Navigating Affordable Housing Law



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- All participants are on mute
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- Webinar is recorded
- PPT is provided as a handout
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Agenda

- I. Defining affordable housing
- II. Zoning & land use laws
- III. Local government tools for long-term affordability
- IV. Funding sources
- V. Affirmatively furthering fair housing
- VI. Florida's fair housing law making affordable housing a protected class



Before we get into it ...

- These slides are intended to give you some ideas for how to engage with local affordable housing policy
- These slides do not constitute legal advice your best friend should be your City or County Attorney
- For any questions, contact Kody Glazer at glazer@flhousing.org





I. Defining affordable housing

Defining affordable housing

- "Affordable" or "workforce" or "attainable" or "attainable workforce" housing are political terms when setting policy
- The definition of what is "affordable housing" or "workforce housing" largely depends on the funding source or policy initiative
- Generally, "affordable" means that monthly housing payments do not exceed 30 percent of the gross income (pre-tax income) for extremely-low (0-30% AMI) to moderate-income households (120% AMI)
- Area median income (AMI): established annually by HUD; tiered based on household size



Check the funding source or policy initiative

- State Housing Initiatives Partnership (SHIP) up to 140% AMI
- Community Development Block Grant (CDBG) primarily serves up to 80% AMI
- HOME Investment Partnerships Program (HOME) –up to 80% AMI
- Emergency Solutions Grant (ESG)- up to 50% AMI
- State surplus lands law up to 120% AMI
- Homeownership Pool Program (HOP) up to 80% AMI
- Local affordable housing program? Check your local definition.



Fla. Stat., § 420.0004(3) definition of affordable housing

- This section is often cited as the prevailing definition for affordable housing in Florida
- A number of statutes cite to this 420.0004 definition including:
 - Surplus Lands Law: F.S. 125.379/166.0451
 - Affordable housing property exemption: F.S. 196.1978
 - HB 1339 zoning flexibility for affordable housing: F.S. 125.01055/166.04151
 - Brownfields site rehabilitation tax credit: F.S. 220.1845
- F.S. 420.0004 <u>does not preempt local governments</u> from adopting their own definition of affordable housing for locally-sourced funding programs or policy initiatives



Review: Definition of affordable housing

- Always check the funding source or controlling state statute
- Terms like "affordable," "attainable," and "workforce," are largely political terms when setting policy
- F.S. 420.0004 definition is used widely but does not preempt local governments from adopting their own definition





II. Zoning and land use laws

Specific Zoning/Land Use Tools Covered

- Inclusionary Zoning
- Accessory Dwelling Units
- Zoning and Land Use override (HB 1339)
- Florida Fair Housing Act section 760.26, F.S- unlawful to discriminate against affordable housing (covered under NIMBY)



Housing Element of the Comprehensive Plan

- Required element of the local Comp Plan. Fla. Stat. § 163.3177(6)(f)(1).
- Provide for housing for all current and anticipated future residents (including the special needs populations) and provide for adequate sites for ... housing for [lower income] families.
- How is this done? By creating an environment **conducive** for the private sector to produce affordable housing.
- Public sector has an obligation to use its land use planning and financing tools to ensure the private sector will produce housing that is affordable.
- Buttressing the obligation and ability to require affordable housing in exchange for local government action is **Land Value Creation and Capture**.



Land Value Creation and Capture

- Land value capture is the concept that certain **governmental activities** lead to **increases in property values** and thus some of the increment should be **recouped for public benefit**
- Government activities that increase property values includes Up-zonings and Infrastructure investments
- For example, when local government rezones a property from agricultural to residential, that results in a dramatic increase in property value for the landowner. Same applies to PUDs.
- Local government secures public benefit (affordable housing) in return for increased property value caused by its land use approvals.



Inclusionary zoning

- Mandatory inclusionary zoning is a land use tool that <u>requires</u> a market-rate developer to provide a set number or percentage of affordable units within a market-rate development
- "Zoning" is a misnomer, more accurately a land use policy
- Voluntary inclusionary/incentives <u>encourages</u> the private sector to provide affordable housing in exchange for favorable development rights (incentives)
- Mandatory IZ is authorized by statute at s. 125.01055 (counties) and s. 166.04151 (cities)



Why is mandatory IZ important?

As of 2016:

- Nationally, approximately **174,000 affordable homes** have been produced with IZ ordinances. This number does not include the additional units created with the **\$1.7 billion collected from in-lieu fees**.
- 443 jurisdictions report **49,277** affordable **homeownership** units
- 581 jurisdictions report 122,320 affordable rental units

In Palm Beach County – more than **2,500 IZ units constructed or approved**.



