



HOUSING VIRGINIA

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# Welcome to the Neighborhood

A Practitioner's Guide to Inclusionary Housing

September 2017



Housing Virginia  
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# EXECUTIVE SUMMARY

Thousands of Virginia’s families struggle to find a secure and affordable home each day. Thankfully, there are proven solutions for expanding housing opportunities for these households. One innovative strategy is inclusionary zoning, which directs or encourages below-market rate units in new housing developments, usually in exchange for meaningful developer incentives. Inclusionary zoning is most effective as a part of a grander ***inclusionary housing*** plan that promotes an array of tools to offer a wide range of housing choices for families whose incomes are a barrier to finding a secure market rate home in their community.

*Welcome to the Neighborhood* is written as a guide for local planners, practitioners, and advocates to understand the opportunities and limits of inclusionary housing in Virginia. This guidebook first overviews the need for expanded housing options for the one million households across the Commonwealth facing unsustainable housing costs. It then provides a detailed legal review of the bifurcated state enabling act for inclusionary zoning, which only permits mandatory inclusionary zoning in a small number of cities and counties. The remainder of Virginia’s localities may opt to create condi-

tional inclusionary zoning programs that are only applicable when a developer seeks a variance or special exemption. Three successful case studies of inclusionary housing programs are also examined, including an in-depth review of Fairfax County’s Affordable Dwelling Unit policy.

Using a review of national best practices, the guidebook offers a series of guidelines and recommendations for crafting effective inclusionary housing programs in Virginia. Building support early and often is key, especially from a diverse range of stakeholders. Local officials and advocates should also carefully consider their messaging to avoid common backfires. And, while there are certain statutory guardrails for inclusionary housing policies, local governments have an impressive range of options to consider when designing these ordinances. Officials should weigh demographic and socioeconomic needs with their current housing market to develop a custom-tailored program.

In some low-growth communities, traditional inclusionary zoning requirements may be a hindrance to expanded housing options. The fifth section of this guidebook outlays other alternatives and incentives for inclusionary community development, including housing trust funds and community land trusts — which may work in conjunction with, or independently of, inclusionary zoning.

Practitioners should not be afraid to think outside the box when attempting to create housing in their community that is secure and affordable. Although Virginia law provides some constraints, there is still ample room for localities to push the envelope using inclusionary zoning and other complimentary strategies. This guidebook acts as the first point of reference to help transform these opportunities into meaningful action.



# 1. INTRODUCTION

## WHAT IS INCLUSIONARY HOUSING?

Policies that mandate or encourage new residential developments to dedicate a share of homes to low and moderate income families are inclusionary housing strategies. The most common method is inclusionary zoning, which creates specific affordability targets in local land use codes, but this guidebook uses the term “inclusionary housing” to also include additional incentives and programs that complement zoning requirements.

## HOW COMMON IS INCLUSIONARY HOUSING?

Inclusionary housing is generally a local-level approach that requires state-level enabling legislation. Nearly 500 cities and counties across the nation have active inclusionary housing policies. That number will continue to rise as communities strive to ensure that all persons, regardless of income level, benefit from increasing growth and investment in their neighborhoods.

## DOES INCLUSIONARY HOUSING WORK EVERYWHERE?

While it may be tempting to view inclusionary housing as a panacea for affordability issues, local governments should carefully weigh the costs and benefits. Inclusionary policies are best suited for high-growth and high-cost areas – if there is more new housing, more affordable units are also needed. In medium-growth communities, inclusionary requirements could deter construction and keep housing costs high unless planners offer meaningful incentives. In slow markets, where demand is low, affordable housing needs are likely to be more effectively met by other means.

## WHAT DOES THIS GUIDEBOOK DO?

This guidebook is meant to provide local decisionmakers with the information and resources necessary to craft inclusionary housing programs that produce affordable units without hindering supply. The guide includes:

- **A statement of need** for additional housing that is affordable to low- and moderate-income families
- **The legal framework** in Virginia for drafting local inclusionary housing policies
- **Examples** of inclusionary best practices in Virginia and across the country
- **Recommendations** for planning, designing, and implementing inclusionary housing programs
- **A glossary** of complementary programs and policies that promote housing affordability
- **A list of datasets and resources** that help communities determine housing needs



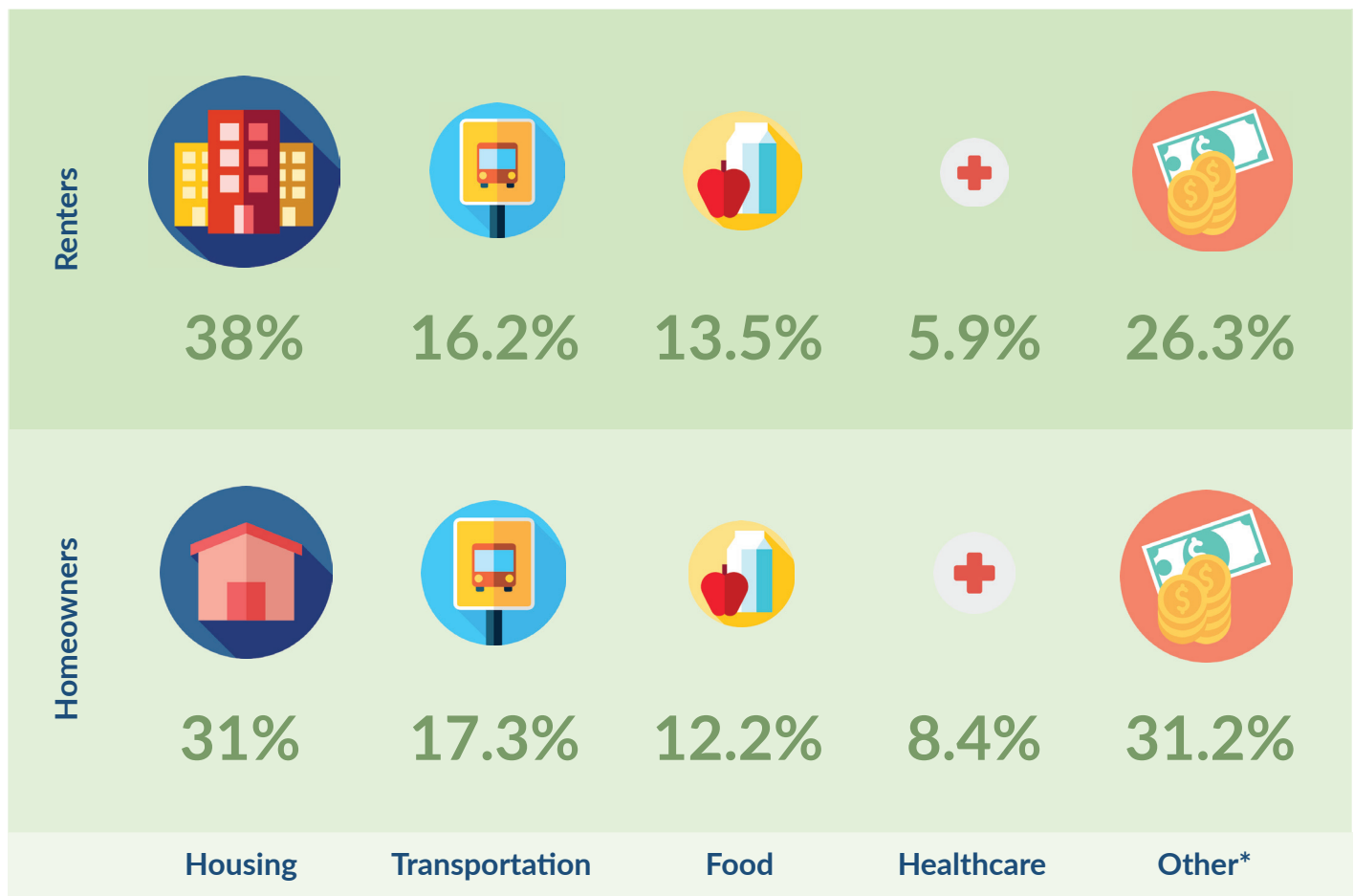
## WHAT IS AFFORDABLE HOUSING?

Housing is said to be *affordable* when families spend 30% or less of their income on rent or mortgage payments. Households are *cost burdened* when they exceed that 30% threshold and are *extremely cost burdened* when housing costs are 50% or more of their income. Sometimes, only inadequate or unsafe housing is available for families with lower incomes. Therefore, affordable housing must also be high quality, safe, and secure.

expenditure, followed by transportation. These two costs are inextricably linked. In general, a household’s transportation costs will rise the further the worker lives from their job. Often, families will need to live far from their place of work to find a home that they can afford. Therefore, the cost of transportation is sometimes added to the cost of housing when measuring housing affordability. For the average renter, this total is nearly 55% of income; for homeowners, it is over 48%.

Figure 1 illustrates the typical American family’s budget by spending category. Housing is the largest

Figure 1: Household spending by housing tenure<sup>1</sup>



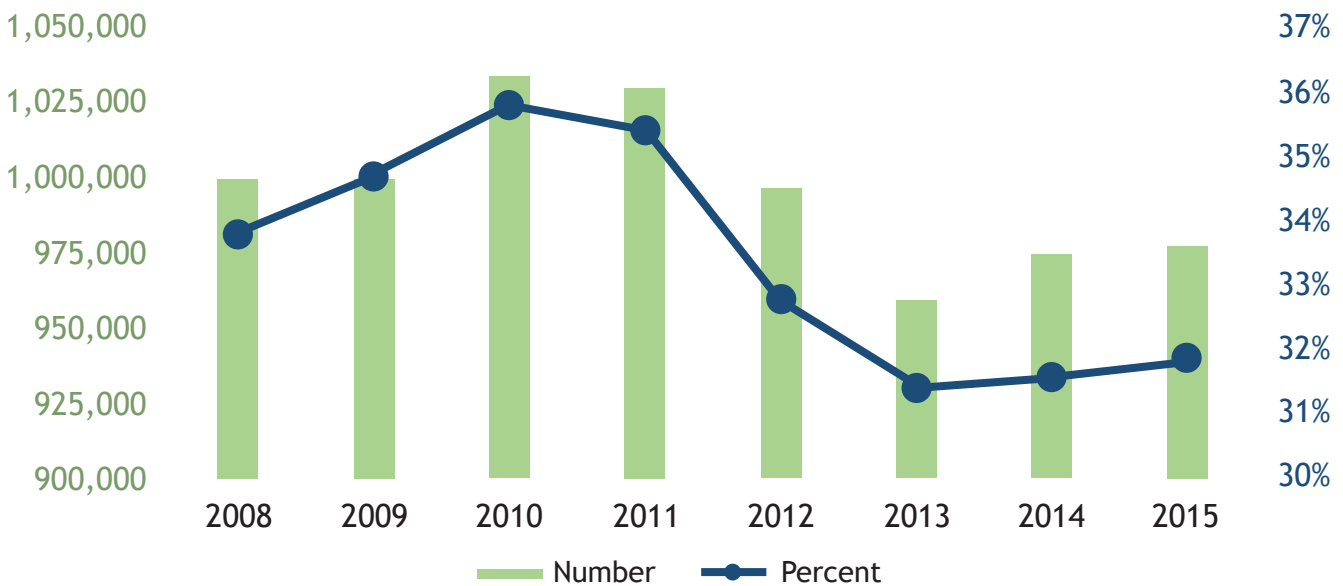
\*Spending categorized as “other” includes: personal insurance and retirement savings, alcoholic beverages, apparel, entertainment, personal care, reading, education, tobacco products, miscellaneous expenses, and cash contributions

