

***FAIR HOUSING & “FAIR SHARE” PLANNING***  
**California’s Housing Element Law & Inclusionary Zoning**

- Testimony of Michael Rawson (Director, California Affordable Housing Law Project/ Public Interest Law Project)
- Before the National Commission on Fair Housing & Equal Opportunity -

September 9, 2008, Los Angeles, California

Members of the Commission:

I am Michael Rawson, director of the California Affordable Housing Law Project of the Public Interest Law Project, a state litigation support and policy center for California legal services and public interest firms. Today I will talk about the critical importance of regional “fair share” planning for affordable housing, focusing on California’s Housing Element Law, an area on which I have concentrated for much of my career. I also will touch upon inclusionary zoning—the primary tool available to state and local governments to ensure the development of affordable housing on the foundation laid by fair share planning.

**Land Use and Equal Opportunity—from Exclusion to Inclusion**

As Professor Powell and others have explained so eloquently, housing is the key to opportunity. Where people live determines their *access* to schools, jobs, health care, transportation, places of worship, recreation and opportunities for interaction with folks from diverse backgrounds. It determines their *security* from pollution and crime. It is central in determining quality of life. And land use laws are central to determining where people live.

Prejudice and economic inequality loom largest, of course, as factors limiting equal opportunity to live in the community of one’s choice, but land use laws are the instrument of the exclusion, sometimes intentionally so, sometimes unwittingly. Since the advent of zoning in the early 20<sup>th</sup> Century, communities have zoned out or segregated apartments and multifamily high density housing from areas with the best jobs, schools and transportation options. This “exclusionary zoning,” as it came to be called, is in some ways more insidious than base discrimination by sellers and landlords, for it creates citadel communities surrounded by moats of restrictive zoning that insulate the inhabitants from integration, deprive the excluded of opportunity and entrench patterns of segregation.

The road to inclusion and integration, then, necessarily requires a rethinking of the role of traditional zoning in determining residential land use. Inherent in the power to exclude land uses and the people that go along with them is the power to include. But, just as it took federal and state housing discrimination legislation to seriously challenge the ingrained discriminatory practices in housing sales and rentals, getting local

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governments to look beyond the parochialism and prejudice embodied in local zoning practices requires similar state and federal mandates.

### **“Fair Share” Planning for Affordable Housing—Essential Response to Exclusion**

State courts took the lead in mandating local planning for affordable housing beginning with the landmark case of *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel*.<sup>1</sup> The court held that the New Jersey Constitution obligated local governments to use their land use powers to affirmatively plan for and make available the reasonable opportunity for development of low and moderate income housing to meet needs of people desiring to live within the community.

State Legislature’s also acted, adopting legislation prohibiting discriminatory land use practices and mandating that communities affirmatively plan for inclusion of affordable housing. California went first, requiring all communities to adopt a housing element<sup>2</sup> that makes “adequate provision” for the locality’s “fair share” of the housing needs of the region for all income categories. This year the United Nations Committee on the Elimination of Racial Discrimination recognized California’s Housing Element Law as model legislation addressing racial discrimination.<sup>3</sup>

### **California’s Housing Element Law—Significant Aspects<sup>4</sup>**

#### **A. Preparation and Contents**

- *Allocation of Fair Share Needs.* Every five years,<sup>5</sup> the California’s Department of Housing and Community Development (HCD) determines the housing need for each region for *very low, low, moderate and above moderate* income households. Next, the regional planning agency—the council of governments (COG)—allocates to each community a share of the need for each income category.
- *Assessment of Housing Needs and Constraints to Development.* The element must first include a detailed inventory sites available, including an analysis zoning densities and sewer and water service and analysis of constraints to development.

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<sup>1</sup> 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (*Mt. Laurel I*)

<sup>2</sup> California Government Code §§ 65580 – 65589.8 (the “Housing Element Law”).

<sup>3</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding Observations-United States*, CERD/C/USA/CO/6, p. 2 (Geneva, February 2008). The Committee meets regularly to review the progress of nations party to the Convention On the Elimination of all Forms of Racial Discrimination (CERD). The Housing Element five year plan system also served as the model for HUD’s five year Consolidated Plan system.

<sup>4</sup> See the detailed overview of the law excerpted from the *California Housing Element Manual: Law, Advocacy and Litigation* (California Affordable Housing Law Project (2<sup>nd</sup> Edition, April 2008)) included in the materials for today’s hearing.

<sup>5</sup> The five year cycle will become eight years for some communities beginning in 2011 as the housing element cycle and regional transportation planning cycles are brought into sync. See California Senate Bill 375 (Steinberg) (2007-2008 Legislative Session) now awaiting the Governor’s signature.

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- *Special Housing Needs.* The element must also assess the special needs for housing, including the need for emergency shelters and the needs of farmworkers and persons with disabilities.
- *Program of Actions.* After the assessments, the element must incorporate specific actions to rezone adequate sites that will be available for development during the five year planning period to accommodate the unmet needs.
  - The sites rezoned for very low and low income households needs must be available for development “*by right*” at *multifamily* densities (*i.e.* developable without the issuance of discretionary permits such as conditional use permits).
  - The program must also identify sites, developable by right, for unmet need for *farmworker housing* and *emergency shelters*.