House Bill 7103 (2019)

- Amended Florida's inclusionary zoning laws found at ss. 125.01055 (counties) and 166.04151 (municipalities)
- For mandatory inclusionary zoning, local governments must now "provide incentives to <u>fully offset all costs</u> to the developer of its affordable housing contribution"
- Ex) if there is a 200-unit market-rate development and 20% of the units are required to be affordable, local government must provide incentives to "fully offset all costs" associated with the 40 affordable units



How to "fully offset all costs" to comply with state law

- First and foremost, Land Value Creation. This could entirely satisfy fully offsetting all costs.
- In addition, density bonuses can more than offset the cost of an inclusionary requirement.
- Other incentive ideas include:
 - Height bonuses; Fee waivers; Flexible design standards; Reduced parking requirement; Infrastructure contributions; Offering publicly-owned land below-market
 - All the negotiations that go into a planned unit development or a master planned community. Especially large-scale development and New Urbanist development (TND)



Accessory Dwelling Units

- ADU is an ancillary unit that has a separate kitchen, bathroom, and sleeping area, either within the primary home or on the same lot.
- Florida Statute is 163.31771
- Following the statute is not required for local government authority but can assist you in avoiding ADUs being used for vacation rentals
- Goal is for local government to permit ADUs in every single family only zone- addresses exclusionary zoning and is a smart growth tool



If Using the Florida Statute

- An application for a building permit to construct an accessory dwelling unit must include an affidavit from the applicant which attests that the unit will be rented at an affordable rate to an extremely-low-income, very-low-income, low-income, or moderate-income person or persons.
- Each accessory dwelling unit allowed by an ordinance adopted under this section shall apply toward satisfying the affordable housing component of the housing element in the local government's comprehensive plan under s. 163.3177(6)(f).

Use this statute if it is helpful to you. Not required.



Land Use Flexibility for Affordable Housing

- House Bill 1339 (2020) provided tremendous flexibility to local governments to approve affordable housing developments without needing a rezoning or comprehensive plan amendment.
- S. 125.01055(6) for counties and S. 166.04151(6) for cities

"Notwithstanding any other law or local ordinance or regulation to the contrary, the governing body of a [city or county] may approve the development of housing that is affordable, as defined in s. 420.0004, on any parcel zoned for residential, commercial, or industrial use."



What does this new statutory provision mean?

- It grants permission for a local government to override their own comprehensive plan and/or zoning code to approve an affordable housing development
- Ex) An affordable housing developer could be permitted to build a multifamily project in a commercial land use designation without needing a zoning change
- This language can act as a "super-waiver" of land development regulations for affordable housing developments



Benefits & Burdens







- Could reduce costly land use barriers for affordable housing development
- Expands government owned-lands that can be used for housing
- Expedite affordable development
- Can be helpful for missing middle housing & adaptive reuse
- Helpful in combating NIMBY

Not so good



- Would be harmful if misused to permit affordable housing where people should not live e.g. near toxic uses, in food deserts, areas without adequate transit or infrastructure
- If used in commercial and industrial areas, may reduce available land for new employment/job growth



How to implement HB 1339

- State law does not provide a method for how to implement this land use flexibility
- Can be done through an implementing ordinance (St. Petersburg) or on a case-by-case basis at the staff level
- Attached as a handout is draft language to use for a comprehensive plan policy



Inventory of lands appropriate for affordable housing

- F.S. 125.379 (counties)/166.0451 (cities) commonly referred to as the "Surplus land laws"
- These statutes require local governments to produce an inventory list every 3 years of all lands it owns in fee simple which are "appropriate for use as affordable housing"
- Best practice: all government-owned lands that are developable should be placed on the inventory



Uses of publicly-owned land placed on the inventory

- Offer for sale and use the proceeds to purchase land for affordable housing
- Offer for sale and use the proceeds to increase the local government fund earmarked for housing
- Sell with a restriction the requires the development of the property as permanent affordable housing
- Donate to a nonprofit housing organization for the construction of permanent affordable housing
- Otherwise make available for production and preservation of permanent affordable housing

Local government authorization to sell or lease real property for affordable housing

S. 125.35(1), Fla. Stat. "The board of county commissioners is expressly authorized to sell and convey any real or personal property, and to lease real property, belonging to the county, whenever the board determines that it is to the best interest of the county to do so, to the highest and best bidder for the particular use the board deems to be the highest and best, for such length of term and such conditions as the governing body may in its discretion determine."