## WHAT IS THE NEED FOR AFFORDABLE HOUSING IN VIRGINIA?

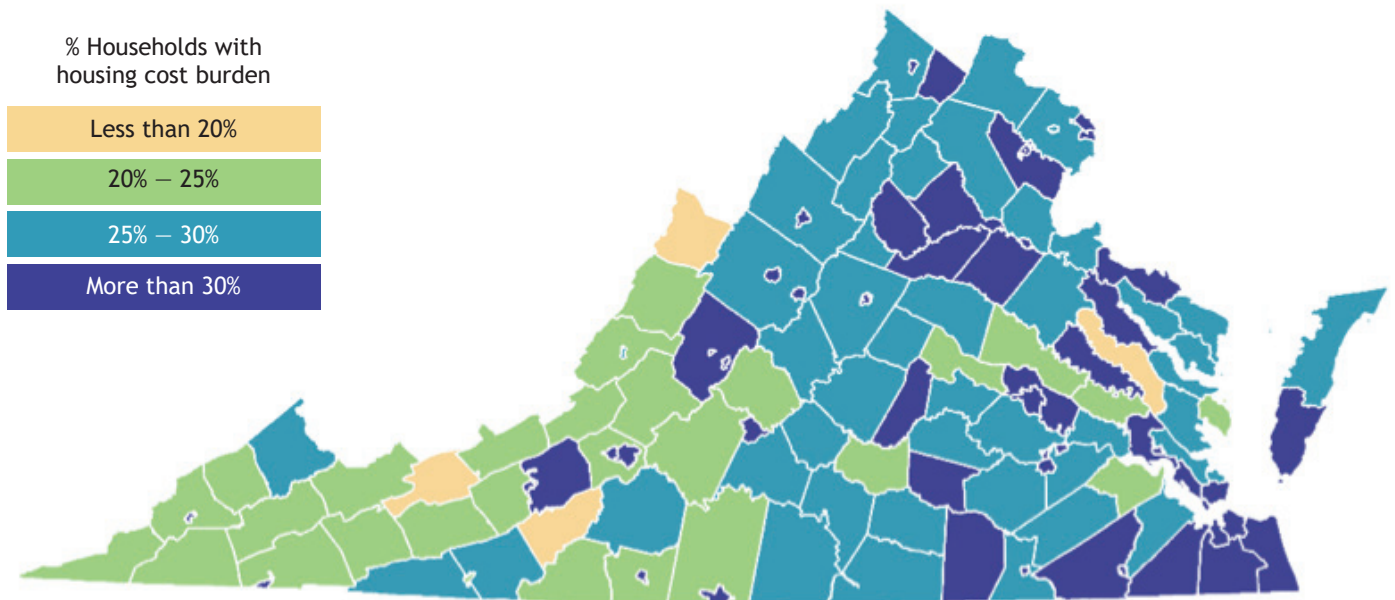
About 1 in 3 households in Virginia are housing cost burdened. This share has decreased from over 35% during the height of the Great Recession in 2010 and 2011, but has failed to dip below 31% (Figure 2). Today, nearly one million of Virginia’s families face housing prices that exceed their budget.

The Commonwealth’s housing affordability problem is not confined to large cities. In fact, just over one quarter of all rural households in Virginia are cost burdened.<sup>2</sup> Map 1 shows how pervasive this issue is across the state.<sup>3</sup>

**Figure 2: Cost burdened households in Virginia (2008-2015)<sup>4</sup>**



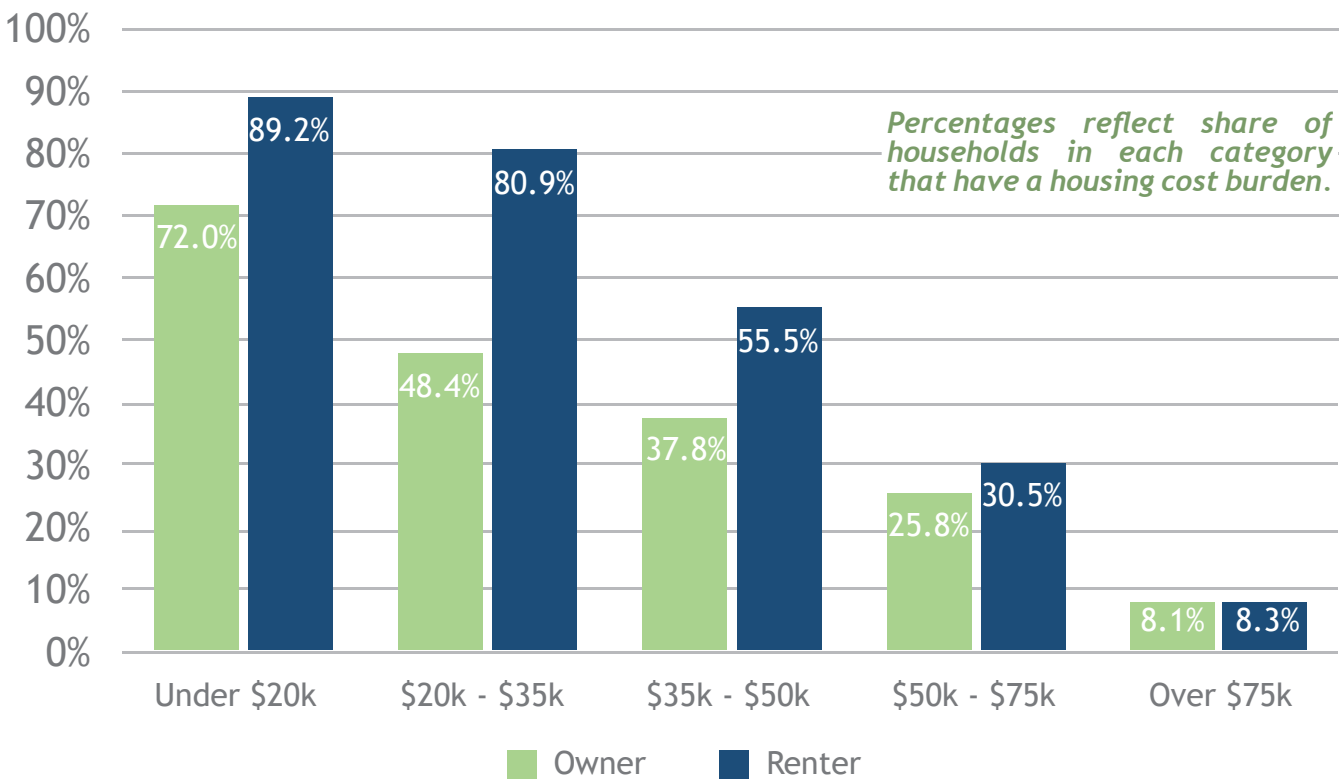
**Map 1: Housing cost burden by county (2015)<sup>5</sup>**



The affordability challenges for owners and renters are different. Renters are significantly more likely to be housing cost burdened – largely because they have lower incomes than homeowners on average. In fact, housing cost burden is directly tied to income: households with low and very low incomes face the greatest challenges in meeting the needs of their family budget (**Figure 3**).

If housing consumes half of the budget for a family earning \$30,000 per year, there is very little remaining for other needs, such as food, education, child care, transportation, and medical expenses. For higher income households, there is much more leeway, even when housing costs exceed 30%.

**Figure 3: Housing cost burden in Virginia by housing tenure and income (2015)<sup>6</sup>**



***Cost burden affects more than four out of five Virginia renters with incomes below \$35,000 per year.***

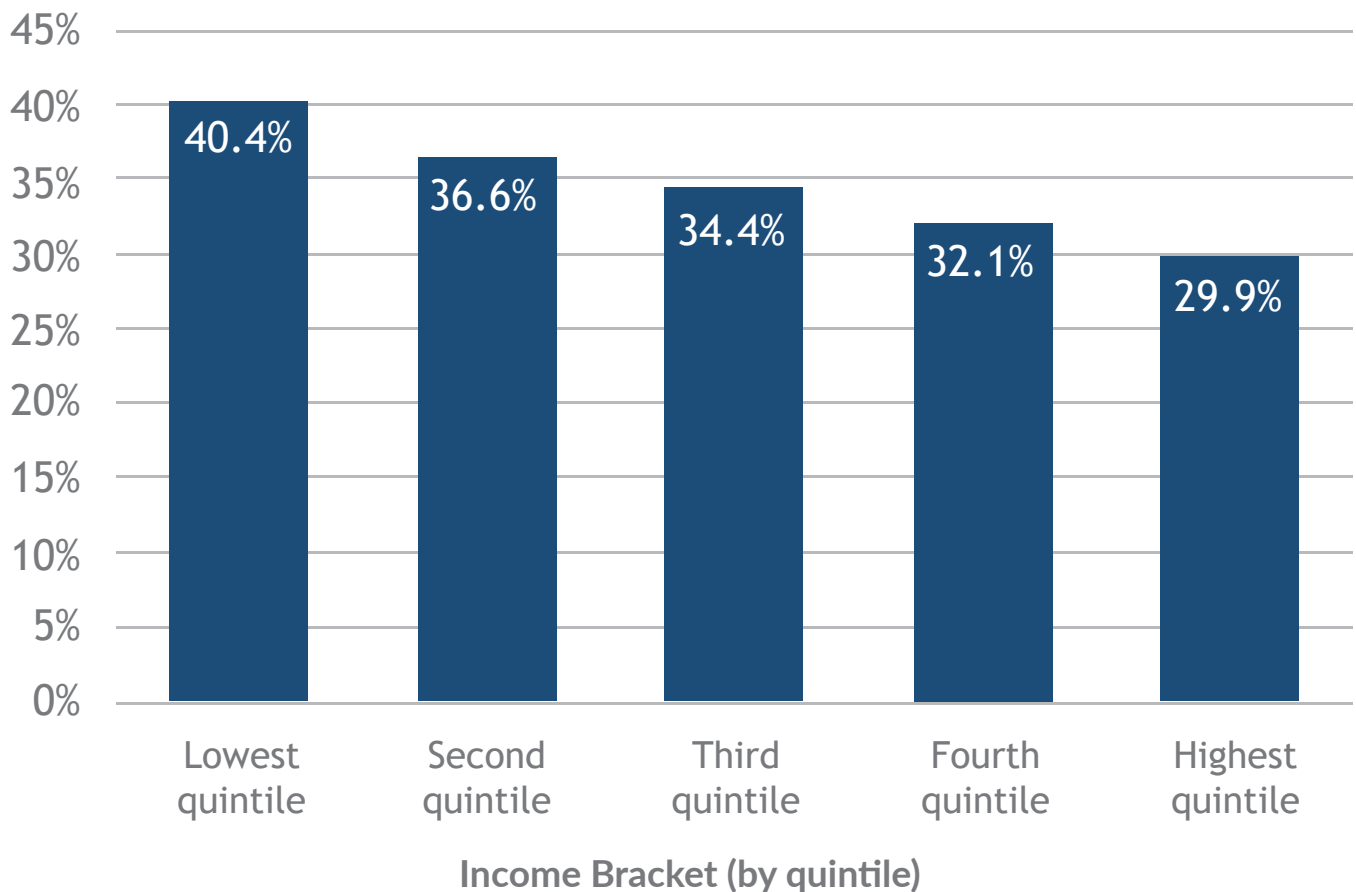


## WHO NEEDS AFFORDABLE HOUSING?

Everyone deserves a safe and affordable home, but not all families have the same needs. Affordability is the relationship between the cost of housing and the income (ability to pay) of the household that needs it. For households with extremely low incomes, affordability means housing that can be obtained for a very low cost. Such housing must be deeply subsidized, usually through a publicly funded program. For a family with a low-to-moderate income, affordability may be just below the level that is provided by the private market.

