URBAN DISPLACEMENT Project

Inclusionary Zoning Policy Brief

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Policy Brief:

Inclusionary Housing in the Bay Area

Inclusionary housing policies aim to increase the stock of affordable housing at a minimal cost to the city, concurrent with development, and in the same neighborhoods as market-rate housing. Inclusionary housing usually takes the form of a zoning requirement placed on developers of new market-rate housing. Developers must either rent or sell a portion (for example, 10%) of their development's units at a reduced price to low- or moderate-income households, or (under some policies) provide housing elsewhere or pay a fee in lieu of producing housing. Some policies, like increased density or waivers of other zoning requirements, help to mitigate profit loss developers may face when offering units at reduced prices.

In this policy brief, we review the basics of inclusionary housing policies, including their regional and national prevalence. We analyze their effectiveness based on a review of the literature and an analysis of primary data from surveys and stakeholder interviews.[1]

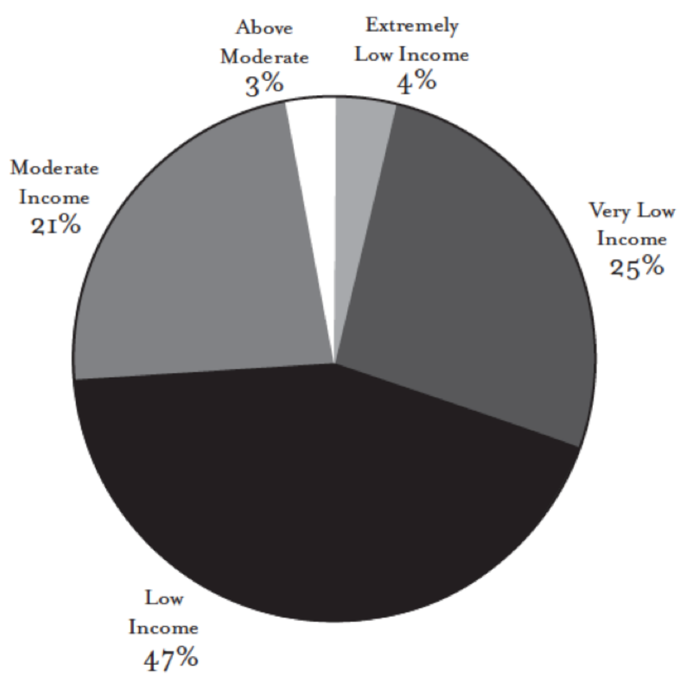

Fig. 1: Inclusionary Units Produced by Income Level
Source: (NPH 2007, 14)

Where is inclusionary housing?

Inclusionary housing programs are widespread—over 500 jurisdictions in 27 states and Washington, DC have policies in place, though they are particularly concentrated in California and New Jersey.[2] Seventy-eight cities in the Bay Area have some type of policy in place, while only 16 cities in Los Angeles County have inclusionary zoning. The policies vary considerably, both in their design and implementation and in how much housing they produce.[3] Overall, "larger, more highly educated jurisdictions, and those surrounded by more neighbors with inclusionary zoning, are more likely to adopt" inclusionary policies.[4]

How effective is inclusionary housing?

Nationally, inclusionary housing policies have generated between 129,000 and 150,000 units, mostly in California, Massachusetts, and New Jersey.[5] In California, between 1999-2007, inclusionary housing programs generated 29,281 affordable units, just 2% of total units authorized for construction in the state during that time.[6]

These policies have made only a small contribution towards addressing the affordable housing shortage: the number of inclusionary units built is modest in comparison to regional housing needs.[7] For example, the Association of Bay Area Governments estimated a need for 133,195 affordable units in the San Francisco Bay Area during the 2001-2006 period, but in the thirty-plus years of inclusionary housing leading up to 2006, the policy had resulted in the production of only 6,836 affordable units.[8] Moreover, there is an uneven distribution of who is housed by these units: almost no inclusionary housing units house extremely low-income households, a quarter house very low-income, nearly half house low-income, and 21% serve moderate-income households (Figure 1). [9]

Looking forward, statewide, 1.5 million affordable rental homes are needed nationwide (for extremely low- and very low-income households) and, in the Bay Area, 17,000 units are needed each year through 2040, for moderate, low, and very low income households.[10] Inclusionary housing on its own is insufficient to meet that large of a demand. The policy is better viewed as one part of a broader affordable housing strategy.[11]

