

Inclusionary Housing

Related Tools: Village Plan Alternative Subdivision, Conservation Subdivision, Infill Development, Feature-Based Density and Lot Size Averaging, Transfer of Density Rights

Inclusionary housing ordinances are one mechanism, among many, intended to spur affordable housing development within the private market. The typical argument justifying why the private market does not create affordable units is that it is not economically viable given the economics of housing production. Inclusionary housing ordinances work to overcome that economic barrier and establish incentives that may make affordable housing development feasible. These incentives may be in the form of zoning exemptions and density bonuses in return for units reserved for low and moderate income households and may assist communities to meet their fair share of regional affordable housing needs.

The ordinances facilitate mixed-income development, where a portion of the new units created are reserved for qualified low to moderate income households, while the remaining units are sold or rented at or above market value. Developments should be designed with a common aesthetic, making the affordable units blend in and be visually unidentifiable from the rest. Thus, inclusionary zoning helps avoid the segregation of affordable or low-income housing, allowing a more diverse and appealing housing stock to be created.

Inclusionary housing ideally generates housing for low to moderate income households, elderly households, and disabled persons. It may be difficult or impossible for inclusionary zoning to serve the lowest or very-low income households since the level of cross-subsidization from the market rate units to make a unit affordable to a very-low income household may be too great (APA 2004). It does however, help establish the workforce housing needed to keep community employees, such as firefighters, nurses, teachers, recent graduates and young professionals in the community where they work. The current deficit of workforce housing in New Hampshire has a negative impact on business growth and expansion and economic development throughout the State and within local communities.

According to Paul Fisher and Jo Patton in “Expanding Housing Options through Inclusionary Zoning” the benefits derived from inclusionary housing ordinances include:

- New incentives for developers,
- Greater housing options for all municipal residents,
- Increased supply of workforce housing, and
- Increased supply of employees to bolster the local employment and economy.

The greatest key to the success of inclusionary housing ordinances are the incentives provided. The incentives must compensate the developer for the foregone profits that market rate development would have brought in the affordable units. Incentives to developers can include density bonuses, expedited permitting, zoning exemptions, waived or reduced application or impact fees, reduced parking provisions, or other financial benefits. Additionally, regulations must permit forms of construction or development, such as higher densities, smaller lots or units, multi-family development, or the ability to have multiple structure types in a single project proposal, which cost less than conventional single-family development for inclusionary housing to work. (Ray 2001)

Inclusionary housing developments typically are allowed through either conditional use permit from the planning board or special exception by the zoning board of adjustment. Although inclusionary development could be permitted by right, establishing the inclusionary housing provision as a conditional use or special exception, the municipality is afforded a greater level of project review. Vesting this review in the planning board as a conditional use permit consolidates the permitting process and control over the terms of the project (as opposed to having the zoning board of adjustment grant a special exception in addition to planning board review of subdivision or site plan requirements). This may also reduce the required permitting time, which in turn lowers development costs, helping to keep the price paid by future residents down.

Communities must also decide where to permit inclusionary housing development or whether to permit it in all zones where residential uses are permitted. If specific areas are to be designated for inclusionary zoning the community must consider the most appropriate locations. Marginal lands should not be selected as the primary permitted location. While land may be less expensive in remote areas communities must also consider access to services of interest to developers and future residents. These services may include water and sewer systems, availability of undeveloped land, retail services, and possible employment.

Inclusionary ordinances should include a clause that ensures compatible architectural style and integration of units. Subdivisions or developments created under an inclusionary housing ordinance ought to be designed in a harmonious and equitable manner that will not segregate households based on income. The low-income units should not be singled out in a manner that identifies them as being less desirable than the market rate units. Ideally, the affordable units should be dispersed throughout the proposed development.

In order for the local planning board to ensure they have sufficient information on any given inclusionary housing proposal, they may add related application data requirements to the subdivision and site plan review regulations. These additional provisions may require:

- Calculation of the number of permitted units under the inclusionary ordinance instead of conventional development of the property.
- Provision of data demonstrating affordability requirement compliance – complete cost estimation.
- Descriptions of the affordable units including size, type and cost.
- Identification of any variances or special exceptions required to make the units affordable.
- Provision of any agreements with outside agencies.

Other than issues directly related to the affordability of units, the planning board should not impose data or procedural requirements that exceed those of other developments.

Appropriate Circumstances and Context for Use

Communities must recognize a specific need for affordable or workforce housing, in the municipality or region, within their master plan before they can implement an inclusionary housing ordinance. To assist with this requirement, the Regional Planning Commissions each prepare a housing needs assessment for their regions that analyzes the housing supply, demand and affordability. These documents can provide the foundation or justification for affordable or workforce housing ordinances.