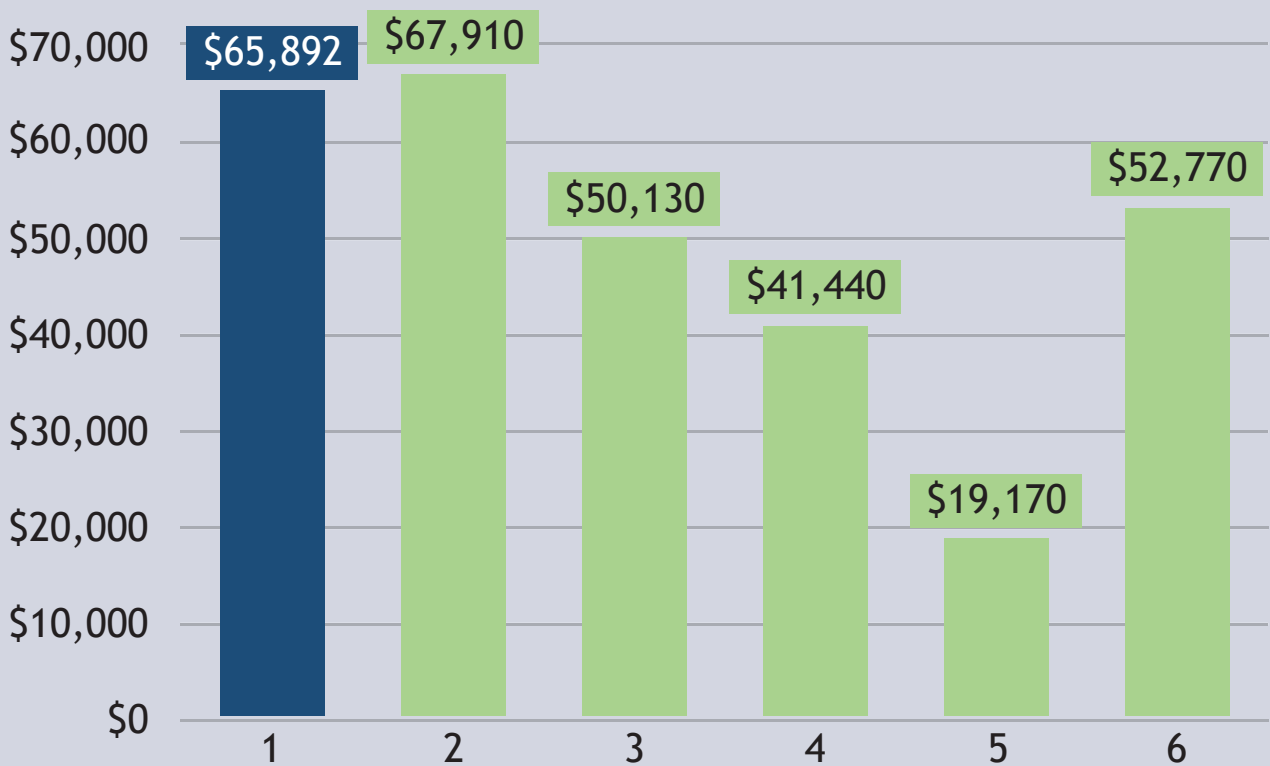
One common myth is that only the poorest families in our communities face severe housing cost challenges and need assistance. The reality is that a significant number of moderate income families struggle to find housing they can afford. Many fail in this effort and find themselves in housing that strains their budget. Over the last decade, incomes have been flat for many workers while housing costs have continued to rise, increasing the challenge of finding affordable housing.

**Figure 4: Average Share of Household Income Spent on Housing in the US (2015)<sup>7</sup>**



### Using “Paycheck to Paycheck” to Understand Affordability in Your Community

Housing Virginia’s SOURCEBOOK provides a tool that allows you to compare the incomes of 70 job classifications to housing costs in your community. In the “Paycheck to Paycheck” tool, you can select occupations and chart the average income against the cost of homeownership or rental housing in your city or county. The example below shows affordability for five types of workers in James City County near Williamsburg. In this case, none of the workers listed have sufficient income to afford the median priced home in the area.



- 1: Minimum income needed to afford median cost of sold unit
- 2: Elementary school teachers
- 3: Firefighters
- 4: Licensed practical / vocational nurses
- 5: Cashiers
- 6: Police / sheriff's patrol officers

Incomes below the minimum (1) signify cost burden or spending over 30% of income for sold housing. The minimum income is based on median sold housing for James City County (based on 78 units sold in the 1<sup>st</sup> quarter of 2018):<sup>8</sup>

**Median monthly cost to own: \$987**  
**Median sales price: \$191,500**

## How Do COMMUNITIES BENEFIT FROM AFFORDABLE HOUSING?

Affordable housing benefits communities in many ways. First, a community places a value on the welfare of its residents, and seeing that all its citizens – from seniors to children – have safe and stable housing is an important component. Having this security allows households to participate more fully and directly in the economic, social, and civic life of the community as well as to be more successful in achieving personal goals.

Inclusive and diverse communities are advantageous not just for the individuals who benefit, but for the community as a whole. Research and experience shows that diverse communities boost innovation that leads to economic growth and creates greater access to jobs. “Creative communities” that strive to include a wide range of household types have been shown to foster entrepreneurship, community-

based economic activity, and educational improvement.

Recent research by Raj Chetty at Harvard demonstrates the dramatic impact that concentrated poverty has on the chances for a child to be successful economically.<sup>9</sup> The opportunity to grow up in a diverse “community of opportunity” makes all the difference in that child’s ability to get a good education, avoid the criminal justice system, go to college, get a good job, and achieve personal goals.

The availability of quality housing has also been shown to have strongly positive effects on health.<sup>10</sup> This results in longer lifespans for people who grow up and live in communities with decent housing, high-quality schools, and access to good jobs.

### Understanding the Economic Impact of Housing in Your Community

*Affordable housing, like all forms of housing, also contributes to the economic health and vitality of the community. Housing is an important part of Virginia’s economy, contributing nearly \$48 billion to the state economy in 2015 – making it the 6<sup>th</sup> largest private sector in the state.<sup>11</sup> During 2015, housing activity directly supported 314,000 jobs that paid over \$14 billion in wages.*

*In partnership with the Housing Research Center at Virginia Tech, Housing Virginia has created an economic impact tool that can calculate the economic benefit of housing development in your community. Visit SOURCEBOOK on the Housing Virginia website to use the Economic Impact Calculators to better understand the impact of housing in your city or county.<sup>12</sup>*

*Example economic impact for 50 garden-style new construction apartments in Waynesboro:*

Short Term (During Construction)		Long Term (Annually, After Completion)	
Estimated Job Creation	98.18	Estimated Jobs Supported	2.68
Estimated Gross Fiscal Revenues	\$362,948.89	Estimated Gross Fiscal Revenues	\$85,507.68
Estimated Local Economic Growth	\$5,849,302.50	Estimated Local Economic Growth	\$378,795.36

## 2. LEGAL FRAMEWORK FOR INCLUSIONARY HOUSING IN VIRGINIA

### INTRODUCTION

Virginia was the first state where a municipality adopted an inclusionary zoning ordinance. As a result, its legal landscape for inclusionary zoning is more finely articulated than many other states. In designing ordinances, municipalities and housing advocates must consider state court precedent and Virginia statutes, as well as case law from federal courts. These legal standards set the parameters for inclusionary zoning ordinances.

A handful of urbanized municipalities in Virginia have a good measure of flexibility to craft ordinances to meet local needs. For all other communities, state law imposes greater constraints. This section provides an overview of the legal framework that guides the exercise of local discretion in the design of inclusionary zoning ordinances.

### WHAT PLANNERS SHOULD KNOW: INCLUSIONARY ZONING TO AFFIRMATIVELY FURTHER FAIR HOUSING

#### *What Are the Legal Origins of Inclusionary Housing?*

Inclusionary zoning is federally recognized as a potential remedy to complaints brought under the federal Fair Housing Act (FHA). Congress enacted the FHA in 1968 to ban housing discrimination and end the dual housing market that had left the United States' metropolitan areas starkly segregated.<sup>13</sup> Racially discriminatory zoning was one of the manifestations of housing bias that precipitated litigation under the FHA in the early years of the statute.

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Around the same time that Fairfax County, Virginia and Montgomery County, Maryland passed pioneering inclusionary zoning ordinances, suburban municipalities across the country were going to great lengths to block the development of affordable housing that would have contributed to residential racial integration. During the 1970s, federal appellate courts recognized in two separate cases that exclusionary zoning policies and practices had unjustified discriminatory effects and violated the FHA.<sup>14</sup>

Both the U.S. Supreme Court<sup>15</sup> and the U.S. Department of Housing and Urban Development (HUD)<sup>16</sup> have recognized that evidence of discriminatory intent is not necessary to prove a violation of the FHA. Instead, HUD has urged the use of a burden-shifting framework to assess whether there has been a violation of the FHA because of the unjustified discriminatory effect or disparate impact of a policy or practice.

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**Evidence of discriminatory intent is not necessary to prove a violation of the Fair Housing Act.**

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### What is Disparate Impact?

To demonstrate *disparate impact*, a plaintiff or complaint must first show that a policy or practice has or would predictably have disproportionate adverse impact on and/or perpetuates the segregation of a protected class, such as African Americans or persons with disabilities.<sup>17</sup> A defendant or respondent has the opportunity to show that its policy is necessary to serve one or more substantial, legitimate, nondiscriminatory interests.<sup>18</sup> A plaintiff must also prove that an alternative policy could serve those interests with less discriminatory effect.<sup>19</sup>

Inclusionary zoning is a valuable component of a jurisdiction's overarching system of land use regulations and can prevent localities from barring access to individuals and families protected from discrimination by the FHA. Inclusionary zoning regulations are combined with other efforts to ensure that adequate land is zoned to accommodate affordable housing development in a range of neighborhoods.

Nonetheless, inclusionary zoning should not be thought of as a shield against liability under the Fair Housing Act for exclusionary zoning, either through an intentional discrimination theory or a discriminatory effects theory. Whether a municipality has violated the FHA through exclusionary zoning is generally determined in the context of specific rejected development proposals. Additionally, some jurisdictions have administered inclusionary zoning ordinances in ways that triggered FHA litigation, such as by requiring residency preferences in tenant selection.<sup>20</sup>

### What is Affirmatively Furthering Fair Housing?

Inclusionary zoning is considered a critical strategy for *affirmatively furthering fair housing* (AFFH). In addition to its prohibition on discrimination, the

Fair Housing Act obligates the Secretary of HUD, as well as other federal agencies that administer housing and community development programs, to affirmatively further fair housing. The courts, and later Congress, applied this duty to state and local governments and public housing authorities that administer federal housing and community development funds.<sup>21</sup>

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**HUD defined affirmatively furthering fair housing as “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities...”**

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In a recent regulation, HUD defined affirmatively furthering fair housing as “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.”<sup>22</sup> The HUD regulation requires recipients of certain funds, including the Commonwealth of Virginia and many of its municipalities, to conduct an Assessment of Fair Housing and then to take actions to overcome the fair housing issues unearthed through that process.<sup>23</sup>

HUD has identified inclusionary zoning as one of the kinds of actions that will frequently be an appropriate means of addressing fair housing issues.<sup>24</sup> Both the non-discrimination provisions of the FHA and the duty to affirmatively further fair housing incentivize municipalities to adopt inclusionary zoning ordinances.

## WHAT PLANNERS SHOULD KNOW: VIRGINIA CASE LAW AND STATUTES

### *Constitutional Challenge to Virginia's First Inclusionary Zoning Ordinance*

Fairfax County became the first municipality in the United States to enact an inclusionary zoning ordinance in 1971. Shortly after, developers sought to invalidate the law and avoid the obligation to provide affordable units within their projects. Their challenge reached the Virginia Supreme Court in 1973. In *Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc.*, the court put a swift end to the county's strategy for increasing access to affordable housing for its residents.<sup>25</sup> The court's decision rested on two grounds.

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### Two different statutes grant variable degrees of local discretion to municipalities adopting inclusionary zoning ordinances.

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First, the court held that the county did not have the authority to enact the ordinance under Virginia's zoning enabling act.<sup>26</sup> **In order for inclusionary zoning to be valid, the General Assembly must either grant that power of local governments, either explicitly or implicitly, or the exercise of that power must be necessary to the operation of the local government.**<sup>27</sup> The court in *Board of Supervisors of Fairfax County* found that the county's ordinance was "socio-economic zoning" and an attempt "to control the compensation for the use of land and the improvements thereon," which were not authorized by the zoning enabling act.<sup>28</sup> This decision was a setback, but one that was within the power of the General Assembly to fix.