"No one has ever claimed that inclusionary is the policy…it's one more tool in the toolbox…maybe between inclusionary and impact fees and this and that, you can cobble together enough [to create some amount of affordable housing]"
–Policy expert

Legal Limitations in California

In California, inclusionary housing policy for rental units has been significantly circumscribed. In 2009, two Court of Appeal decisions, Building Industry Ass'n of Cent. California v. City of Patterson and Palmer/Sixth Street Properties L.P. v. City of Los Angeles together upended previous understandings of inclusionary housing ordinances. Palmer found that an existing state law related to rent control precludes jurisdictions from forcing developers to include rent-restricted units in their market-rate, rental developments.[12] More specifically, the two cases, taken together, have the following implications for inclusionary ordinances:

1. Patterson suggests that inclusionary housing ordinances should be viewed as "exactions" that must be justified by nexus studies. [13]
2. Palmer does not allow inclusionary housing ordinances to limit rents unless public assistance to the landlord is provided. Palmer does not affect buildings that receive public funds, nor those that receive some regulatory incentive, such as a density bonus. [14]

Legal Limitations on Inclusionary Housing

Rental Housing –
Inclusionary units prohibited unless they receive public funds or other incentives

Ownership Housing –
Inclusionary housing upheld in 2015 San Jose case

Since these decisions, most California jurisdictions have ceased applying their inclusionary policy to market-rate rental developments to stay clear of legal trouble.[15] Others have instead required developers to pay fees in lieu of constructing inclusionary units, which the city can then use to fund other affordable housing developments.[16] However, to do so, cities must show what impact a new market-rate development will have on increasing the need for affordable housing. For example, a study might show that new residents will shop at nearby establishments, increasing the number of employees they must hire, many of whom earn a low wage and therefore need affordable housing. This is the "nexus" between the new market-rate housing and the need for affordable housing. The city must show that the amount charged is proportional to the impact, which makes assessing such fees more difficult and raises less in revenue.[17]

In 2013, a bill to reverse the Palmer decision was passed by the California legislature, but was vetoed by Governor Jerry Brown.[18] Efforts are ongoing to pass a "Palmer fix."

A subsequent case in San Jose challenged inclusionary laws that apply to home-ownership (California Building Industry Ass'n v. City of San Jose). In June 2015, the California Supreme Court ruled that inclusionary housing ordinances for ownership units are allowed under jurisdictions' police powers and, importantly, that "affordable housing ordinances are simply price controls on new homes" and therefore require no nexus studies or proof of "deleterious impact" to be passed, making their implementation much easier. [19]

Inclusionary Housing in the Bay Area

In the nine-county Bay Area, 72% of cities have inclusionary policies as of 2014.[20]

Notably, Oakland, which has many anti-displacement policies in place, does not have an inclusionary housing policy. A longtime advocate in Oakland believed this was because the city council is "just so eager to get development of any [kind]" given an "image problem" and a view that "people don't want to invest in Oakland" and so are wary of development limitations of any kind.

Most policies require developers to designate between 10-15% of their units as affordable, though some require as high as 20% or as low as 4%. Nearly 70% of policies include an "in-lieu fee" provision for developers. Most policies specify a minimum number of units a development must have before the law is triggered, usually around 4-10.

Several cities include different requirements depending on the level of affordability the units are offered, i.e. for moderate-, low-, or extremely low-income. For example, in Richmond, developers must designate either 17% of their units for moderate-income households, 15% for low-income, 10% for very low-income, or 12.5% for a combination of very low-income and low-income. A very common feature of the policies is to include a prescribed breakdown of levels of affordability within the required below market-rate (BMR) units.[21]

A plurality of policies explicitly target moderate, low, and very low-income households (nearly 40%), while others focus on only low- and very low-income households. Stakeholders from several cities in the Bay Area suggested changing the policies to shift the focus from moderate-income to lower-income households. Several other stakeholders suggested raising the in-lieu fees, which they said are currently too low.

The examples of Colma and Walnut Creek show that inclusionary zoning does not work in cities without new market-rate housing investment. Over the approximately ten years these cities have had inclusionary housing policies in place, stakeholders report that fewer than ten units of inclusionary housing have been developed. In Colma, a large proportion of land is used for cemeteries. Between 2007 and 2013, only 2 units of housing, of any kind, have been built. In Walnut Creek, the figure is 75. However, in Walnut Creek, 47 of those units have been for very low-income households, developed through other affordable housing policies besides inclusionary housing.