Affordable housing is defined as housing opportunities for all income levels, where the annual gross housing costs do not exceed 30 percent of the household's annual income. Most often, when addressing affordable housing needs in a state, region, or individual community, analysts and policy makers focus on establishing affordable housing opportunities for households earning at or below 80 percent of the area median income, since market based opportunities are most limited for these households. The area median income is adjusted for household size and typically based on the United States Department of Housing and Urban Development (HUD) Metropolitan or Non-Metropolitan Fair Market Rent Area (HMRA or county RMRA) in which the housing is located. Median area income figures are established and published annually by the United States Department of Housing and Urban Development.

Since ownership units require additional up front capital for purchase, they may have higher income limits than rental units and can include households earning up to 80 or 100 percent of the median income. For rental housing, which typically is more affordable than ownership properties, affordable workforce housing is typically limited to households earning up to 60 or 80 percent of the median income.

Inclusionary zoning is most effective within communities with a growing housing stock since it relies on new housing construction or adaptive reuse of existing structures to generate affordable units. Communities with existing growth control ordinances in effect can exempt inclusionary housing development from the annual development cap or maximum as an implementation incentive. Additionally, the community should work

with local trusted developers to ensure their incentives will truly induce the creation of affordable units. Alternately, if multiple communities have similar provisions it will eliminate the chances of builders electing to forego development in one community in preference for another's more profitable ordinances. If inclusionary housing ordinances are similar across a regional market it increases the probability of utilization. (Ray 2001)

Additionally, inclusionary ordinances can be supplemented by the incorporation of other initiatives that encourage affordability and a variety of housing types. These may include:

- Smaller permitted lot sizes,
- Increased density,
- Open space or cluster development,
- Mixed use development,
- Village plan alternative development,
- Tax increment financing,
- Public/private partnerships,
- Manufactured housing,
- Smaller dwelling units,
- Housing for the elderly and disabled, and
- Accessory dwelling units.

The combination of many affordability mechanisms can produce greater benefits than any of the programs used in isolation. Additionally, there are many agencies and private developers across the state willing to partner with municipalities interested in developing affordable housing. (Frost 2001)

Although it is not necessary for a municipality to partner with a local, regional, or state housing authority or a community housing trust, these partnerships often help facilitate the ordinance's implementation and make associated monitoring easier. The partner agency can help to remove the burden of continued affordability from the municipality which may not have the administrative means to take on this responsibility. Additionally, the agency can retain a "first right of refusal" through deed restrictions that will allow them the right to purchase the property and guarantee its affordability.

Communities without direct access to a monitoring agency may choose to forgo this partnership, so long as a municipal employee, such as a planning coordinator or building inspector, is available and able to monitor the future sale or transfer of affordable properties. Otherwise, it is advised that these communities look outside their borders for an agency committed to regional participation for assistance. Additionally, the simpler the ordinance, the less administrative time required to maintain it.

Legal Basis and Considerations for New Hampshire

The power to establish inclusionary housing or zoning ordinances is granted to New Hampshire communities under the statutes providing for Innovative Land Use Controls, RSA 674:21 I (k). The statute defines inclusionary zoning in RSA 647:21 IV (a) as "...land use control regulations which provide a **voluntary** incentive or benefit to a property owner in order to induce the property owner to produce housing units which are affordable to persons or families of low and moderate income. Inclusionary zoning includes, but is not limited to, density bonuses, growth control exemptions, and a streamlined application process." This means that, under New Hampshire law, inclusionary zoning may not be made mandatory. Municipalities wishing to implement inclusionary zoning must find ways to induce developers to voluntarily engage in such an effort.

Inclusionary housing ordinances are one tool, among others, that can help communities ensure that their land use regulations would not be considered exclusionary by a court. This concern is generally addressed by RSA 672:1 III-e, which states:

"All citizens of the state benefit from a balanced supply of housing which is affordable to persons and families of low and moderate income. Establishment of housing which is decent, safe, sanitary and affordable to low and moderate income persons and families is in the best interests of each community and the state of New Hampshire, and serves a vital public need. Opportunity for development of such housing, including so-called cluster development and the development of multi-family structures, should not be prohibited or discouraged by use of municipal planning and zoning powers or by unreasonable interpretation of such powers..."

The Britton v. Town of Chester case (1991) was the second case in the State of New Hampshire to rule against exclusionary zoning, the first being Soares v. Atkinson 1986 and 1987. In the Britton case the court stated that the Town of Chester's exclusionary zoning was in violation of RSA 674:16, the zoning enabling act, and that the provision of housing for all income levels was a fundamental part of "promoting the health, safety, or the general welfare of the community."

As with the development of affordable housing through any mechanism, maintaining affordability becomes one of the greatest complications. Many ordinances require a deed restriction to be set in place and recorded when the unit is constructed. These restrictions set resale price limits, allowing the seller to benefit from some of the appreciated value, yet limiting the resale price.