Second, the Virginia Supreme Court held that the ordinance was taking of private property

for a public purpose without just compensation in violation of Section 11 of Article 1 of the Constitution of Virginia.<sup>29</sup> It is important to note that Fairfax County's ordinance did not provide for a density bonus or any other incentives to offset the cost of providing affordable units. The Virginia Supreme Court has not assessed the validity of an inclusionary zoning ordinance that attempts to provide just compensation through the provision of incentives, but inclusionary zoning efforts have proceeded under the assumption that such an ordinance is valid. The General Assembly cannot determine that inclusionary zoning is not a taking by statute.

It is important to note that developers have used litigation to challenge inclusionary zoning ordinances from around the country in federal court. Those attempts, which have included takings theories similar to that accepted by the Virginia Supreme Court, have been unsuccessful.<sup>30</sup> At the same time, neither the U.S. Supreme Court nor the U.S. Court of Appeals for the Fourth Circuit, which includes Virginia, have decided whether inclusionary zoning is valid under the U.S. Constitution.<sup>31</sup>

### *Virginia Statutes on Inclusionary Zoning: A Variable Regulatory Environment*

Two different statutes grant variable degrees of local discretion to municipalities adopting inclusionary zoning ordinances. In 1989, the General Assembly enacted **VA. CODE ANN. §15.2-2304**, which authorized certain municipalities to adopt inclusionary zoning ordinances, or "affordable dwelling unit" (ADU) ordinances.<sup>32</sup> Six localities were exclusively permitted under the statute: the Counties of Albemarle, Arlington, Fairfax, and Loudoun and the Cities of Alexandria and Fairfax.

The statute places no restrictions on the magnitude of the set-aside requirement, the depth of affordability of units, and the extent of any incentives included in an affordable dwelling unit

ordinance. Subject to the constraint that incentives must be sufficient to compensate developers for the cost of providing affordable units, these municipalities have latitude to adopt ordinances that meet local needs.

**Subject to the constraint that incentives must be sufficient to compensate developers for the cost of providing affordable units, these municipalities have latitude to adopt ordinances that meet local needs.**

In the next legislative session, the General Assembly adopted **VA. CODE ANN. §15.2-2305**, which authorizes affordable dwelling unit ordinances in all other municipalities in Virginia. Unlike § 15.2-2304, this statute takes a prescriptive approach to empowering localities to engage in inclusionary zoning. A developer’s obligation is generally only triggered by an application for rezoning or for a

special exception, sometimes called a special use permit. This means that if a development is permitted as of right under existing zoning, a municipality typically cannot apply an inclusionary zoning requirement to it.<sup>33</sup> Additionally, the statute caps set-aside and density bonus requirements at 17% and 30% and, if reduced, provides that they must be reduced in tandem to maintain that ratio.<sup>34</sup> Finally,<sup>35</sup> municipalities must impose an affordability term of not less than 15 years and not more than 50 years for affordable dwelling units.<sup>36</sup>

Nonetheless, municipalities still have a fair amount of discretion for two reasons. First, nothing in the statute restricts the income levels at which municipalities can require that units are made affordable. Requiring that units be made affordable at lower income levels is one of the most powerful ways in which municipalities can strengthen inclusionary zoning. Second, a 17% set-aside requirement is not low by national standards. In fact, municipalities like Fairfax County that have more latitude generally have not opted for more ambitious set-aside requirements to avoid stifling overall development.

	VA. CODE ANN. §15.2-2304	VA. CODE ANN. §15.2-2305
Where	Localities permitted to adopt inclusionary zoning ordinances: Counties of Albemarle, Arlington, Fairfax, and Loudoun; Cities of Alexandria and Fairfax	Authorizes affordable dwelling unit ordinances in all Virginia municipalities
When	Incentives must simply be sufficient to compensate developers for cost of providing affordable units	Developer’s obligation triggered by application for rezoning or special use permit
What	No restrictions on set-asides, density bonuses, depth of affordability, or extent of incentives	Caps set-aside and density bonus requirements at 17% and 30%; if reduced, must maintain this ratio
How Long	No restrictions on affordability terms	Municipalities must impose an affordability term between 15 and 50 years

### *Alternatives to Inclusionary Zoning*

Inclusionary zoning is not the only strategy that local governments around the country use to capture some of the publicly created value from changes in zoning and land use regulations and utilize the captured value to create affordable housing. Additionally, development impact fees are common nationally, and proffers are ubiquitous in Virginia.

### **Takeaways for Inclusionary Zoning Program Design in Virginia**

*State and federal law in Virginia provide a multi-layered landscape for municipalities considering the adoption of inclusionary zoning ordinances. The Counties of Albemarle, Arlington, Fairfax, and Loudoun and the Cities of Alexandria and Fairfax have wide discretion to design their inclusionary zoning ordinances and apply them in a broad array of contexts. They should, nonetheless, be sure to provide incentives to developers to compensate them in order to avoid takings challenges under the Constitution of Virginia. Other municipalities within the Commonwealth have a narrower range of options in designing ordinances and should hew closely to the requirements of VA. CODE ANN. §15.2-2305.*

*At present, federal constitutional law does not place more restrictions on Virginia municipalities than does Virginia law through advocates and local officials should continue to monitor federal case law developments as judicial treatment of inclusionary zoning remains an evolving field. By taking this legal context into account, municipalities in Virginia can develop and implement strong inclusionary zoning ordinances that are built to last.*

**Mandatory impact fees** are contribution requirements imposed upon developers by local governments to compensate for costs associated with proposed projects. Where new development is projected to increase the need for affordable housing, many states allow municipalities to assess impact fees that are then used to develop affordable housing. In Virginia, the statutes that authorize impact fees for road improvements and public facilities do not expressly authorize the imposition of impact fees for affordable housing.<sup>37</sup>

Courts have held that the General Assembly has not generally provided municipalities with the authority to impose impact fees.<sup>38</sup> Following the decision in *Kansas-Lincoln LC*, the General Assembly provided Arlington County with the authority to assess commercial linkage fees.

In a **proffer**, a developer voluntarily agrees to comply with a condition or set of conditions to obtain a land use approval that a municipality has the direction to withhold. The provision of affordable housing, either through onsite units or through a fee paid into an affordable housing trust fund, is an example of a type of condition that might be included in a proffer.

In 2016, the General Assembly passed a new statute partially curtailing the use of proffers in Virginia. **VA. CODE ANN. §15.2-2303.4** prohibits localities from requesting or accepting “unreasonable” proffers. In defining whether a proffer is reasonable, the statute looks to whether the impact addressed by the proffer is “specifically attributable” to the proposed development. The statute creates a rebuttable presumption that off-site proffers, which would include fees, are unreasonable. Certain portions of the state, which are generally high density and/or located near mass transit, are exempt from the new law.



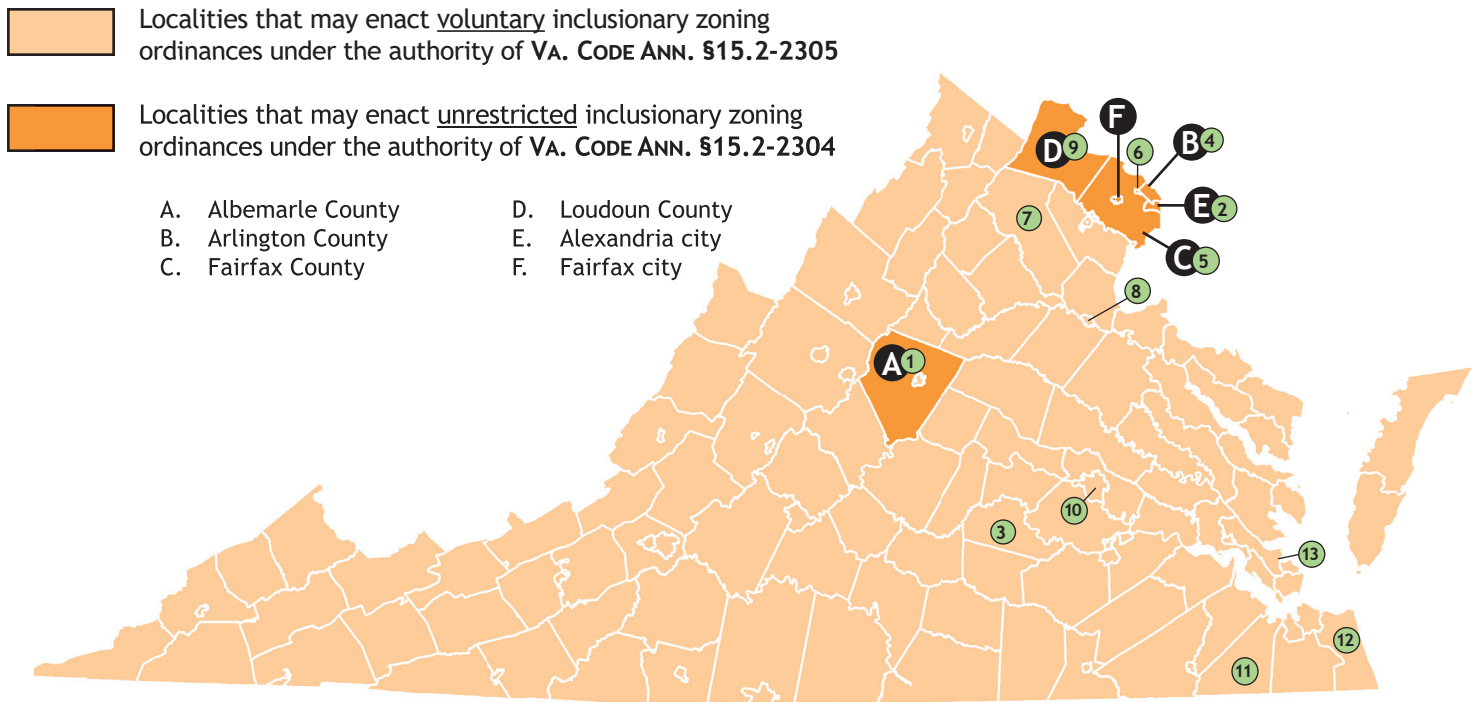
# 3. EXAMPLES AND BEST PRACTICES

## INTRODUCTION

Inclusionary zoning is not a prescribed set of regulations, but rather an adaptable array of mechanisms that can be modified to address local policy goals. Inclusionary housing programs are localized in nature, but they should also be viewed within the context of their state regulatory environment and their jurisdiction’s broader affordable housing programs. The program

examples in this section demonstrate how local inclusionary policies vary based on housing needs, regional markets, and depth of the state-level enabling legislation. To achieve their affordable housing objectives, localities have also designed these programs to blend with other best practices. The case studies that follow offer an examination of effective inclusionary zoning programs both in Virginia and throughout the nation.

**Map 2: Inclusionary Zoning Requirements Across Virginia**



- Localities with any type of inclusionary or ADU ordinance
- |                     |                        |                         |
|---------------------|------------------------|-------------------------|
| 1. Albemarle County | 6. Falls Church city   | 11. Suffolk city        |
| 2. Arlington County | 7. Fauquier County     | 12. Virginia Beach city |
| 3. Amelia County    | 8. Fredericksburg city | 13. York County         |
| 4. Arlington city   | 9. Loudoun County      |                         |
| 5. Fairfax County   | 10. Richmond city      |                         |

Data from *Housing Virginia PLAYBOOK* (2016)

## 1) FAIRFAX COUNTY, VIRGINIA



### Legal Context

Fairfax County developed the first inclusionary zoning program in the nation in 1971, which featured a flat, mandatory set-aside of 15 percent in any development with more than 50 units.<sup>39</sup> After the Virginia Supreme Court struck down the original ordinance, Fairfax enacted a second version in 1990 under the authority of VA. CODE ANN. §15.2-2304.

The Affordable Dwelling Unit (ADU) Program offers developers a density bonus for designating an agreed-upon share of new units to families making 50 to 70 percent of Area Median Income (AMI).