Other cities have seen more success: in East Palo Alto, 80 units were developed through the policy between 1994-2013; in Sunnyvale, hundreds of units have been constructed since 1980; and in San Francisco, 1,214 on-site units (within the market-rate buildings) and 346 off-site units (in separate buildings than the market-rate units) have been constructed between 1992-2013.[22] Having these statistics at all is unique: most cities do not track the numbers of units built through inclusionary ordinances.

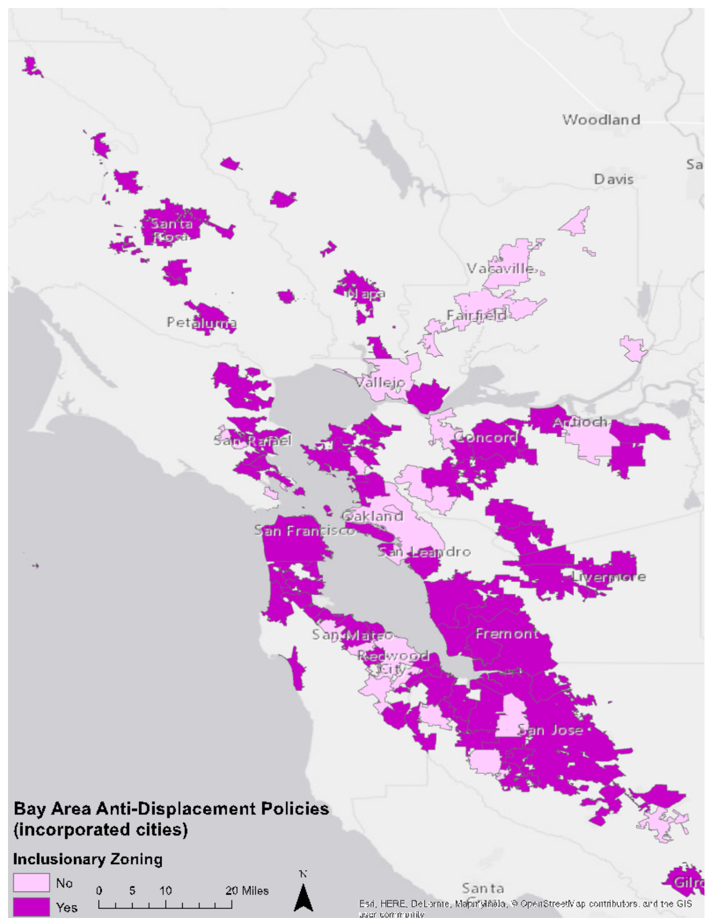

Figure 2: Inclusionary Zoning in Bay Area Cities

Source: UC-Berkeley Internal Analysis

Related Policy: Density Bonus

While inclusionary housing policies require developers to devote a certain portion of new development to below-market renters or owners, some cities choose to further incentivize affordable development through density bonuses. California's Density Bonus Law requires that municipalities allow developers to build at higher density in exchange for affordable units.[23] When included within the inclusionary policy, density bonuses act as a cost off-set for developers to be able to increase the number of affordable units in their developments, specifically in cities where there is significant market interest in developing taller buildings.[24] For example, New York City rezoned formerly industrial land on the Brooklyn Waterfront (and other parcels in the city) to residential and provided a strong density bonus for developers that agreed to meet specified affordability targets. The program generated about 2,700 permanently affordable rental units between 2005 and 2013.[25]

Related Policy: Accessory Dwelling Units

For areas that may lack in developable land for new units, jurisdictions may allow homeowners to create accessory dwelling units on their property, as enabled by the California Second Unit Law (AB 1866). The creation of secondary units (known as "in-law" or "granny units") helps increase the stock of very low- and low-income housing units, in middle- or high-income areas, without dramatic increases in parking demand nor government investment.[26] This in turn, "could help to free up such scarce (and dwindling) monies for the subsidization of the lowest-income affordable developments." [27]

Conclusion

While inclusionary housing is a popular policy, its effectiveness as a broad affordable housing solution in California and the Bay Area is limited. On its own, inclusionary housing can't produce a sufficient volume of units to meet current demands, and its potential impact has been further curtailed by recent legal limitations. However, as a generator of new affordable units in mixed-income neighborhoods with minimal outlay of public funds, inclusionary housing can be an important

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Cover Photo Source: Bert Johnson, *East Bay Express,* http://media1.fdncms.com/eastbayexpress/imager/u/zoom/4443589/feature-8-8683e01326982ad3.jpg

[1] We reviewed both academic and practitioner literature on anti-displacement strategies. We sent a survey on the effectiveness of anti-displacement strategies to staff at all of the planning departments in the Bay Area as well as housing-related community based organizations; we refer to responses from this survey as "stakeholder" comments. Finally, we conducted interviews with many other stakeholders, including community advocates, staff of community organizations, and individuals involved with local, regional, and state policy.