The Strafford Regional Planning Commission and the Workforce Housing Coalition of the Greater Seacoast recently prepared a model "Affordable Housing Restrictive Covenant and Agreement." It is intended for use by municipal officials, long-term

affordability monitoring agencies, developers, and homebuyers to establish terms of resale. The agreement is made between the property owner and The Housing Partnership, a non-profit community-based organization in Portsmouth. The covenant provides essential definitions, maintains rights of first refusal for The Housing Partnership, sets resale and transfer restrictions, as well as restrictions on use, rental and junior encumbrances, establishes mortgage protections, and sets the term, in years, the covenant will run with the home.

The New Hampshire Housing Finance Authority has prepared a “Long Term Value Retention Model,” through which municipalities may ensure affordability of housing units over time. The New Hampshire Housing model includes an ordinance that is intended to work together with an inclusionary zoning ordinance. The model establishes an easily administered mechanism through which municipalities acquire a lien on properties that are built as affordable housing units under an inclusionary zoning ordinance. The value of the lien is based on the difference between the fair market value of the unit and its reduced “affordable” sale price, which is indexed according to qualifying income standards that are previously established. The municipality’s lien is inflation indexed, so its value does not degrade over time, but the owner is able to reap the benefits of an expanding real estate market. Subsequent sales are not limited based on income targets, but the maintenance of the municipality’s lien will tend to keep units affordable for a relatively long period.

Examples and Outcomes where Inclusionary Housing has been Applied

Amherst, New Hampshire

Amherst has established an “Affordable Housing” provision in the Zoning Ordinance as a conditional use. The ordinance first establishes suitability criteria for proposed projects including style, affordability standards, environmental concerns, and required tract areas. Amherst’s ordinance defines affordability as dwelling units available for sale or rent to households earning at or below 100 percent of the median area income. In exchange, the Town provides flexible lot size, setback, and density standards which are reduced from those for traditional subdivisions. This allows otherwise non-conforming lots to be developed for affordable units. Additionally, a maximum dwelling unit size of 1,300 square feet is set, which cannot be expanded or increased for ten years.

Using the ordinance, developers have created a variety of affordable housing types in Amherst including duplexes, multi-family, and single family homes. By requiring smaller units and allowing smaller lots, prices have been reduced from \$350,000 or higher for market rate townhouses down to \$170,000 for affordable ones.

Chester, New Hampshire

Chester has established an “Incentive System for Low-Moderate Income Cluster Housing” within Article 7 of their Zoning Ordinance. This ordinance established definitions for four different income levels which are each permitted different density

bonuses dependent on whether the proposed units will be owner or renter occupied. The density bonus is calculated using a multiplier, so that the percent of units in the development dedicated to a specific income group is multiplied by a factor ranging from 1.25 to 5.00 (dependent of the type) to determine the increase in density. Applicants can combine types of housing for a mix of income groups and add up density bonuses until they have achieved a the maximum permissible density for that site based on on-site well and septic standards of the New Hampshire Department of Environmental Services.

Projects developed under this ordinance are required to set purchase price and resale restrictions to maintain affordability. Additionally, occupancy restrictions are set to ensure that the target income group identified during permitting becomes the unit inhabitants. The Town's Building Inspector is charged with administration and monitoring of housing developments created under this cluster housing ordinance. Since the ordinance was enacted, there have been three developments built in Chester that have utilized this option. A total of 72 units were created within these subdivisions with 13 units (18 percent of units) affordable to moderate income households.

Exeter, New Hampshire

Exeter's inclusionary housing ordinance is incorporated into the zoning provisions for elderly congregate health care facilities and open space development. Within both sections, the Zoning Ordinance simply grants a 15 percent density bonus in exchange for 20 percent of the total number of proposed units provided as affordable (15 percent for households with incomes between 80 and 120 percent of the area median income and 5 percent for households with incomes below 80 percent of the area median income). The area median income is defined as the New Hampshire portion of the Portsmouth, New Hampshire HUD Metropolitan Fair Market Rent Area. All units are to be sold with deed restrictions and a recorded housing agreement that limit the resale value to no more than the purchase price plus two times the accumulated consumer price index for a period of 30 years. The Exeter inclusionary housing ordinance is one of the most straightforward.

The ordinance is currently being implemented in the Watson Road mixed income subdivision. The development has 86 single family homes, 20 of which are two bedroom condominiums priced at \$180,000 and up. Another eight units are priced starting at \$300,000. The remaining homes begin at \$400,000. Income limits have been set for prospective buyers. While the affordable units were priced about \$60,000 below their market value, the combined benefits of the density bonus and higher cost unit revenues will offset the price reduction.

Margin Note: More information on financial assistance programs for affordable housing development through statewide agencies can be found at the following websites:

- New Hampshire Housing Finance Authority www.nhhfa.org

- New Hampshire Community Development Finance Authority www.nhcdfa.org
- New Hampshire Community Loan Fund www.nhclf.org

Additional resources may be available from local and regional non-profit housing organizations.