Municipalities are left to the discretion of their governing body under home rule unless otherwise prescribed by state law or county charter.

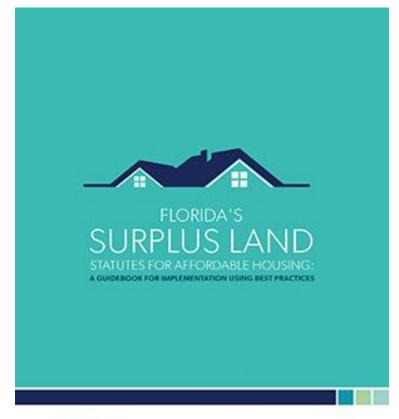


Does publicly-owned land have to be on the required affordable housing inventory to sell or lease the land for affordable housing?

No. Counties under F.S. 125.35 have the discretion to sell or lease land for affordable housing purposes regardless of if the land is on the affordable housing inventory. Municipalities, using their home rule authority, can also do so unless a state statute or county charter is in conflict.



Check out our Surplus Lands Guidebook for more info











III. Local government tools for long-term affordability

Long-term affordability

- Limited public resources should be used for housing that will be affordable permanently or affordable long-term (50+ years)
- Local governments can go above affordability requirements set by state or federal funding programs
- Main tools to ensure permanent or long-term affordability
 - 99-year ground lease- using a CLT, or other mechanism
 - Land use restriction agreement (LURA)
 - Deed restriction- of limited use-only applies if local government is deeding the property- also lacks privity for enforcement. Law favors right of alienation.



99 Year Ground Lease-Community Land Trust

- A Community Land Trust is an alternative to renting
- A Community Land Trust (CLT) is a nonprofit entity that stewards land used for permanent affordable housing
- For homeownership, a CLT sells resale-restricted, below-market rate housing to income-eligible homebuyers subject to a 99-year ground lease
- F.S. 193.018: CLT property appraiser statute required CLT homes to be assessed according to resale-restricted value



Using a CLT for Rental Housing

- Local government can ensure permanent affordability for rental development on land it owns through a 99-year ground lease.
- Local Government could require that in exchange for subsidy, developer would deed the land to local government or a separate CLT using 99-year ground lease. (Pinellas example)



Long Term or Permanent Affordability without a CLT

Land use restriction agreement

- Affordability period
- Households served
- Compliance monitoring procedures
- Party responsible for qualifying households (developer or housing staff?)
- Reversion clause if housing is not developed within ____ number of years
- Enforcement- specific enforcement rather than financial penalties is important to avoid flipping development to market rate.



florida community land trust

INSTITUTE















IV. Funding sources

State Housing Initiatives Partnership (SHIP) program

- Example for how funding sources can be dictated by statute and how a locally-funded program can be structured
- Key provisions
 - Income levels served with income set-asides (30% for LI; 30% for VLI)
 - Eligible uses w/set-aside requirements (65% for homeownership; 75% for construction)
 - Affordability periods
 - Producing a plan for how funds are spent
 - Annual reporting requirements
 - Loan, grant, & recapture standards



Recent statutory changes to the Sadowski Trust Funds

- F.S. 201.15: Distribution of doc stamp collections
- Percentage of doc stamp collections are deposited into the Sadowski Affordable Housing Trust Funds and are appropriated annually by the Legislature towards SHIP and SAIL
- For the past 20 years, the Legislature routinely diverted funds collected for affordable housing towards other purposes
- Senate Bill 2512 (2021): permanently cut the Sadowski Trust Funds by 50% but prevents the Legislature from "sweeping" future collections



F.S. 201.15(5) – Preventing future sweeps of the Sadowski Trust Fund

(5) Notwithstanding s. 215.32(2)(b)4.a., funds distributed to the State Housing Trust Fund and the Local Government Housing Trust Fund pursuant to paragraph (4)(c) may not be transferred to the General Revenue Fund in the General Appropriations Act.