[2] Hickey, Robert, Lisa Sturtevant, and Emily Thaden. "Achieving Lasting Affordability through Inclusionary Housing," 2014. http://communitylandtrust.org/wp-content/uploads/2014/08/CLT-inclusion-July2014-LincLandInst.pdf.

[3] Ibid.

[4] Furman Center for Real Estate and Urban Policy, Jenny Schuetz, Rachel Meltzer, and Vicki Been. "The Effects of Inclusionary Zoning on Local Housing Markets: Lessons from the San Francisco, Washington DC and Suburban Boston Areas," November 19, 2007. http://furmancenter.org/files/publications/Long_working_paper_08.pdf.

[5] This estimate includes units produced "in whole or part with [in-lieu] fees," paid by developers in place of building the below-market rate units in their developments. Mallach, Alan, and Nico Calavita. "United States: From Radical Innovation to Mainstream Housing Policy." In Inclusionary Housing in International Perspective: Affordable Housing, Social Inclusion, and Land Value Recapture, 15–77. Cambridge, MA: Lincoln Institute of Land Policy, 2010.

[6] 1,500,213 units of housing were authorized to be constructed in this period.

NPH. "Affordable By Choice: Trends in California Inclusionary Housing Programs." Non-Profit Housing Assocation of Northern California, California Coalition for Rural Housing, San Diego Housing Federation and the Sacramento Housing Alliance, 2007. http://www.wellesleyinstitute.com/wp-content/uploads/2013/01/NPH-IHinCA2006.pdf.

California Department of Finance. "Housing, Permits & Starts, California and United States," March 2015. http://www.dof.ca.gov/HTML/FS_DATA/LatestEconData/FS_Construction.htm.

A data limitation on California inclusionary housing production figures is that units produced via now-shuttered redevelopment agencies are left out. These redevelopment agencies had requirements that "15% of all production inside a project area has to be affordable under state law," which meant that "every community [using redevelopment dollars] had to have an inclusionary policy of some kind," according to a policy expert. Therefore, other units developed in a similar manner as inclusionary zoning have been produced in the state and are not captured in these figures.

[7] Powell, Benjamin, and Edward Stringham. "Economics of Inclusionary Zoning Reclaimed: How Effective Are Price Controls, The." Florida State University Law Review 33 (2006 2005): 471.

[8] Ibid.

[9] NPH. "Affordable By Choice: Trends in California Inclusionary Housing Programs." Non-Profit Housing Association of Northern California, California Coalition for Rural Housing, San Diego Housing Federation and the Sacramento Housing Alliance, 2007. http://www.wellesleyinstitute.com/wp-content/uploads/2013/01/NPH-IHinCA2006.pdf.

[10] California Housing Partnership Corporation. "Update on California's Affordable Housing Crisis: The Role of Housing Access and Affordability in Reducing Poverty," April 2015. http://www.chpc.net/dnld/2015StatewideHousingNeedReportFINAL.pdf.

Chapple, Karen. "Evaluating the Effects of Projected Job Growth on Housing Demand," 2012. http://www.planbayarea.org/pdf/KC_Effects_of_Projected_Job_Growth_on_Housing.pdf.

[11] Calavita, Nico, Kenneth Grimes, and Alan Mallach. "Inclusionary Housing in California and New Jersey: A Comparative Analysis." Housing Policy Debate 8, no. 1 (January 1, 1997): 109–42. doi:10.1080/10511482.1997.9521249.

Powell, Benjamin, and Edward Stringham. "Economics of Inclusionary Zoning Reclaimed: How Effective Are Price Controls, The." Florida State University Law Review 33 (2006 2005): 471.

[12] Shigley, Paul. "Court Rules L.A. Inclusionary Housing Mandate Violates State Law." California Planning & Development Report, August 20, 2009. http://www.cp-dr.com/node/2401.