#### B. Enforcement & Incentives

Administrative & Judicial Review. HCD reviews all draft housing elements. If found out of compliance, the locality must make changes *or* it may adopt the substandard element but risk litigation in which the element is not entitled to a presumption of validity. Failure to adopt or implement an adequate housing element exposes the community to litigation.<sup>6</sup> If a court finds the element does not substantially comply with the statute, the court *must* order revision of the element *and* restrict the authority of the community to approve development until it adopts an adequate element. The possibility of this remedy has proven a powerful incentive for local government compliance.

Incentives. A finding of compliance by HCD is generally included as a rating and ranking criteria in housing and community development programs administered by the state, including the State CDBG and HOME programs.

#### C. Critical Complementary Laws

Affordable Housing Anti-Discrimination Law.<sup>7</sup> This law prohibits discrimination by local government against affordable housing developments. Communities may not deny or impose conditions or development standards on a development based on its receipt of subsidy or because of occupancy by lower income households.

“Anti-NIMBY” Law.<sup>8</sup> This statute requires approval of affordable housing developments on sites designated for residential development in the local general plan, including the housing element, unless the development would have a specific adverse and unavoidable impact on objective health and safety standards that cannot be mitigated.

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<sup>6</sup> See California Government Code § 65750 *et seq.* and § 65584.09

<sup>7</sup> California Government Code § 65008.

<sup>8</sup> California Government Code § 65589.5

## D. Results<sup>9</sup>

Results are hard to measure because the necessary rezoning doesn't necessarily coincide with the necessary funding. But, anecdotally, our experience is that when sites are rezoned as part of the housing element process, affordable housing will always follow on some of them. And, HCD's analysis of the impact of the law at the end of 2007 found:

- 80% of California's 535 local governments have adopted elements found in compliance by the department.
- 98% of the multifamily housing permits issued in California are issued in jurisdictions with approved housing elements—communities that have rezoned sites to accommodate their fair share of affordable multifamily housing.

**Other States** [At least 25 states require some level of planning for affordable housing]<sup>10</sup>

New Jersey. One difference between California's Housing Element Law and New Jersey's implementation of the *Mt. Laurel* decision is the availability of an express "builders remedy" in New Jersey. A developer in a community without a state certified fair share plan may bring a suit if denied approval of an affordable housing development.

Massachusetts, Connecticut, Rhode Island and Illinois. These states have so-called "anti-snob" laws that provide affordable housing developers with an administrative or judicial appeal that can overturn a decision by a local government.

### **Recommendations for Legislative Action**

1. State fair share planning statutes should combine the attributes of the laws of California and other states, including *regularly updated housing plans, mandatory zoning for by-right development of multifamily housing, judicial remedies that include suspension of development approval powers, a builder's remedy and an appeals process outside of the jurisdiction.*
2. Amend the Fair Housing Act and state fair housing laws to a) prohibit discrimination against affordable housing developments and b) prohibit the exclusion of multifamily housing from any community.
3. Federal Consolidated Plan statute should condition CDBG funding on local governments zoning sufficient multifamily land to accommodate their very low and low income housing needs.

### **Inclusionary Zoning—Important and Proven Companion to Fair Share Planning**

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<sup>9</sup> From HCD's 2007 Report to the Legislature—*Status of California Housing Elements*.

<sup>10</sup> ABA, *The Legal Guide to Affordable Housing Development*, Chapter 1 (2005)

To borrow from the global warming crisis lexicon, we are approaching the “tipping point” at this stage of land use in America. As we strive to hold the line on the development footprint and land and resources dwindle, we risk raising the drawbridge on the road to inclusionary communities and accepting permanent exclusion—accepting systemic segregation. *It is absolutely critical that further housing development, whether it be in new neighborhoods or urban infill, include housing affordable at below market prices and rents.*

#### A. Inclusionary Housing

Inclusionary or “mixed income” housing requirements generally have been adopted on the local government level, although there are also some regional and statewide requirements. They require that a percentage (usually for 10% to 20%) of units in all new construction (and often redeveloped or converted units) be affordable to persons of lower and moderate incomes. Most allow alternatives to onsite development of the affordable units, including off-site development, payment of “in lieu” fees and land dedication.

#### B. Proven Effective

Successful inclusionary zoning programs have been in place in Maryland, California and other parts of the country for over 30 years. In Montgomery County, Maryland, over 13,000 were produced through a program requiring up to 15% of the units in new developments to be affordable.<sup>11</sup> By June 2007 in California, over 170 communities had adopted inclusionary zoning requirements.<sup>12</sup> Since 1999 alone, these programs had produced over 29,000 units of affordable housing in California.

#### C. Chosen Tool of Fair Share Compliance

The phenomenal increase in inclusionary zoning ordinances in California can be attributed to a convergence of the dire need for affordable housing in California’s escalating housing market and the obligation to comply with the Housing Element Law. When updating their housing elements, many communities, confronting the cost of producing affordable housing and the dwindling supply of land, concluded that inclusionary programs were critical to ensure supply of below market rate housing.

**Recommendation:** Amend HUD’s Consolidated Plan statute to condition CDBG funding on proof that communities require lower income housing in all new projects.<sup>13</sup>

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<sup>11</sup> Brunick, Nicholas, *Practice Inclusionary Zoning*, 9 Zoning Practice 2 (American Planning Association, Sept. 2004).

<sup>12</sup> Nonprofit Housing Association of Northern California, *Affordable By Choice: Trends in California Inclusionary Housing Programs* (June 2007).

<sup>13</sup> The ConPlan’s Analysis of Impediments must already certify removal of building and zoning barriers.