To complement the ADU program, a second, voluntary program was established for high-rises. The Workforce Dwelling Unit Program encourages affordable housing development in high-density areas. In exchange for offering WDUs, developers can receive a density bonus up to 20 percent. The program targets higher income households than ADUs, ranging from 80 to 120 percent of AMI.<sup>40</sup>

Overall, Fairfax's program is notable for its evolution over time to accommodate the needs of development stakeholders and avoid slowing the rate of high-density multifamily construction.

### Program Highlights

<b>Sliding Scale of Requirements</b>	Developers receive a larger density bonus if they produce more ADUs. The ADU Program applies its mandatory set-asides only to smaller multifamily buildings with fewer than four floors and no elevators. <sup>41</sup>
<b>Density Bonuses and Set-Asides</b>	In return for the calculated number of ADUs, builders receive a density bonus of up to 20 percent. Single-family developments are eligible for up to a 20 percent density bonus if at least 12.5 percent of units are affordable. Developers of multifamily buildings with fewer than four floors have the option of up to a 10 percent density bonus for providing 6.25 percent of units as ADUs or up to a 20 percent bonus for providing 12.5 percent of units as ADUs. <sup>42</sup>
<b>Affordability Terms and Integration of ADUs</b>	The affordability period is 30 years, which is renewable for for-sale ADUs and nonrenewable for rentals. ADUs must be dispersed throughout the community and an outsider should not be able to discern an ADU based on marked differences in unit quality. <sup>43</sup>
<b>Income Limits</b>	One-third of a development's rental ADUs are restricted to households with incomes that are less than 50 percent of AMI, though the remaining two-thirds are set aside for households whose incomes are less than 70 percent of AMI. <sup>44</sup> The buyer's household income cannot exceed 70 percent of AMI.
<b>Alternatives</b>	Land dedication to the county is allowed by the zoning code but has not been employed by developers to date. Payment of in-lieu fees is also permitted but has not been used by developers. The third alternative is provision of some portion of the required ADUs with a buy-out option for others. <sup>45</sup>

### Program Impact

The ADU Program has been extremely effective in dispersing ADUs throughout Fairfax County, creating affordable housing that is available in communities that may have otherwise excluded low-income residents. Between 1992 and 2011, 1,112 renter-occupied units and 1,336 owner-occupied units were developed under the program.<sup>46</sup>

Part of Fairfax's success is the result of the ADU Task Force, which is a group of stakeholders charged with monitoring the program and suggesting reforms as necessary. The group includes builders, developers, and housing advocates to ensure equal representation and encourage consensus.



***The Reserve at Fairfax Corner<sup>47</sup>***  
*21 affordable one-bedroom apartments*  
*20 affordable two-bedroom apartments*



***The Ridgeleigh at Van Dorn Metro<sup>48</sup>***  
*12 affordable one-bedroom apartments*  
*11 affordable two-bedroom apartments*

## Fairfax's Blended Affordable Housing Program

*In addition to the ADU and WDU Programs, Fairfax County also administers a range of corollary programs that encourage affordable housing development. The county maintains an affordable housing trust fund and promotes Mixed-Use Centers and Transit-Oriented Development as a way of providing affordable housing near employment centers.*

*The county government maximizes utilization of federal and state housing assistance programs and facilitates use of tax credits allocated by the Virginia Housing Development Authority. Fairfax County also administers funds for Community Development Authorities for revenue collections and bond proceeds for affordable housing and mixed-use development, which may include Tax Increment Financing.*

## 2) MONTGOMERY COUNTY, MARYLAND



### Legal Context

Maryland is significantly less restrictive than Virginia in its delegation of local land use control for inclusionary zoning. Its enabling legislation is among the oldest in the nation, and localities such as Montgomery County have used it to develop pioneering inclusionary zoning codes. The Maryland code broadly authorizes density bonuses to create affordable housing units and enables restrictions on the use, cost, and resale of housing.<sup>49</sup> This broad authorization enables significant local variation on inclusionary housing practices.

### Program Overview

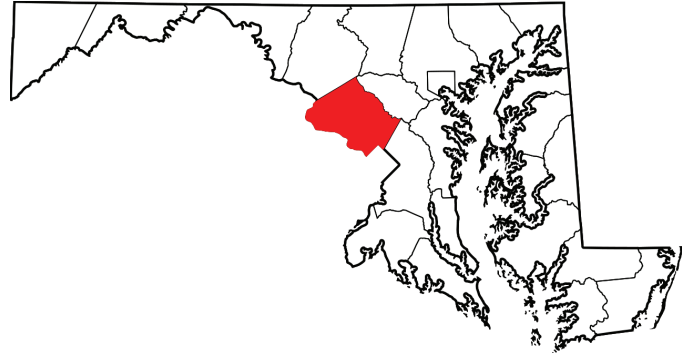
The Moderately Priced Dwelling Unit (MPDU) Program adopted by Montgomery County in 1973 has served as a national policy model and has produced more affordable housing units than any other program in the country.<sup>50</sup> While the ordinance has undergone significant modifications since its adoption, the current iteration of the regulation is described in the chart below.

### Program Highlights

<b>Mandatory Set-Aside</b>	Regardless of whether a developer elects to use a density bonus, for all developments with more than 20 units, 12.5 percent of new units must be designated as MPDUs.
<b>Density Bonuses and Set-Asides</b>	Developers may receive a 22 percent density bonus if 15 percent of new units are designated as MPDUs. <sup>51</sup> The density bonus provides an incentive for building more than the required 12.5 percent of MPDUs.
<b>Affordability Terms</b>	Rental MPDUs currently have an affordability term of 99 years, ensuring that the units are permanently affordable. For-sale MPDUs have an affordability period of 30 years, though the price control period is renewable upon resale. <sup>52</sup>
<b>Income Limits</b>	Income limits are based on AMI and vary by household size, tenure, and unit type. To purchase for-sale MPDUs, qualifying buyers must meet the minimum gross household income requirement of \$35,000. Maximum household income eligibility thresholds vary by household size, and the maximum household income limit is typically 60 to 70 percent less than the corresponding median household income. <sup>53</sup>
<b>Alternatives</b>	Developers delivering fewer than the number of MPDUs required by the ordinance may transfer ownership of land or unfinished lots to the locality for development of MPDUs. A full or partial waiver may be acquired. Developers may provide MPDUs at an alternative site in the same planning policy area. Finally, an in-lieu fee may be paid to the Housing Initiative Fund, an affordable housing trust fund. <sup>54</sup>

### Program Impact

The Montgomery County inclusionary zoning program is widely regarded as one of the most effective in the nation. It has produced more than 13,000 affordable housing units that have been sold or rented to low- and moderate-income households. Although only 1,200 of the for-sale units remain under price controls, all stakeholders agree that these units remain relatively affordable. Developers view the policy as part of the cost of doing business in the locality and have come to accept the MPDU Program as a standard part of the development process.<sup>55</sup>



### Montgomery County's Blended Affordable Housing Program

*In 2012, Montgomery County acknowledged the need to broaden their affordable housing programs beyond inclusionary zoning to spur development.<sup>56</sup> The Montgomery County Department of Housing and Community Affairs now administers a Housing Acquisition and Preservation Fund, which is a capital fund that provides direct construction subsidies in the form of affordable housing loans to for-profit and nonprofit developers.*

*DHCA also provides special financing and short-term loans at competitive interest rates and maximizes HOME and CDBG fund use for homeless and special needs housing. The department allows Payment in Lieu of Taxes, offering real property tax abatements for housing projects and a Right of First Refusal to certain development groups to match residential contracts to preserve affordable housing. DHCA develops rental agreements with multifamily purchasers that agree to provide a percentage of affordable units for a specified term.*

*Finally, DHCA provides focused neighborhood assistance in select geographic submarkets, providing concentrated housing code enforcement, facade grants, and below-market interest rate loans and grants for housing rehabilitation.*

### 3) CITY OF IRVINE, CALIFORNIA



#### Legal Context

In response to extremely high housing costs, California has become a leader in affordable housing policies. Its well-known statewide inclusionary zoning program is the California State Density Bonus Law (California Government Code 65915). The law mandates provision of affordable housing units when developers apply for a density bonus. Ten percent of the developed units must be designated as low-income housing, five percent must be

designated very low-income housing, and ten percent must be designated for moderate-income housing.<sup>57</sup> The amount of the density bonus is set on a sliding scale, depending on what percentage of affordable housing is provided by the developer. California's inclusionary zoning policies survived a takings challenge after they were denied review by the Supreme Court in 2016. In 2003, the City of Irvine passed its Inclusionary Housing Ordinance.

#### Program Highlights

<b>Requirements</b>	The provisions of the Inclusionary Housing Ordinance are applicable to all developments with 50 or more units, regardless of zoning. Participation in the inclusionary housing program is voluntary for all developments with fewer than 50 units, and is incentivized by density bonuses. <sup>58</sup>
<b>Density Bonuses and Set-Asides</b>	The density bonuses provided are set on a sliding scale pursuant to the State Density Bonus Law. For a development with over 50 units, 15 percent of those units must be designated as affordable housing. Five percent of units must be affordable as rental or ownership units to very low-income households earning less than 50 percent of the county median income, 5 percent of units must be affordable as either rental or ownership units to households earning 51 percent to 80 percent of the county median income, and 5 percent of units must be affordable to households earning 81 percent to 120 percent of the county median income.
<b>Other Incentives</b>	Waivers and reductions in standards are permitted if they may prevent the project from being built at the permitted density and are not related to public health and safety. The maximum parking requirements are also reduced. All for-sale affordable units may be marketed through the Redevelopment Agency or Land Trust. Financial incentives may be provided if additional affordable units are provided. Also, reduction in overall inclusionary requirements is allowable if an increased number of lower income units are provided. <sup>59</sup>
<b>Affordability Terms</b>	The duration of affordability is 30 years. <sup>60</sup>
<b>Alternatives</b>	Only projects with fewer than 50 units are eligible for alternatives. These include donating an in-lieu fee to the City's affordable housing trust, converting existing market rate housing to affordable units for a period of at least 40 years, and transferring control of units to a nonprofit housing agency. <sup>61</sup>

### *Program Impact*

Adoption of the inclusionary housing policy had not slowed housing production in the City because a range of incentives and alternatives are offered. Between 2003 and 2013, approximately 362 affordable units have been built and/or approved as a result of the Inclusionary Housing Ordinance.<sup>62</sup>



### **City of Irvine's Blended Affordable Housing Program**

*To meet targets for affordable housing development, the City of Irvine blends its Inclusionary Zoning Program with other housing programs. The City maintains a GIS database of residential and mixed-use sites and ensures sufficient residential capacity is maintained at those sites during commercial development.*

*The City coordinates with the Irvine Community Land Trust to administer CDBG, HOME, public, and private grants. Additionally, the City of Irvine promotes mixed-use and transit-oriented development as well as single room occupancy (SRO) units for extremely low-income households in its zoning ordinance and administers grants to incentivize development.*

*The city government also provides direct construction subsidies in the form of deferred payment loans and grants to developers. Finally, the jurisdiction has a program to preserve publicly-assisted affordable housing projects at risk of conversion to market-rate housing.*

## 4. RECOMMENDATIONS AND GUIDELINES

### INTRODUCTION

In their purest form, inclusionary housing ordinances simply require that developers of new housing units in a locality reserve a certain share for low- to moderate-income families, in exchange for density bonuses and other incentives. In practice, however, these policies can take years to properly design and adopt. The following chapter provides a range of tools and strategies to help implement local inclusionary housing programs in Virginia.

### BUILDING SUPPORT

#### *Demonstrating Need*

Localities should begin their planning process by investigating the need for affordable housing in their community. In many cases, local and regional housing nonprofits will have already compiled useful statistics for decision-makers to use as a starting point. The scope of this research may range from a simple briefing to a comprehensive housing needs assessment. At the very least, officials should be able to summarize recent trends in the number of low-income and cost burdened households compared with the number of new housing units that are available to these families.