[13] Nexus studies must show that the construction of market-rate housing contributes to the need for affordable housing. They usually do so by showing the new market rate housing will increase household spending in a community, which will create low-wage jobs, whose workers will need a place to live. An alternative nexus theory, more difficult to quantify, is that market-rate projects use up land that would otherwise be available for affordable housing. In a case involving commercial linkage fees, the Ninth Circuit discussed the "indirectness of the connection between the creation of new jobs and the need for low-income housing," but ultimately concluded that the fees bore a "rational relationship to a public cost closely associated with" new development. Commercial Builders of Northern California v City of Sacramento, 941 F.2d 872, 874-76 (9th Cir. 1991).

[14] Strategic Economics, and Vernazza Wolfe Associates, Inc. "Housing Impact Fee, Nexus Study," April 2015. http://www.21elements.com/Resources/nexus-study.html.

[15] Hickey, Robert. "After the Downturn: New Challenges and Opportunities for Inclusionary Housing." Inclusionary Housing: A Series of Research & Policy Briefs. Center for Housing Policy, February 2013. http://www.nhc.org/media/files/InclusionaryReport201302.pdf.

[16] Although 81% of programs in California offered payment of fees as an option, there are not many estimates of the total amount of in-lieu fees generated by inclusionary programs. One estimate is that "nearly one-quarter of all the reported units (4,798)," though the figure is likely higher (NPH 2007, 17). Such counts are inexact because most jurisdictions mingle in-lieu fees with other housing funds and do not track them separately.

CCRH and NPH. "Inclusionary Housing in California: 30 Years of Innovation." Sacramento, CA: California: Coalition for Rural Housing and Non-Profit Housing Association of Northern California., 2003.

NPH. "Affordable By Choice: Trends in California Inclusionary Housing Programs." Non-Profit Housing Association of Northern California, California Coalition for Rural Housing, San Diego Housing Federation and the Sacramento Housing Alliance, 2007. http://www.wellesleyinstitute.com/wp-content/uploads/2013/01/NPH-IHinCA2006.pdf.

[17] Jacobus, Rick. "CA's Surprisingly Strong Stand in Support of Inclusionary Housing," June 16, 2015. http://www.rooflines.org/4165/cas_surprisingly_strong_stand_in_support_of_inclusionary_housing/.

[18] Daniel, Frattin. "Governor Scuttles Palmer Fix." Reuben, Junius & Rose, October 17, 2013. http://www.reubenlaw.com/index.php/rj/singleUpdate/governor_scuttles_palmer_fix.

[19] Goldfarb Lipman LLP. "Law Alert: California Supreme Court Greenlights Affordable Housing Ordinances," June 16, 2015. http://nonprofithousing.org/wp-content/uploads/GL-LLP-Law-Alert-CA-Supreme-Court-Greenlights-Affordable-Housing-Ordinances.pdf.

[20] Three policies were adopted between 1979-1989; 19 in the 1990s; 38 in the 2000s; and 11 between 2010-2014. The policies differ in terms of whether they target rental or ownership housing or both, and in regards to the specific proportion of affordable housing they require. Other differences include whether developers are allowed to construct their inclusionary units off-site from their market-rate development, and whether they may pay fees in lieu of providing the housing.

[21] For example, in San Bruno, 15% of units (in projects with 10 units or more) must be offered at below-market rents; for rental buildings, 40% of those units are for very low-income households, and the rest for low-income, while in ownership buildings, 40% are reserved for low-income households and the rest for moderate-income.

[22] San Francisco Mayor's Office of Housing and Community Development. "SF Inclusionary Housing Program Completion and Pipeline Data 2014 Q1," 2014. http://sf-moh.org/index.aspx?page=295.

[23] APA, American Planning Association. "Model Affordable Housing Density Bonus Ordinance." In Smart Growth Codes, 2006.

[24] ChangeLabSolutions, Allison Allbee, Rebecca Johnson, and Jeffrey Lubell. "Preserving, Protecting, and Expanding Affordable Housing: A Policy Toolkit for Public Health," 2015. http://changelabsolutions.org/publications/affordable_housing_toolkit.

[25] Ibid.

[26] Chapple, Karen, Jake Wegmann, Alison Nemirow, and Colin Dentel-Post. "Yes in My Backyard: Mobilizing the Market for Secondary Units," June 2012. http://communityinnovation.berkeley.edu/reports/secondary-units.pdf.

[27] Ibid, p.12. The regulatory environment, with its onerous parking requirements, is the most significant barrier to secondary unit development.