Local Affordable Housing Trust Fund

- Local governments can establish their own funding sources to support a local affordable housing trust fund
- A local programs can fill needs not met by existing state and federal sources
- Local ordinance would dictate eligible uses, incomes served, reporting requirements, and other standards
- Locally sourced fund examples:
 - General revenue Hillsborough County & Orange County
 - Linkage fee
 - Infrastructure surtax
 - Community Redevelopment Agencies (CRA) F.S. 163.360/163.387



Linkage Fee

- A linkage fee is akin to a housing impact fee local government tool to raise revenue for affordable housing programs
- Typically charged on new office, commercial, or industrial development
- "Links" a new development with the workforce housing needs generated by that development
- Like with a traditional impact fee, collecting a linkage fee requires a nexus study
- Florida examples: Winter Park, Coconut Creek, Jupiter
- St. Petersburg, Broward County, and Winter Park have recently completed nexus studies

Linkage Fees are Codified in Statute

F.S. 125.01055 (counties) & F.S. 166.04151(municipalities):

- (3) An affordable housing linkage fee ordinance may require the payment of a flat or percentage-based fee, whether calculated on the basis of the number of approved dwelling units, the amount of approved square footage, or otherwise.
- (4) In exchange for a developer fulfilling the requirements of subsection (2) or, for a residential or mixed-use residential development, the requirements of subsection (3), a [city or county] must provide incentives to fully offset all costs to the developer of its affordable housing contribution or linkage fee.

Note: A local government does **NOT** need to fully offset all costs for a linkage fee on commercial, office, industrial, or other non-residential uses. This provision makes assessing a linkage fee on residential development more difficult.



Why a Linkage Fee May be Good for your Community

- Flexible revenue source
- Completely directed by local ordinance
- Can fill gaps not covered by other traditional sources
- Helps workers of hotels, big box stores, large scale retailers employers that may pay below an amount needed to afford housing



Elements of a Linkage Fee

- Development type that triggers the linkage fee
- How to calculate the fee (square footage, unit-type, flat-fee, etc.)
- Program administration & uses



Implementing a Linkage Fee Ordinance

- Consider development factors
- Nexus study (see Broward County, St. Petersburg, Winter Park)
 - Establish connection between new development and its generated workforce housing demand
 - Determine maximum fee amount based on use
- Program administration
 - When fee is collected and by whom
 - Alternatives to paying the fee
 - Uses of the funds



Linkage Fee Uses

- Land acquisition for workforce housing
- Down-payment assistance
- Rental subsidies and move-in costs for new workers
- New construction
- Home repair



Infrastructure Surtax

- F.S. § 212.055(2) authorizes counties to levy a discretionary sales surtax of 0.5 of 1 percent as a Local Government Infrastructure Surtax
- Commonly called a "Penny Sales Tax" or "Half-cent Sales Tax"
- F.S. 212.055(2)(d): allows counties to use this surtax for land acquisition for affordable housing
- Examples:
 - Pinellas County \$80 million of "Penny for Pinellas" from 2020-2030 on affordable housing
 - Collier County plans to use \$20 million of the surtax for a Workforce Housing Land Trust Fund





V. Affirmatively furthering fair housing

Affirmatively Furthering Fair Housing

- The federal Fair Housing Act requires that HUD administer its programs in a manner "affirmatively to further" the policies of the Fair Housing Act
- HUD carries out this requirement by extending the AFFH obligation to HUD grantees
- HUD grantees must certify, as a condition of receiving federal funds, that they will AFFH
- 760.31(4) The Florida Fair Housing Act also contains an AFFH provision but it has not been implemented to the extent of federal AFFH



Brief History of AFFH

- Clinton (1994): first AFFH-related regulations which required local government HUD grantees to conduct an Analysis of Impediments (AI) to fair housing choice
- Obama (2015): established the Assessment of Fair Housing (AFH) process for HUD grantees most comprehensive AFFH requirement to-date
- Trump (2018-20): repealed Obama and Clinton-era AFFH Rules with a more deferential rule to HUD grantees
- Biden (2021): recently issued an interim final rule on AFFH



Biden Administration's Limited AFFH Rule

- In June 2021, HUD issued a "limited" interim AFFH rule
- The rule repealed the Trump-era AFFH rule but did not fully reinstate the Obama-era AFFH rule
- What it did:
 - Reinstated a number of definitions from the 2015 Rule relating to AFFH certifications
 - Reinstated the voluntary process for HUD to provide TA to HUD grantees to comply with AFFH
- What it did not do:
 - Reinstate the AFH, AI, or mandate any specific fair housing planning mechanism

Biden HUD Admin's Definition of AFFH

Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development.