Useful data measures for designing inclusionary housing programs:

- Households by income range (% of AMI)
- Households with housing cost burden
- Rent asked / mortgage amounts
- Fair Market Rents
- Number of affordable housing units
- Number of new housing units
- Land available for new development
- Property assessment values

When possible, localities should use digital mapping programs to spatially analyze how and where housing needs are distributed. For example, this type of assessment could reveal that most new affordable units are constructed in low opportunity areas with few jobs and poor transit access. In such a case, planners may consider incentivizing new inclusionary units in higher opportunity communities.

#### *Public and Stakeholder Input*

Inclusionary housing ordinances are more likely to succeed when they receive broad-based support from the community. Policies designed without public input, even with the best of intentions, will generate scrutiny from citizens and developers alike.

Localities should begin with outreach efforts that clearly make the case for addressing affordable housing needs and illustrate how an inclusionary housing program would begin to solve the problem. According to the *Inclusionary Housing Advocacy Toolkit* published by the Non-Profit Housing Association of Northern California, proponents should be able to succinctly answer these questions:<sup>63</sup>

- What is inclusionary housing?
- Why do we need inclusionary housing?
- Why is inclusionary housing useful?
- How does inclusionary housing work?

The strongest opposition may come from developers and builders. However, with proactive engagement and education, they might also become useful allies. Localities should offer a positive working relationship with developers and demonstrate



how incentives and cost-offsets will be beneficial. Developers may find inclusionary zoning attractive for three major reasons:<sup>64</sup>

1. Providing affordable units may assuage public concerns that private development does not act in the community's best interest.
2. High-density development, which is generally incentivized in an inclusionary program, is usually more profitable.
3. A well-designed inclusionary policy includes provisions that make the development process predictable and streamlined.

Planners and local officials should also consider incorporating inclusionary housing into the existing community planning process. For example, localities may choose to pursue an inclusionary zoning strategy when updating their comprehensive plan. Such a discussion should be part of a larger conversation on housing needs.

One possible output of public sessions is a draft "statement of purpose" for an inclusionary program. Guiding stakeholders to collectively agree on *what* the policy attempts to accomplish is a strong foundation for later negotiations on *how* the policy is eventually implemented.

### Statement of Purpose From Fairfax County, Virginia Inclusionary Housing Ordinance:

*The Affordable Dwelling Unit Program is established to assist in the provision of affordable housing for persons of low and moderate income. The program is designed to promote a full range of housing choices and to require the construction and continued existence of dwelling units affordable to households whose income is seventy (70) percent or less of the median income for the Washington Standard Metropolitan Statistical Area.*

*An affordable dwelling unit shall mean the rental and/or for sale dwelling unit developments, where the dwelling unit type for the affordable dwelling unit is different from that of the market rate units, the affordable dwelling units should be integrated within the developments to the extent feasible, based on building and development design. In developments where the affordable dwelling units are provided in a dwelling unit type which is the same as the market rate dwelling units, the affordable dwelling units should be dispersed among the market rate dwelling units.*



### Getting the Messaging Right

Supporters of inclusionary housing should be prepared for contentious debates about the role of government involvement in the housing market. Below are common concerns raised by opponents and those skeptical of inclusionary housing, along with recommended responses.

<p><b><i>“Government should not force private developers to help address housing affordability.”</i></b></p>	<p>Every person pays taxes that help fund transportation, schools, parks, and economic growth. In turn, these public investments make communities more valuable and attract private development. It is fair to ask developers to adjust their plans to ensure that families of all incomes can live in the high-value places they helped create.</p>
<p><b><i>“Private developers should not have to give up their profits by providing affordable units.”</i></b></p>	<p>Inclusionary programs in Virginia bestow incentives (e.g., density bonuses) that offset the costs of providing below-market units. Local governments already require developers to “forego profits” in the form of building codes and proffers that create safe homes and good infrastructure. Inclusionary housing is a logical extension of this relationship and helps create high-quality communities by guaranteeing homes for our police officers, teachers, and other working class families.</p>
<p><b><i>“Builders will just cover the costs of inclusionary housing by raising rents and sales prices.”</i></b></p>	<p>Inclusionary housing requirements usually include incentives to developers to offset the costs of providing below market rate units. Sometimes these incentives are not enough. In such cases, developers must still set competitive prices to attract new buyers. Any residual costs of compliance with an inclusionary ordinance are generally absorbed by lower land prices or reductions in developers’ profits.<sup>65</sup></p>
<p><b><i>“Developers won’t build any more housing under inclusionary ordinances, limiting the supply of new construction and raising prices for everyone.”</i></b></p>	<p>The most comprehensive empirical research on inclusionary housing suggests that it does not discourage the construction of new housing and does not significantly affect market-rate housing costs.<sup>66</sup> Properly designed inclusionary programs take local market conditions into account to maintain – or increase – new construction.</p>



## DRAFTING EFFECTIVE POLICIES

Inclusionary housing policies not designed for the specific environments and economies of their localities are at best ineffectual and at worst counterproductive. Local governments should carefully consider their staffing capacities, assess housing markets, and recognize demographic trends before drafting any inclusionary housing ordinances. This section offers a series of best practices, along with a suite of policy options, to help local decision-makers create successful and sustainable inclusionary housing programs.

### *Mandatory vs. Voluntary*

Under Virginia law, inclusionary ordinances can be written in three different ways:

1. **Mandatory** – Applies only to localities specified in VA. CODE ANN. §15.2-2304. Ordinance may require affordable units or alternative fees for all new residential development.
2. **Mandatory upon upzoning** – Available to all localities. Ordinance may require that any residential development requesting an upzoning or special exemption require affordable units or alternative fees, as prescribed by the terms in VA. CODE ANN. §15.2-2305.
3. **Voluntary** – Available to all localities. Ordinance may incentivize the *optional* construction of affordable units through density bonuses or other measures.

Mandatory programs make up 83 percent of all inclusionary policies nationwide and are generally more effective at generating affordable units than voluntary programs.<sup>67</sup> While voluntary programs typically underperform their mandatory counterparts, they can be successful when local government staff conduct proactive outreach to developers.

### *Set-Aside Requirements*

Strong inclusionary housing policies include provisions on how, when, and where affordable units are built, including:

#### **Set-Aside Ratio**

- While the localities specified in VA. CODE ANN. §15.2-2304 have wide authority to set the ratio of ADUs per market rate units, all other localities are limited to 17 percent or fewer.
- While specific set-aside requirements should be developed according to the needs and conditions of local markets, most of the largest inclusionary programs set the ratio between 10 percent and 20 percent.<sup>68</sup>
- Sliding set-aside requirements set in proportion to the allowable density bonus are often employed by localities and are permitted in VA. CODE ANN. §15.2-2305.

### **Higher versus Lower Set-Asides**

*As the set-aside percentage increases, the average per-unit revenue of a development declines. The revenue loss potential is greater for buildings with units that generate higher market rate rents. The set-aside requirement can significantly impact development feasibility and may be offset with packages of subsidies, grants, and tax abatements in addition to standard density bonuses permitted in the inclusionary zoning code.<sup>69</sup> Please refer to the Glossary of Strategies for Inclusionary Development for the suite of supplemental incentives to blend with the inclusionary zoning ordinance.*

### Design Standards

- To avoid social stigmatization, all affordable units built under an inclusionary program should be indistinguishable from market rate units in terms of build quality and materials.

### On-Site or Off-Site

- If considering off-site units as a compliance option, localities should carefully determine where and how these units might be located. Developers may choose to site affordable developments in neighborhoods with lower land values to seek a better bottom line. If the municipality has a goal to equitably site new affordable housing, these off-site units should be steered toward areas with access to quality education, employment, and transit.

### Construction Timeline

- Some inclusionary ordinances require affordable units to be finished in their entirety before certificates of occupancy are granted for the final market rate units. Such provisions help guarantee that developers do not back away from their obligations.

### Program Targeting

One of the most important aspects of an inclusionary housing ordinance is defining the terms of eligibility for development projects as well as income limits. Effective programs address:

#### Income Limits

- Under Virginia law, localities have wide authority to set the income ranges for families to live in inclusionary units. These limits are most commonly defined as a value that is a certain percentage below the Area Median Income as defined by HUD (e.g., 60 percent of AMI).

- Localities should determine what income levels, if any, are currently not served by the market or other affordable housing programs.
- In some large markets, the AMI may be high enough to consider deeper targeting of affordability than originally thought. For example, 80 percent of AMI in Fairfax County for a family of four is \$70,150. In such cases, the program might consider setting the maximum eligibility at 50 percent AMI or lower.
- To promote income diversity, inclusionary ordinances may reserve a certain portion of affordable units for different income ranges. For example, the policy could mandate that all ADUs be targeted at 80 percent of AMI or below, but one half must be reserved for 50 percent of AMI or below.

### Project Size Threshold

- While a locality may theoretically impose an ADU requirement for all proposed developments, most ordinances exclude projects below a certain size.
- Restrictions are commonly defined by a minimum number of units (usually 10), but may also include minimum acreage or density.<sup>70</sup>

### Marketing to Eligible Buyers

- Inclusionary programs should offer instructions for how to advertise ADUs and select residents. Ordinances may include language on selection processes, income verification, waitlist prioritization, and other elements.

### Providing Incentives

Without incentives to counterbalance the costs of providing affordable units, inclusionary housing policies are more likely to depress overall production.<sup>71</sup> Nearly all mandatory programs have

built-in incentives, but there is no single prescription for success — these offsets are diverse in terms of mechanism and scope and depend heavily on local environments. Below are some of the most common and effective incentives localities employ as part of their inclusionary programs:

### Density Bonus

- Almost every inclusionary program links the number of affordable units with an allowable increase in the number of units a developer can build on a property.<sup>72</sup> This is a market-responsive incentive designed to either encourage developer participation in voluntary programs or offset the impacts of mandatory policies to prevent takings claims. These increases usually go above and beyond what is permitted by-right.
- **Bonuses should be designed to work in conjunction with existing zoning. For example, localities should not undercut inclusionary development by separately permitting equal density without the affordability requirement.**
- For all Virginia municipalities not specified in VA. CODE ANN. §15.2-2304, density bonuses are capped at 30 percent.

### Expediting Permits and Applications

- Localities may also choose to streamline the administrative permitting and inspection process for builders. Projects that build inclusionary units could have their submissions moved to the “front of the line” to save time and costs.

### Fee Waivers

- Local governments can incentivize development by reducing or waiving fees for permits and other applications. Real estate tax abatement is another option.

## Higher versus Lower Density Bonuses

*Financing a housing development becomes more difficult when below market rate units are included. One way to offset this challenge is by permitting more units than normally allowed under the project’s existing zoning. This “density bonus” allows the developer to build more apartments or homes in exchange for setting some aside for modest income families. The increased density can provide additional revenue to help the project succeed.*

*Density bonuses are effective as an incentive in areas where market rate development is already occurring and offer modest incentives where development is low to moderate. High density development is only feasible in certain submarkets, and incentives may only be effective in these submarkets. Problematically, extreme density increases may raise construction costs and parking requirements, adding significant up-front costs that may make development infeasible. A sliding density bonus is often employed to accommodate developer need.<sup>73</sup>*

### Alternative Design Standards

- In cities or communities with strict development standards and architectural guidelines, localities can lessen these burdens to make the production of affordable units less costly.

### Lower Parking Requirements

- In urbanized areas, localities can lower the cost of production by reducing the requirement for parking spaces in new developments.

### *Guaranteeing Perpetual Affordability*

A thorough inclusionary housing policy includes specific provisions about the minimum terms of affordability, along with measures detailing how the unit will remain affordable for that period.

#### **Affordability Term**

- Except for the municipalities specified in VA. CODE ANN. §15.2-2304, localities in Virginia must specify an affordability term between 15 and 50 years. Most inclusionary housing programs nationwide have terms of at least 50 years, and longer terms are generally more effective.<sup>74</sup>

#### **Affordability Guarantees**

- To ensure that inclusionary properties are sold to buyers that meet the prescribed income limits, localities generally use deed restrictions or covenants.<sup>75</sup>
- Inclusionary ordinances commonly have the affordability requirement reinstated upon any future transfer or sale of the property.