Nashua, New Hampshire

Nashua's Inclusionary Zoning, Section 16-93 of the City's Land Use Code, begins with a clear set of definitions particular to this section, and potentially helpful to others looking to establish an inclusionary housing ordinance. To allow for greater flexibility in affordable housing, Nashua has created a series of 12 different potential exchange rates--affordable units for density--based on the type of housing offered. Alternately, the ordinance allows developers to pay a fee, equal to the dwelling unit construction cost, into a housing trust fund as means of compliance.

All types of affordable housing created under the ordinance must be designed to be "compatible in architectural style and appearance" to all other units in the development. Additionally, an affordability "control period" is specified for each affordable housing type which must be enforced through deed restrictions, restrictive covenants or contractual agreements with a housing authority or trust. The ordinance provides project phasing requirements that ensure all affordable units have been constructed and completed before the final ten percent of the market rate units are completed and marketed. The City's Community Development Department is charged with administering the ordinances and monitoring of completed developments.

Model Language, Illustrations, and Guidance for Implementation

I. Purpose

The purpose of this *Article* is to encourage and provide for the development of affordable housing within Community. It is intended to ensure the continued availability of a diverse supply of home ownership and rental opportunities for low to moderate income households. This *Article* was established in order to meet the goals related to affordable housing provision set forth in the Community Master Plan. Additionally, in implementing this *Article* Community has considered the region's affordable housing need as defined in the Regional Planning Commission Housing Needs Assessment.

II. Authority

This innovative land use control *Article* is adopted under the authority of RSA 674:21, and is intended as an "Inclusionary Zoning" provision, as defined in RSA 674:21(I)(k) and 674:21(IV)(a).

III. Applicability

- A. Development in accordance with the provisions of this *Article* is permitted as a conditional use within the following zoning districts as defined in this Zoning Ordinance:
- *List Zoning Districts*

Margin Note: Communities must decide where to permit inclusionary housing development. Options include either in all residentially zoned areas or selected locations. Decisions should be weighed carefully to determine where the greatest incentive for inclusionary housing development would be. Inclusionary housing could be extended as a permitted use into compatible mixed use or commercial zones. Industrial and other incompatible lands should retain their strict prohibition of residential development.

- B. Permitted Uses: In the interest of encouraging affordability, single-family, duplex, multi-family, and manufactured housing is permitted within an application under this *Article* irrespective of the permitted uses of the underlying zoning requirements in the areas identified in section III-A above.

Margin Note: Applications under this ordinance should allow greater flexibility in the permitted housing types as an added incentive to developers. This is especially true in areas where only single family residential is permitted. Alternate, more affordable housing construction types need to be encouraged as a way of ensuring lower development costs and subsequently lower sale or rental prices.

- C. Any person aggrieved by a Planning Board decision that constitutes a denial of a Conditional Use Permit due to noncompliance with one or more of the provisions of this ordinance may appeal that decision to the Superior Court, as provided for in RSA 677:15. A Planning Board decision on the issuance of a Conditional Use Permit cannot be appealed to the Zoning Board of Adjustment (RSA 676:5 III)

IV. Definitions

Affordable Rental Housing – where the rent plus utilities for the dwelling unit does not exceed 30 percent of the allowed individual household income.

Affordable Owner-Occupied Housing – where the total cost of mortgage principal and interest, mortgage insurance premiums, property taxes, association fees, and homeowner’s insurance does not exceed 30 percent of the maximum allowed income of the purchaser. The calculation of housing costs shall be based on current taxes, a 30-year fixed rate mortgage, a 5 percent down payment, and prevailing mortgage rates within the region.

Area Median Income (AMI) – is the median income of the greater region, either the HUD Metropolitan or Non-Metropolitan Fair Market Rent Area to which Community belongs, as is established and updated annually by the United States Department of Housing and Urban Development.

Assets –as defined as “Net Family Assets” by 24 CFR Part 5, Subpart F, and as amended from time to time.

Income – As defined as “Annual Income” by 24 CFR Part 5, Subpart F, and as amended from time to time.

Margin Note: The definition of Annual Income considers both wage income and assets when determining a family’s income level eligibility – the full definitions are provided in the reference section at the end of this chapter. This definition MUST be considered in conjunction with the definitions of Low, Low to Moderate, and Moderate Income herein.

Low Income – a household income (as defined herein) that does not exceed fifty percent (50%) of the area median income.

Low to Moderate Income – a household income (as defined herein) that is more than fifty percent (50%) and does not exceed eighty percent (80%) of the area median income.

Market Rate Housing – any unit within a development, whether the unit is to be owner or renter occupied, that is intended to be available for sale or occupancy at the prevailing market value for the area similar to comparable real estate transactions.