Affirmatively Furthering Fair Housing

- Local governments should strive to AFFH regardless of HUD requirements
- Ensure all housing activities are in line with the policies of the Fair Housing Act
 - Consider the effect of local housing policies on the racial and socioeconomic composition of the surrounding area
 - Dismantle historic patterns of racial segregation
 - Preserve integrated housing that already exists
 - Facilitate access to fair housing choice
 - Reduce barriers to integration



Liability under the Fair Housing Act

- **Disparate treatment** housing discrimination against or for a protected class <u>with intent</u>
- **Disparate impact** it is a violation of the FHA if a policy or practice creates <u>unjustified disproportionate effects</u> on members of a protected class even if not motivated by discriminatory intent



Policies to look at for disparate impact liability

- Examples of policies that may create discriminatory effects:
 - Only approving prospective tenants with full-time jobs (disability)
 - Zoning decisions that limit multifamily housing development (national origin, race, familial status)
 - Charging higher broker fees for certain neighborhoods (race, national origin, religion)
 - Encouraging home repairs before sale in some neighborhoods but not others (race, national origin, religion)
 - Residency preferences if the area in question heavily skews towards a protected class
 - Ban on Section 8 voucher holders if no local source of income protections (race)
 - Criminal background checks (race)





VI. Florida's fair
housing law — making
affordable housing a
protected class

760.26 - Florida Fair Housing Act for overcoming Not in my backyard (NIMBYism)

760.26 Prohibited discrimination in land use decisions and in permitting of development.—It is unlawful to discriminate in land use decisions or in the permitting of development based on race, color, national origin, sex, disability, familial status, religion, or, except as otherwise provided by law, the source of financing of a development or proposed development.



Not in my backyard (NIMBYism)

- Connotes objections made to stop the development of affordable housing based on fear or prejudice
- Avoiding and overcoming opposition to affordable housing is key to producing and preserving needed homes



Tools for Avoiding NIMBYism

- 1. Reduce unnecessary approvals
 - Approve developments "by right"
 - Delegate approvals to staff rather than at a public hearing
- 2. Launch general audience education campaigns
 - Make use of credible research and local data to support the message
 - Educate elected officials and the community to view affordable housing as a community asset or infrastructure
- 3. Garner support from a broad range of interests
 - Engage business community, philanthropy. clergy, social services agencies
 - Make the connection between affordable housing and community sustainability

Tools for Avoiding NIMBYism

- 4. Engage elected officials
 - Meet with key staff
 - Embrace affordable housing as essential infrastructure
 - Address the elected officials' interests and concerns
- 5. Engage neighborhood groups with specific developments
 - If neighborhood engagement is done well, it can smooth the development process



Tools for Overcoming NIMBYism

- 1. Address all legitimate opposition
 - Focus on legitimate, non-discriminatory (on its face) concerns around issues like traffic or project design
- 2. Know the law and use the law
 - If all legitimate concerns are addressed, a project denial may violate fair housing law and/or the 14th amendment
 - 14th Amendment of U.S. Constitution: local officials must have a rational purpose for exercising development decisions
 - Courts have held that the public's negative attitude, or fear, unsubstantiated by factors that are property recognized in a development proceeding, are not "rational purposes" for land use decisions
 - Florida Fair Housing Act at s. 760.26: prevents discrimination in land use decision made on the basis of financing
 - CH 70 Enforcement through Bert Harris Property Rights Act



Takeaways

- Local government has an obligation under the Housing Element to provide for affordable housing
- Local government has a number of the zoning, financial, and land resources to address housing affordability
- Strive for permanent affordability
- Florida fair housing land use law makes it unlawful to discriminate against affordable housing







FLORIDA HOUSING COALITION PUBLICATIONS

Access these valuable resources and more under the Publications tab at Flhousing.org

Florida Home Matters Report

Accessory Dwelling Unit (ADU) Guidebook

Adaptive Reuse of Vacant Rentals

Affordable Housing Resource Guide

Affordable Housing Incentive Strategies

CLT (Community Land Trust) Primer

CLT Homebuyer Education – Teacher's Guide

CLT Homebuyer Education – Buyer's Guide

Community Allies Guide to Opportunity Zones

Community-Based Planning Guide

Creating a Local Housing Disaster Recovery

Creating Inclusive Communities in Florida

Credit Underwriting Guide for Multi-Family
Affordable Housing in Florida

Developing & Operating Small Scale Rental
Properties

Disaster Management Guide for Housing

Landlord Collaboration Guidebook

PSH Property Management Guidebook

Residential Rehabilitation Guide

SHIP Administrators Guidebook

Using SHIP For Rental Housing

Supporting Households Moving Out of

Surplus Lands Guidebook

Homelessness















































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