### *Alternatives*

Highly effective inclusionary programs offer alternative means for developers to satisfy affordability requirements. Flexible policies help ensure that developers meaningfully contribute to the locality's housing needs, rather than encouraging them to build elsewhere. Alternative mechanisms also help account for changes in future variables like market booms or busts, land values, and material costs. Common examples include:

#### **Fees in Lieu of Development**

- Allows developers to provide payment to the locality rather than constructing affordable

units. May be allowed as a right or only if the developer demonstrates that the inclusionary requirement is overly burdensome.

- Income can be allocated to a municipal housing trust fund for affordable unit production by redevelopment authorities or nonprofit CDCs.

#### **Municipal or Nonprofit Right to Purchase**

- Some ordinances permit developers to transfer their affordable units to a local housing authority or nonprofit provider upon completion. This helps guarantee perpetual affordability of the ADUs.

#### **Land Dedication**

- Provides option for developer to pay the fee via transferring land of equal value to the municipality. Land may then be used to build affordable units or sold to fund a housing trust.

### *Program Administration*

Inclusionary housing programs should not be implemented and then left stagnant. To become successful and sustainable, localities have a responsibility to maintain these programs for perpetuity. Local governments should determine:

- Whether primary administrative and oversight duties are done by municipal employees or contracted out to a housing nonprofit.
- What and when program data are collected, such as number of units produced, number of applicants, and applicant demographics.
- How often program updates are provided to staff, elected officials, and the public. Progress reports may be short annual updates, supplemented with comprehensive reviews every five years.

## 5. STRATEGIES FOR INCLUSIONARY DEVELOPMENT

### OPTIMIZING THE EFFECTIVENESS OF INCLUSIONARY ZONING PROGRAMS

The key to designing an effective set of policies to stimulate inclusionary development is finding the type and mix of incentives to blend with an inclusionary zoning program. Public policy for inclusionary development must enable developers to create a profitable product, and inclusionary zoning policies depend on market rate development to be successful.

For localities with moderate rates of market rate development, inclusion of other subsidies and incentives ensure profitability for developers and increase the utility of inclusionary zoning programs. Policy makers must employ optimal levels and combinations of development incentives and other affordable housing strategies to form a broader housing plan that supports inclusionary development.

### DRAFTING EFFECTIVE POLICIES

Subsidies reduce the required equity or debt needed to fund construction. When hard construction and financing costs are reduced enough to offset the lost economic value associated with the below-market units, developers can afford to pay the market price for land. These construction subsidies can supplement developer capital and make large-scale affordable housing projects feasible.

#### *Forgivable Zero Interest Loans, Grants, and Bonds*

Community Development Financial Institutions (CDFIs) and other lenders may administer loans and grants that require no payments, have zero percent interest, and forgive a percentage of the loan balance annually. Sources include general revenue funds, state funding, general obligation bonds, tax-

exempt multifamily bonds, HOME and Community Development Block Grants (CDBG), and a diverse array of other funding sources.

#### *Low-Interest Loans*

Low-interest loans are administered by various private and quasi-governmental agencies. This includes the Virginia Housing Development Authority (VHDA), which enables local governments and developers to bundle loan resources for developments serving extremely low-income and very low-income households. VHDA's Workforce Housing Loan Program provides a yearly subsidy to lower the interest rates for multifamily rental strategic lending programs and offers taxable bonds for the acquisition, construction, and rehabilitation of mixed-use and mixed-income developments.

#### *Tax Increment Financing Incentives*

Tax Increment Financing (TIF) is a public financing method that is used as a subsidy for redevelopment and other community improvement projects. In Tax Increment Financing, property tax revenue increases are diverted from a defined area or district toward an economic development project or public improvement project. These funds may be collected by an affordable housing trust fund and distributed as grants to developers constructing low-income housing.

#### *Housing Districts*

Housing districts are a common type of Tax Increment Financing district. The funds collected by the TIF in a housing district must be dedicated for affordable housing development. Local governments can only use a TIF to pay for certain

qualifying improvements such as land acquisition, demolition, infrastructure improvements, and site grading, but in a housing district, the building itself is an eligible cost.

### *Public Land Dedication*

Publicly owned land may be an ideal site for affordable housing development, and localities planning to dispose of public or surplus land may offer public agencies or nonprofits first right of refusal for building housing on the site. Local jurisdictions may further facilitate land transfer by reducing prices or donating public land, on the condition that a portion or all the land is used for affordable housing.

## PROPERTY TAX INCENTIVES

Property tax incentives can be used to preserve the affordability of a rental property by providing financial incentives to owners. These may encourage property owners to remain in government subsidy programs, or they may be applied as part of a financing package for owners seeking to purchase a subsidized property.

They may also be employed as a means of persuading unsubsidized owners to maintain affordable rents for a limited period if rents and property values are trending up, creating an “affordability bridge” for a ten- to fifteen-year period while more permanent options for affordable housing construction are pursued.

### *Property Tax Assessment Freeze*

Tax freeze programs offer developers with qualifying affordable housing units an exemption from the increase in real estate taxes from the time of application for the exemption. These freeze a property’s assessed value for a period of time after construction or rehabilitation of affordable housing.

### *Property Tax Rate Reduction or Relief*

Tax reduction and relief programs offer developers who qualify for the program partial or full tax exemption from real estate taxes. They base the assessment on actual income and expenses rather than on potential market rate figures, and/or by adjusting the assessment formula (for example, through variations on the capitalization rate) to lower the assessed value of a property. Localities may waive taxes on affordable units owned by a nonprofit corporation.

### *Payment in Lieu of Taxes*

A Payment in Lieu of Taxes (PILOTs) is an agreement between a jurisdiction and a nonprofit or for-profit developer, business, or landowner that substitutes a negotiated payment for annual real estate taxes that are traditionally due on the property. The PILOT is a payment made to compensate a local government for some or all of the property tax revenue that it loses because the affordable housing project is exempted from local taxes. The fee is in recognition of services provided to the affordable housing complexes by the locality.

## OTHER AFFORDABLE HOUSING STRATEGIES

These affordable housing strategies are developed and promoted by localities and go beyond the suite of affordable housing incentives funded by the US Department of Housing and Urban Development or those administered by the Commonwealth of Virginia.

### *Housing Trust Funds*

A Housing Trust Fund (HTF) is an affordable housing production program managed by the jurisdiction that funds the production or preservation of affordable housing through acquisition, new construction, and rehabilitation or funds housing supportive services. The HTF receives ongoing dedicated sources of public funding or donations, committing dedicated revenue to appropriate projects.



### *Housing Impact Fees*

Impact fees are typically charged on new, market rate housing development based on an assessment of the extent to which the development of new market rate housing generates additional demand for affordable housing. Studies assess the extent to which new market rate development attracts higher income households who will spend more on retail and services, creating new low-income jobs for individuals in need of affordable housing.

### *Commercial Linkage Fees*

This form of impact fee is assessed on new commercial developments or major employers based on the need for workforce housing generated by new and expanding businesses. Revenues are used to help fund affordable housing opportunities within commuting distance to the employment center. Commercial linkage fees balance growth in non-residential development by stimulating affordable residential development for works or supporting demand for services.

### **Legality of Impact Fees**

*In Virginia, the statutes that authorize impact fees for road improvements and public facilities do not expressly authorize the imposition of impact fees for affordable housing.<sup>76</sup> Courts have held that the General Assembly has not generally provided municipalities with the authority to impose impact fees.<sup>77</sup> Following the decision in Kansas-Lincoln LC, the General Assembly provided Arlington County with the authority to assess commercial linkage fees.*

### *Community Land Trusts*

A community land trust (CLT) is a nonprofit corporation that acquires and manages land for affordable housing development. Community land trusts sell homes to low- and moderate-income

families at an affordable, below-market rate but retain ownership of the land. They enter into a shared-equity agreement with the homeowner, who leases the land for a nominal fee. The buyers agree to perpetuate property affordability by reselling at below-market rates.

### **Thomas Jefferson Community Land Trust (TJCLT)**

*The TJCLT is the first CLT in the Commonwealth. It was formed in 2008 but had a slow start because of the precipitous decline in homebuilding following the housing-driven recession of 2008-2012. TJCLT has rebounded and produced a number of new homes in partnership with an active local Habitat for Humanity affiliate. The focus is on households with incomes below 80% of AMI, which is \$63,900 for a 4-person household in the service area. The CLT includes both new and existing homes. All of its activity thus far has been in the City of Charlottesville, but it has plans to expand into Albemarle County and eventually to the entire Planning District.*

### *Land Banks*

Land banks are governmental entities focused on conversion of vacant, abandoned, and tax delinquent properties into a productive stock of affordable housing. These are a response to the growing trend of vacancy and abandonment, aiming to turn liabilities into assets. Land banks are created as public entities by local ordinance.

### *Proffers*

A proffer is an offer made by a developer at their own initiative or in a response to a request from a local government to provide affordable housing units not required by law in exchange for zoning and land use approvals that the local government



has the discretion to withhold. This provision of discretionary approval in exchange for affordable housing is an alternative to inclusionary zoning policies and faces a lower level of judicial scrutiny.

### *Right of First Refusal*

A “right of first refusal” is a policy that ensures a qualified nonprofit developer, a government agency, or the development’s tenant association can purchase a subsidized rental housing property when the owner decides to stop participating in the subsidy program. Sometimes, this right is triggered only when the owner sells the property or under other circumstances, and facilitates the transfer of subsidized properties to new owners who commit to maintaining long-term affordability.

### *Subsidy Programs*

The safest way to develop and maintain affordable units is to enable participation in government subsidy programs. These include the Low Income Housing Tax Credit (LIHTC) Program, project-based Housing Choice Vouchers, the Rental Assistance Demonstration Program, and the USDA – Rural Development Program, among others.

## **Proffer Law in Virginia**

*In 2016, the General Assembly passed a new statute partially curtailing the use of proffers in Virginia. VA. CODE ANN. §15.2-2303.4 prohibits localities from requesting or accepting “unreasonable” proffers. In defining whether a proffer is reasonable, the statute looks to whether the impact addressed by the proffer is “specifically attributable” to the proposed development. The statute creates a rebuttable presumption that off-site proffers, which would include fees, are unreasonable. Certain portions of the state, which are generally high density and/or located near mass transit, are exempt from the new law.*

## 6. RESOURCE DIRECTORY

### HOUSING VIRGINIA RESOURCES

Housing Virginia provides a wide range of tools to help localities understand and tackle their housing affordability challenges:

**SOURCEBOOK** is an online clearinghouse of socioeconomic and housing data for all counties, cities, and regions in Virginia. SOURCEBOOK also includes calculators to estimate housing costs and economic impacts from housing development. Updated quarterly.

**PLAYBOOK** is a comprehensive inventory of affordable housing policies and programs within Virginia, including ADU ordinances. PLAYBOOK provides the name and description of the affordable housing policy program and, optionally, additional details about the policy or program, including local contact. Updated biennially.

**Overcoming NIMBYism: New Tools for Positive Community Engagement** is a training series developed and hosted by Housing Virginia to help housing providers, local government officials, and advocates successfully combat “Not In My Back Yard” (NIMBY) reactions to affordable housing developments. The workshop covers how to use transparent communication, dispel myths with facts, and find community supporters. Contact Housing Virginia if you are interested in an Overcoming NIMBYism session in your community.