Moderate Income – a household income (as defined herein) that is more than eighty percent (80%) and does not exceed one-hundred percent (100%) of the area median income.

Owner-occupied Housing – is any dwelling unit intended to be conveyed in fee simple, condominium or equity-sharing arrangement such as a community housing land trust and limited equity cooperatives.

Rental Housing – is any dwelling unit intended to be leased.

Margin Note: The Area Median Income (AMI) is determined and published annually by the United States Department of Housing and Urban Development. The AMI varies by location and by household size. Each community’s AMI, or HUD Income Limit, is that of the Metropolitan Fair Market Rent Area (HMRA) or County based Non-Metropolitan Fair Market Rent Area (RMRA) if the community

is not part of a HMRA. The NH Housing Finance Authority also publishes these limits on their website on the “HUD Limits and Allowances” page.

V. Affordable Housing Categories and Incentives

Margin Note: The incentives section could be expanded to allow others including parking reductions, setback reductions, exemption from impact fees, exemption from application fees, or exemption from growth control ordinances.

- A. A Site Plan or Subdivision Plan that will guarantee a designated percentage of units, reserved as affordable housing, may be approved with an increase in the density of the site and a reduction of the minimum site frontage as is set forth in Table 1. The Planning Board may allow a reduction of the minimum lot size to accommodate the increased site density.

Table 1
Affordable Housing Incentives

Low Income Rental Housing	15 to 25%	15 to 25%
Moderate to Low Income Rental Housing	20 to 30%	15 to 25%
Low Income Owner-occupied Housing	5 to 10%	15 to 25%
Moderate to Low Income Owner-occupied Housing	10 to 20%	15 to 25%
Moderate Income Owner-occupied Housing	15 to 25%	15 to 25%

Margin Note: The designated affordable percentage, density bonus, and minimum site frontage reductions presented in Table 1 are recommended ranges. A fixed percent should be established for both the designated affordable percentage and bonus in consultation with local developers or housing professionals actively engaged in the local housing market. The fixed percentage is not recommended to be less than the bottom limit of the range but could be in excess of the upper limit if market conditions will support such development. The bonus MUST compensate the developer for the designated affordable percentage. Too low a bonus will cause the ordinance to fail or not be implemented.

Margin Note: Inclusion of “Low Income Owner-occupied Housing” incentives is optional. Very few households in this income bracket are able to support the costs of home ownership. To provide ownership opportunities for these households will require deeper subsidies given the higher risk of loan default.

- B. A Site Plan or Subdivision Plan can mix affordable housing types and accumulate density bonuses to a maximum bonus equal to 30 percent where municipal sewer and water are available or in areas without water and sewer service to the maximum density permitted by on-site well and septic standards of the New Hampshire Department of Environmental Services as applied to the site.

When mixing affordable unit types the designated affordable percentage for each individual affordable housing type may be less than that required in Table 1. The density bonus is then proportioned to the actual percentage of designated affordable units provided, so that if the applicant provides only one-half of the required designation of one type of affordable housing they will receive one-half of the density bonus. The combined total of all affordable housing types must equal a 15 percent designation of affordable units, at a minimum.

Margin Note: Allowing developers to combine bonuses and increase the number of designated affordable units they provide is mutually beneficial to the municipality and the developer. The incentives need to maintain some flexibility to respond to the market conditions developers are working within. Aggregated bonuses will allow this flexibility. Communities may leave the aggregated density bonus uncapped or set a cap of twenty percent (20%) or greater.

- C. Individual lots within an application under this *Article* are also granted a frontage reduction equal to the density bonus established in section V-A or V-B of this *Article*.

VI. General Requirements of Affordable Units

- A. The dwellings qualifying as affordable housing shall be compatible in architectural style and appearance with the market rate dwellings in the proposed development. The affordable units should be interspersed throughout the overall development.

Margin Note: Requiring compatible architectural styles does not indicate that all units must be identical. The affordable units may be smaller or scaled down versions of the higher cost units, using different interior finishes, fixtures, or amenities. The overall subdivision or development should be designed in a harmonious and equitable manner that will not promote segregation based on income. Ideally, the affordable units should be dispersed throughout the proposed development and not clustered together independent from market rate units.

- B. To ensure that the application is completed as permitted, the dwellings qualifying as affordable housing shall be made available for occupancy on

approximately the same schedule as a project's market units, except that the certificates of occupancy for the last ten percent (10%) of the market rate units shall be withheld until certificates of occupancy have been issued for all the affordable housing units. A schedule setting forth the phasing of the total number of units in a project under this *Article*, along with a schedule setting forth the phasing of the required affordable housing units shall be established prior to the issuance of a building permit for any development subject to the provisions of this *Article*.

