing ordinance may be a challenge, but it is one worth taking. 

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<sup>1</sup> Fla. Home Builders Ass’n v. City of Tallahassee, No. 37 2006 CA 000579 (Fla. 2d Cir. Ct. Nov. 20, 2007).

<sup>2</sup> Fla. Home Builders Ass’n v. City of Tallahassee, No. 37 2006 CA 000579 (Fla. 2d Cir. Ct. Nov. 20, 2007), appeal docketed, No. 1D07-6413 (Fla. 1st DCA Dec. 12, 2007).

<sup>3</sup> 1000 Friends of Florida is a Tallahassee-based not-for-profit corporation created in 1986 whose purposes include monitoring and ensuring proper implementation of the State’s growth management laws; advocating for sustainable development, affordable housing, and protection of natural resources; and providing education and support for public participation in growth management.

<sup>4</sup> § 163.3177(3)(f), Fla. Stat. (2007).

<sup>5</sup> § 163.3161(3), Fla. Stat. (2007) (emphasis added); see generally Ch. 163, Part II, Fla. Stat. (2007).

<sup>6</sup> § 163.3177(3)(f), Fla. Stat. (2007).

<sup>7</sup> § 163.3177(3)(g), Fla. Stat. (2007).

<sup>8</sup> § 163.3202, Fla. Stat. (2007).

<sup>9</sup> Non-Profit Housing Association of Northern California, “Affordable By Choice: Trends in California Inclusionary Housing Programs” (2007).

<sup>10</sup> Hallfeldt v. City of Folsom, Cal. App. Dep’t Super. Ct., Sacramento, Case No. 01CS01149 (2001).

<sup>11</sup> Interview with Michael Rawson, Co-Director of the California Affordable Housing Law Project (which conducts housing litigation for the Public Interest Law Project of California).

<sup>12</sup> See Homebuilders Ass’n of N. Cal. v. City of Napa, 90 Cal. App. 4th 188 (2001); N. State Building Industry Ass’n v. County of Sacramento (Sacramento County Super. Ct., No. C052814); Building Industry Ass’n v. City of San Diego (San Diego Super. Ct., No. GIC 817064).

<sup>13</sup> Fla. Home Builders Ass’n v. City of Tallahassee, No. 37 2006 CA 000579 at 7 (Fla. 2d Cir. Ct. Nov. 20, 2007).