### DATA SOURCES

Advocating and designing strong inclusionary housing measures requires useful data. The following federal and state resources provide valuable raw data and analysis tools to examine housing needs at the local level:

**The U.S. Census Bureau** collects, aggregates, and releases a wide body of data on population,

socioeconomic, and housing figures. Three major survey products are the most useful for local decision makers:

1. **U.S. Census:** Population and housing data collected on every person and household in America every 10 years. Data is available at all geographic levels, including tract, block group, and block (the smallest unit of Census geography). Useful for conducting small-scale community analysis with low margins of error. Next collection will be in 2020.
2. **American Community Survey:** Covers same topics as the Census but conducted every year by sampling a portion of the total population. Data is available in **1-year estimates** for localities with populations of at least 65,000 people and rolling average **5-year estimates** for all localities. ACS data is available down to the block group level, but with higher margins of error. Useful for tracking trends over time at the neighborhood scale or larger. The 2015 estimates, released in 2016, are the most recent data.
3. **American Housing Survey:** Collects household-level statistics on housing costs, financing, physical home conditions, and many other housing related measures. Useful for analyzing detailed large-scale housing trends. Only available for selected metropolitan statistical areas (MSAs). The following MSAs in Virginia were recently surveyed by the AHS:
  - Washington-Arlington-Alexandria, DC-VA-MD-WV MSA (2015, 2013)
  - Richmond, VA MSA (2013)
  - Virginia Beach-Norfolk-Newport News, VA-NC MSA (2011)

All of these Census data products can be accessed via the *American FactFinder* tool: [factfinder.census.gov](https://factfinder.census.gov)

*The U.S. Department of Housing and Urban Development* (HUD) maintains datasets on housing assistance programs and related housing information. Within the HUD User Data Portal, the following datasets could help administrators design an inclusionary program:

- Fair Market Rents (FMR)
- Income Limits (based on AMI and family size)
- Location and number of:
  - Public housing units
  - Low Income Housing Tax Credit projects
  - Housing Choice Vouchers
  - HUD Insured Multifamily Properties
  - CDBG and HOME activity
- Affirmatively Furthering Fair Housing (AFFH) Data and Mapping Tool
  - Interactive web-based map that synthesizes Census and HUD data on the distribution of population demographics, housing assistance, job availability, poverty, and other socioeconomic factors.
  - Provides data at the Census tract level to explore disparities within municipalities.

The HUD User Data Portal can be accessed here: [www.huduser.gov/portal/home.html](https://www.huduser.gov/portal/home.html)

## INCLUSIONARY HOUSING RESOURCES

1. **InclusionaryHousing.org**: A project of the Grounded Solutions Network, this website offers a complete toolkit for users that helps answer basic and advanced questions about inclusionary housing. Includes information on messaging, policy design, and implementation.

2. **Lincoln Institute of Land Policy**: An independent, nonpartisan organization that promotes creative and innovative uses of land policy to improve the quality of life for all citizens. Provides research, working papers, policy briefs, and educational opportunities on inclusionary housing and related mechanisms.
3. **National Housing Conference**: A nationwide nonprofit that promotes affordable housing issues through advocacy, research, and strategic messaging. Hosts conferences, webinars, and other education sessions for practitioners. NHC's Research Library includes numerous publications on inclusionary zoning.

## VIRGINIA HOUSING RESOURCES

*The Virginia Housing Directory* is a comprehensive list of housing providers and associated resources throughout the entire Commonwealth, maintained and updated by VHDA. Includes addresses and contact information for federal and state agencies, city and county resources, and nonprofit organizations.

[www.vhda.com/BusinessPartners/GovandNon-Profits/Pages/Virginia-Housing-Directory.aspx](https://www.vhda.com/BusinessPartners/GovandNon-Profits/Pages/Virginia-Housing-Directory.aspx)

## 7. REFERENCES AND FOOTNOTES

<sup>1</sup> Adapted from Stromberg, Brian and Mindy Ault. *Paycheck to Paycheck – More than Housing*. January 2017. Washington, D.C.: National Housing Conference.

<sup>2</sup> Housing Virginia. *Meeting Housing Needs in Rural Virginia: Trends, Needs, Gaps, Solutions*. April 2017.

<sup>3</sup> For a full list of cost burden figures by locality and MSA, visit Housing Virginia’s SOURCEBOOK: [www.housingvirginia.org/sourcebook](http://www.housingvirginia.org/sourcebook)

<sup>4</sup> Housing Virginia SOURCEBOOK (Cost Burden). Accessed April 2017.

<sup>5</sup> U.S. Census. 2011-2015 American Community Survey, Virginia.

<sup>6</sup> Housing Virginia SOURCEBOOK (Cost Burden). Accessed April 2017.

<sup>7</sup> Adapted from Stromberg, Brian and Mindy Ault. *Paycheck to Paycheck – More than Housing*. January 2017. Washington, D.C.: National Housing Conference.

<sup>8</sup> Housing Virginia SOURCEBOOK (Paycheck to Paycheck). Accessed April 2017.

<sup>9</sup> Chetty, Raj, Nathaniel Hendren, and Lawrence Katz. “The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment.” 2016. *American Economic Review* 106(4): 855-902.

<sup>10</sup> Saul, Amanda et al. *Health in Housing: Exploring the Intersection Between Housing and Health Care*. 2016. Portland, OR: Center for Outcomes Research and Education (CORE) and Enterprise Community Partners, Inc.

<sup>11</sup> Governor’s Housing Policy Advisory Council. *2015 Impact of the Virginia Housing Industry*.

<sup>12</sup> Housing Virginia SOURCEBOOK (Economic Impact Calculator for Residential New Construction). Accessed April 2017.

<sup>13</sup> 42 U.S.C. § 3601.

<sup>14</sup> Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977); U.S. v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974).

<sup>15</sup> See Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2518 (2015).

<sup>16</sup> 24 C.F.R. § 100.500.

<sup>17</sup> 24 C.F.R. § 100.500(c)(1).

<sup>18</sup> 24 C.F.R. § 100.500(c)(2).

<sup>19</sup> 24 C.F.R. § 100.500(c)(3).

<sup>20</sup> See Complaint, Fair Housing Justice Center, Inc. v. Town of Eastchester, No. 7:16-cv-09038 (S.D.N.Y. Nov. 21, 2016).

<sup>21</sup> See Otero v. New York City Housing Authority, 484 F.2d 1122, 1129-30 (2d Cir. 1973); 42 U.S.C. § 5304(b)(2).

<sup>22</sup> 24 C.F.R. § 5.152.

<sup>23</sup> 24 C.F.R. § 5.154.

<sup>24</sup> Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710, 43726 (proposed July 19, 2013).

<sup>25</sup> 198 S.E.2d 600 (Va. 1973).

<sup>26</sup> *Id.* at 602.

<sup>27</sup> This last basis for validity is unlikely to be applicable in the context of inclusionary zoning.

<sup>28</sup> *Board of Supervisors of Fairfax County*, 198 S.E.2d at 602.

<sup>29</sup> *Id.*

<sup>30</sup> See, e.g., Alto Eldorado Partnership v. County of Santa Fe, 634 F.3d 1170 (10th Cir. 2011); 2910 Georgia Avenue LLC v. District of Columbia, 2017 WL 598469 (D.D.C. 2017); Home Builders Assoc. of Greater Chicago v. City of Chicago, 2016 WL 5720482 (N.D. Ill. 2016). Other theories include substantive due process, procedural due process, and unconstitutional conditions theories. *Id.*

<sup>31</sup> See California Building Industry Assoc. v. City of San Jose, 351 P.3d 974, 996 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016).

<sup>32</sup> This section solely addresses the impact of Virginia statutes on inclusionary zoning and not on related strategies like development impact fees and proffers. Separate statutory frameworks apply in those contexts. See, e.g., VA. CODE ANN. §§ 15.2-2296-2298 (addressing proffers); VA. CODE ANN. § 15.2-2329 (addressing impact fees).

<sup>33</sup> There is an exception to this general rule allowing a municipality to require a set-aside if a developer submits a site plan or subdivision plat with a density of greater than one unit per acre within an approved sewer area. *Id.*

<sup>34</sup> VA. CODE ANN. § 15.2-2305(B)(3).

<sup>35</sup> Additional limits on discretion apply but are less likely to significantly affect inclusionary zoning program design.

<sup>36</sup> VA. CODE ANN. § 15.2-2305(E)(6).

<sup>37</sup> VA. CODE ANN. § 15.2319; VA. CODE ANN. § 15.2329.

<sup>38</sup> See *Kansas-Lincoln LC v. County Board of Arlington*, 66 Va. Cir. 274 (Va. Cir. Ct. 2004).

<sup>39</sup> Levy, N. et al. 2013. *Expanding Housing Opportunities Through Inclusionary Zoning: Lessons from Two Counties*. Department of Housing and Urban Development.

<sup>40</sup> Fairfax County General Regulations Article 2, Part 11, Section 2-1100.

<sup>41</sup> Fairfax County General Regulations Article 2, Part 8, Section 2800.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Levy, N. et al. 2013. *Expanding Housing Opportunities Through Inclusionary Zoning: Lessons from Two Counties*. Department of Housing and Urban Development.

<sup>47</sup> Photo courtesy of Equity Residential: [www.equityapartments.com](http://www.equityapartments.com)

<sup>48</sup> Photo courtesy of The Ridgeleigh at Van Dorn Metro and Klingbeil Capital Management: [www.kcmpts.com](http://www.kcmpts.com)

<sup>49</sup> Levy, N. et al. 2013. *Expanding Housing Opportunities Through Inclusionary Zoning: Lessons from Two Counties*. Department of Housing and Urban Development.

<sup>50</sup> Montgomery County, Maryland. 2012b. 2004 Montgomery County Code, as amended.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> Levy, N. et al. 2013. *Expanding Housing Opportunities Through Inclusionary Zoning: Lessons from Two Counties*. Department of Housing and Urban Development.

<sup>56</sup> Zapana, V. 2012. Montgomery tries to spur affordable housing. *The Washington Post*.

<sup>57</sup> California Code 65915.

<sup>58</sup> City of Irvine 2013-2021 Housing Element. Retrieved from: <http://legacy.cityofirvine.org/civica/filebank/blobload>.

[asp?BlobID=22223](#)

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> Non-Profit Housing Association of Northern California. 2003. *Inclusionary Housing Advocacy Toolkit*. San Francisco, CA: Non-Profit Housing Association of Northern California. Home Builders Association and Non-Profit Housing Association of Northern California.

<sup>64</sup> Jacobus, Rick. 2015. *Inclusionary Housing: Creating and Maintaining Equitable Communities*. Cambridge, MA: Lincoln Institute of Land Policy.

<sup>65</sup> Jacobus, 2015.

<sup>66</sup> Sturtevant, Lisa. 2016. *Separating Fact from Fiction to Design Effective Inclusionary Housing Programs*. Washington, DC: National Housing Conference.

<sup>67</sup> *Ibid.*

<sup>68</sup> Hickey, Robert, Lisa Sturtevant and Emily Thaden. 2014. *Achieving Lasting Affordability through Inclusionary Housing*. Cambridge, MA: Lincoln Institute of Land Policy.

<sup>69</sup> Williams, Stockton, et al. 2016. *The Economics of Inclusionary Development*. Washington, DC: Urban Land Institute.

<sup>70</sup> Thaden, Emily. 2014. *Developing an Inclusionary Housing Program*. Portland, OR: National Community Land Trust Network.

<sup>71</sup> Schuetz, Jenny, Rachel Metzger and Vicki Been. 2008. *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, DC and Suburban Boston*. New York, NY: Furman Center for Real Estate and Urban Policy.

<sup>72</sup> Jacobus, 2015.

<sup>73</sup> Stockton et al., 2016.

<sup>74</sup> Jacobus, 2015.

<sup>75</sup> Regional Inclusionary Housing Initiative. 2014. *Issues to Consider When Creating an Inclusionary Housing Ordinance*. Chicago, IL: Business and Professional People for the Public Interest.

<sup>76</sup> VA. CODE ANN. § 15.2319; VA. CODE ANN. § 15.2329.

<sup>77</sup> See *Kansas-Lincoln LC v. County Board of Arlington*, 66 Va. Cir. 274 (Va. Cir. Ct. 2004).





This guidebook was made possible with the  
generous support of:

The Bob & Anna Lou Schaberg Fund  
at the Virginia Nonprofit Housing Coalition

Virginia Housing Development Authority

The Housing for Virginians Foundation