Margin Note: By requiring that the affordable units are completed before the market rate units gives a certain level of protection to the municipality that the proposed affordable units will be completed as permitted. This percentage may be adjusted and a more regimented schedule could be utilized. To ensure that sufficient project capital is generated for the project to be successful, municipalities should not mandate affordable unit provision prior to completion of the first third of the market rate units.

- C. To ensure that only eligible households purchase/rent the designated affordable housing units, the purchaser/renter of an affordable unit must submit copies of their last three years' federal income tax returns and written certification verifying their annual income level, combined with household assets, does not exceed the maximum level as established by this ordinance in sections IV and V-A of this *Article*. The tax returns and written certification of income and assets must be submitted to the developer of the housing units, or the developer's agent, prior to the transfer of title. A copy of the tax return and written certification of income and assets must be submitted to all parties charged with administering and monitoring this ordinance, as set forth in sections VIII through VIII-D of this article, within 30 days following the transfer of title.

Margin Note: It is essential that prospective affordable unit occupants document both their actual income and assets to prevent misuse of the units by those households that may be on a fixed income but have significant assets. For example, many recent retirees may be on a fixed income from a retirement or pension plan that meets the income requirements, but also own outright a large single family or vacation home or have other large assets, rendering the household more than capable of affording market rate housing. Additionally, community members should review income related documents with the utmost confidentiality as permitted under State statutes.

- D. All applicants under this article must submit the following data to ensure project affordability:

1. Calculation of the number of units provided under this *Article* and how it relates to its provisions.
2. Project Cost Estimate including land, development and construction costs; financing, profit, and sales costs; and other cost factors.
3. Description of each unit's size, type, estimated cost and other relevant data.
4. Documentation of household eligibility as required in section VI-C of this *Article*.
5. All agreements established as part of sections VII through VII-2 of this *Article*.
6. List of required variances, conditional use permits, and special exceptions including justification of their necessity and effectiveness in contributing to affordability.

VII. Assurance of Continued Affordability

In order to qualify as affordable housing under this *Article*, the developer must make a binding commitment that the affordable housing units will remain affordable for a period of thirty (30) years. This shall be enforced through a deed restriction; restrictive covenant; or a contractual arrangement through a local, state or federal housing authority or other non-profit housing trust or agency. For the thirty (30) year term, the deed restriction, restrictive covenant, or contractual arrangement established to meet this criterion must make the following continued affordability commitments:

- A. Affordable housing units offered for sale shall require a lien, granted to Community, be placed on each affordable unit. The value of the lien shall be equal to the difference between the fair market value of the unit and its reduced "affordable" sale price, which is indexed according to the qualifying income standards. The municipality's lien is inflated over time at a rate equal to the Consumer Price Index (CPI). Future maximum resale values shall be calculated as the fair market value minus the CPI adjusted lien value. Subsequent sales are not limited based on income targets, but the combination of maintenance of the municipality's lien and adherence to this *Article's* Definition of Affordable Owner-Occupied Housing for a period of thirty (30) years.

Margin Note: The provisions of section VII-A are established to be consistent with NHHFA's Value Retention Model, which is required if the community wishes to have NHHFA administer their inclusionary housing ordinance. Alternate mechanisms of continued affordability could be utilized, such as alternate indexed, itemized, or appraisal-based formulas. The Workforce Housing Coalition of the Greater Seacoast's "Affordable Housing Restrictive Covenant and Agreement" requires limiting equity appreciation to an amount not to exceed twenty-five percent (25%) of the increase of the affordable housing unit's value, as determined by the

difference between fair market appraisal at the time of purchase of the property and a fair market appraisal at the time of resale, with such adjustments for improvements made by the seller and necessary costs of sale.

- B. Affordable housing rental units shall limit annual rent increases to the percentage increase in the area median income, except to the extent that further increases are made necessary by hardship or other unusual conditions.

Margin Note: Inclusionary Ordinances must include assurances for continued affordability. Municipalities should review any possible continued affordability or value retention programs they find locally suitable and review them with their attorney to establish the most appropriate and enforceable ordinance language. The process adopted by the community should be referenced here and appropriate revisions made to Section VII to VII-B of this model.

- C. Deed restrictions, restrictive covenants, or contractual arrangements related to dwelling units established under this *Article* must be documented on all plans filed with the Community Planning Board and the Registry of Deeds.

VIII. Administration, Compliance and Monitoring

- A. This article shall be administered by the *Planning Board or Local Planning Department*. Applications for the provisions provided under this *Article* shall be made to the Planning Board and shall be part of the submission of an application for Site Plan or Subdivision Plan approval.
- B. No certificate of occupancy shall be issued for an affordable housing unit without written confirmation of the income eligibility of the tenant or buyer of the affordable housing unit and confirmation of the rent or price of the affordable housing unit as documented by an executed lease or purchase and sale agreement.
- C. Ongoing responsibility for monitoring the compliance with resale and rental restrictions on affordable units shall be the responsibility of [*insert designated entity, i.e. board of selectmen, building inspector, planning department, other coordinating housing authority or trust*] or their designee.
- D. The owner of a project containing affordable units for rent shall prepare an annual report, due on Insert Date, certifying that the gross rents of affordable units and the household income of tenants of affordable units have been maintained in accordance this *Article*. Such reports shall be submitted to [*insert designated entity set in section VIII-C above*] or their designee and shall list the contract rent and occupant household incomes of all affordable housing units for the calendar year.

Margin Note: It is critical there be a municipal staff person or designated agent, rather than a volunteer, with the capacity to take on the required monitoring in conjunction with the Planning Board and Planning Department. This could be a town administrator, building inspector, planning department staff, or other coordinating housing authority or trust. This person/agency must be specified in sections VIII-C and VIII-D of this model. Additionally, all documents produced should be reviewed by legal counsel.

References

The following publications provide an overview of inclusionary housing, how the ordinances work, and present many ideas to consider when planning an inclusionary ordinance for a community.

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The following ordinances were used herein either as examples or as guidance when formulating the model.

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Referenced Code of Federal Regulations Language

For the purpose of general reference, the definitions of Net Family Assets and Annual Income provided by 24 CFR Part 5, Subpart F, as of October 2006, are included below. The actual language must be verified as it changes periodically.

Net family assets (§ 5.603 Definitions) - (1) Net cash value after deducting reasonable costs that would be incurred in disposing of real property, savings, stocks, bonds, and other forms of capital investment, excluding interests in Indian trust land and excluding equity accounts in HUD homeownership programs. The value of necessary items of personal property such as furniture and automobiles shall be excluded.

(2) In cases where a trust fund has been established and the trust is not revocable by, or under the control of, any member of the family or household, the value of the trust fund will not be considered an asset so long as the fund continues to be held in trust. Any income distributed from the trust fund shall be counted when determining annual income under §5.609.

(3) In determining net family assets, PHAs or owners, as applicable, shall include the value of any business or family assets disposed of by an applicant or tenant for less than fair market value (including a disposition in trust, but not in a foreclosure or bankruptcy sale) during the two years preceding the date of application for the program or reexamination, as applicable, in excess of the consideration received therefor. In the case of a disposition as part of a separation or divorce settlement, the disposition will not be considered to be for less than fair market value if the applicant or tenant receives important consideration not measurable in dollar terms.

(4) For purposes of determining annual income under §5.609, the term “net family assets” does not include the value of a home currently being purchased with assistance under part 982, subpart M of this title. This exclusion is limited to the first 10 years after the purchase date of the home.

§ 5.609 Annual income.

(a) *Annual income* means all amounts, monetary or not, which:

(1) Go to, or on behalf of, the family head or spouse (even if temporarily absent) or to any other family member; or

(2) Are anticipated to be received from a source outside the family during the 12-month period following admission or annual reexamination effective date; and

(3) Which are not specifically excluded in paragraph (c) of this section.

(4) Annual income also means amounts derived (during the 12-month period) from assets to which any member of the family has access.

(b) Annual income includes, but is not limited to:

(1) The full amount, before any payroll deductions, of wages and salaries, overtime pay, commissions, fees, tips and bonuses, and other compensation for personal services;

(2) The net income from the operation of a business or profession. Expenditures for business expansion or amortization of capital indebtedness shall not be used as deductions in determining net income. An allowance for depreciation of assets used in a business or profession may be deducted, based on straight line depreciation, as provided in Internal Revenue Service regulations. Any withdrawal of cash or assets from the operation of a business or profession will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested in the operation by the family;

(3) Interest, dividends, and other net income of any kind from real or personal property. Expenditures for amortization of capital indebtedness shall not be used as deductions in determining net income. An allowance for depreciation is permitted only as authorized in paragraph (b)(2) of this section. Any withdrawal of cash or assets from an investment will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested by the family. Where the family has net family assets in excess of \$5,000, annual income shall include the greater of the actual income derived from all net family assets or a percentage of the value of such assets based on the current passbook savings rate, as determined by HUD;

(4) The full amount of periodic amounts received from Social Security, annuities, insurance policies, retirement funds, pensions, disability or death benefits, and other similar types of periodic receipts, including a lump-sum amount or prospective monthly amounts for the delayed start of a periodic amount (except as provided in paragraph (c)(14) of this section);

(5) Payments in lieu of earnings, such as unemployment and disability compensation, worker's compensation and severance pay (except as provided in paragraph (c)(3) of this section);

(6) *Welfare assistance payments.* (i) Welfare assistance payments made under the Temporary Assistance for Needy Families (TANF) program are included in annual income only to the extent such payments:

(A) Qualify as assistance under the TANF program definition at 45 CFR 260.31; and

(B) Are not otherwise excluded under paragraph (c) of this section.

(ii) If the welfare assistance payment includes an amount specifically designated for shelter and utilities that is subject to adjustment by the welfare assistance agency in accordance with the actual cost of shelter and utilities, the amount of welfare assistance income to be included as income shall consist of:

(A) The amount of the allowance or grant exclusive of the amount specifically designated for shelter or utilities; plus

(B) The maximum amount that the welfare assistance agency could in fact allow the family for shelter and utilities. If the family's welfare assistance is ratably reduced from the standard of need by applying a percentage, the amount calculated under this paragraph shall be the amount resulting from one application of the percentage.

(7) Periodic and determinable allowances, such as alimony and child support payments, and regular contributions or gifts received from organizations or from persons not residing in the dwelling;

(8) All regular pay, special pay and allowances of a member of the Armed Forces (except as provided in paragraph (c)(7) of this section).

(9) For section 8 programs only and as provided in 24 CFR 5.612, any financial assistance, in excess of amounts received for tuition, that an individual receives under the Higher Education Act of 1965 (20 U.S.C. 1001 *et seq.*), from private sources, or from an institution of higher education (as defined under the Higher Education Act of 1965 (20 U.S.C. 1002)), shall be considered income to that individual, except that financial assistance described in this paragraph is not considered annual income for persons over the age of 23 with dependent children. For purposes of this paragraph, “financial assistance” does not include loan proceeds for the purpose of determining income.

(c) Annual income does not include the following:

- (1) Income from employment of children (including foster children) under the age of 18 years;
- (2) Payments received for the care of foster children or foster adults (usually persons with disabilities, unrelated to the tenant family, who are unable to live alone);
- (3) Lump-sum additions to family assets, such as inheritances, insurance payments (including payments under health and accident insurance and worker's compensation), capital gains and settlement for personal or property losses (except as provided in paragraph (b)(5) of this section);
- (4) Amounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member;
- (5) Income of a live-in aide, as defined in §5.403;
- (6) Subject to paragraph (b)(9) of this section, the full amount of student financial assistance paid directly to the student or to the educational institution;
- (7) The special pay to a family member serving in the Armed Forces who is exposed to hostile fire;
- (8)(i) Amounts received under training programs funded by HUD;
- (ii) Amounts received by a person with a disability that are disregarded for a limited time for purposes of Supplemental Security Income eligibility and benefits because they are set aside for use under a Plan to Attain Self-Sufficiency (PASS);
- (iii) Amounts received by a participant in other publicly assisted programs which are specifically for or in reimbursement of out-of-pocket expenses incurred (special equipment, clothing, transportation, child care, etc.) and which are made solely to allow participation in a specific program;
- (iv) Amounts received under a resident service stipend. A resident service stipend is a modest amount (not to exceed \$200 per month) received by a resident for performing a service for the PHA or owner, on a part-time basis, that enhances the quality of life in the development. Such services may include, but are not limited to, fire patrol, hall monitoring, lawn maintenance, resident initiatives coordination, and serving as a member

of the PHA's governing board. No resident may receive more than one such stipend during the same period of time;

(v) Incremental earnings and benefits resulting to any family member from participation in qualifying State or local employment training programs (including training programs not affiliated with a local government) and training of a family member as resident management staff. Amounts excluded by this provision must be received under employment training programs with clearly defined goals and objectives, and are excluded only for the period during which the family member participates in the employment training program;

(9) Temporary, nonrecurring or sporadic income (including gifts);

(10) Reparation payments paid by a foreign government pursuant to claims filed under the laws of that government by persons who were persecuted during the Nazi era;

(11) Earnings in excess of \$480 for each full-time student 18 years old or older (excluding the head of household and spouse);

(12) Adoption assistance payments in excess of \$480 per adopted child;

(13) [Reserved]

(14) Deferred periodic amounts from supplemental security income and social security benefits that are received in a lump sum amount or in prospective monthly amounts.

(15) Amounts received by the family in the form of refunds or rebates under State or local law for property taxes paid on the dwelling unit;

(16) Amounts paid by a State agency to a family with a member who has a developmental disability and is living at home to offset the cost of services and equipment needed to keep the developmentally disabled family member at home; or

(17) Amounts specifically excluded by any other Federal statute from consideration as income for purposes of determining eligibility or benefits under a category of assistance programs that includes assistance under any program to which the exclusions set forth in 24 CFR 5.609(c) apply. A notice will be published in the Federal Register and distributed to PHAs and housing owners identifying the benefits that qualify for this exclusion. Updates will be published and distributed when necessary.

(d) *Annualization of income.* If it is not feasible to anticipate a level of income over a 12-month period (*e.g.*, seasonal or cyclic income), or the PHA believes that past income is the best available indicator of expected future income, the PHA may annualize the income anticipated for a shorter period, subject to a redetermination at the end of the shorter period.