Zoning Techniques and Legal Challenges in the Low-Income Housing Development of the U.S.A.

Tae sun An*

< Abstract >

The main purpose of this study is to find out the efforts focusing on the various zoning techniques for the low-income housing development of the U.S.A.

For this purpose this paper reviews and examines the zoning devices for the low income housing construction that the jurisdictions of the United States have taken. Inclusionary zoning is one of the solutions to the low-income housing shortage that has been instituted in the many jurisdictions in the United States.

There are two types of the inclusionary zoning, mandatory and voluntary approaches. Under the voluntary approach, existing zoning devices such as special permit, floating zones, and planned unit development(PUD) are well operated to encourage the construction of low and moderate income housing. However, in spite of becoming an effective tool for low-income housing development mandatory type of zoning faces the challenges of taking issues of the Constitution. The due process and equal protection clauses of the Constitution also might provide the challenge by a developer.

Finally, this study suggests the design guidelines in order to provide legal basis that the private housing developer encourage the low income housing development within the constitutional bounds.

Keyword : Low-income housing, inclusionary zoning, legal challenges of zoning

* Associate Professor, Department of Urban Planning and Engineering, Hyupsung University, ats@hyupsung.ac.kr
I. Introduction

The cost of housing has become a major problem for many Americans as well as for many people in other people in other counties, particularly those with low and moderate incomes. In the Unite States, dwindling federal grants, inflation, and other factors such as local land regulation and fiscal policy have exacerbated the problem of housing cost.

Inclusionary zoning is one of several proposed solutions to the lower-income housing shortage that has been instituted in the many jurisdictions in the United States.¹ Inclusionary ordinance operate under the zoning power to include private sector construction of low and moderate income housing. Mandatory forms of inclusionary zoning explicitly require rental or sale of a certain percentage of the units of a new development at below market prices to individuals with low or moderate income. Under a voluntary approach, existing Zoning devices such as special permits, floating zones, and planned unit developments (PUDs) are adapted to encourage construction of low or moderate income housing.

Challenges to inclusionary ordinance have claimed that the ordinance is beyond the zoning board’s authority and that it is taking of property without just compensation in violation of the fifth and fourteenth amendments of the United States Constitution. The due process and equal protection clauses of the fourteenth amendment also might provide the basis for challenge by a developer arguing that the ordinance was unreasonable or applied in a discriminatory manner.

While all of these claims are constitutional in nature, this paper refers to the authority challenge as the ultra vires issue and to the taking, due process, and equal protection claims

¹ A number of different solutions to the problem of housing costs and supply at the state government level. One is “anti-snob” legislation that would create agency empowered to overrule local land use decisions that exclude low and moderate income housing. Another proposal is to amend the zoning enabling act so as to require towns to use the zoning authority to benefit all economic segments of society, to promote regional rather than local welfare, and to prohibit certain discriminatory zoning provisions. A third proposal is the use of various monetary incentives or penalties to encourage town governments to eliminate costly and exclusionary provisions from their zoning regulations.
as the constitutional issue. In the first section, this paper describes the current mandatory inclusionary ordinance. The third section introduces and examines voluntary inclusionary zoning techniques. In the fourth section, this paper reviews the current trends for adopting inclusionary zoning programs in municipalities and proposes and discusses design guidelines that will withstand the constitutional challenge of taking, due process, and equal protection. Finally, it discusses a policy implication of inclusionary zoning for the future directions of low-income housing both in the U.S.A. and Korea.

II. Mandatory Inclusionary Zoning and Legal Bases

1. The Mandatory Inclusionary Zoning Ordinance

The impetus behind the inclusionary ordinance has flowed from the failure of local housing markets to adequately meet the housing needs of lower income people. This section describes the prominent feature of major inclusionary ordinance to assess the viability of the ordinances.

A typical mandatory inclusionary ordinance requires the sale or rental of a certain percentage of the units in new housing developments to now or moderate income occupants.2) The

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2) Examples of inclusionary zoning programs include:

   Montgomery County, Maryland (Moderately Priced Dwelling Unit Ordinance)
   - Applies to residential projects of over 50 dwelling units.
   - Requirement is enforced through a written agreement between the developer and the Department of Housing and Community development.
   - Where a density bonus is sought, the developer must set aside 12 percent of the units for moderate-income households.
   - Resale controls restricting price and occupant eligibility are imposed for a ten-year period.
   - Developers must make reasonable efforts to ensure that 15 percent of the units are set aside for sale to low-(6%) and moderate-(9%) income household.

For other examples, see Fox and Davis, Density bonus zoning to Provide low and Moderate Cost Housing, 3 Hasting Const. L.Q. 1015, 1976; Netter, Legal foundations for municipal affordable housing programs: inclusionary zoning, linkage, and housing preservation, 10 Zoning and Planning Law, no. 10, 161-168 (1987);
ordinance require that as many as 40 percent of all units be low-and moderate-income housing, and as few as 5 percent.\(^3\) While there are programs site, most ordinances require that those housing units be located within the development.\(^4\) The ordinance applies to developments of a certain type, such as multiple-family housing or projects exceeding a certain size.\(^5\) The sale prices or rents of the low or moderately priced dwellings (MPDs) are set by the terms of the ordinance, by a related subsidy program, or by a formula tied to the county median income.\(^6\) Often the ordinances also include resale controls to prevent the first occupants from realizing a windfall profit by selling or subletting the units at market rates. The resale controls generally give the administrative agency a right of first refusal to buy or rent vacant units.\(^7\) The ordinance also include a non-rental clause as well as eligibility requirements.\(^8\) Some inclusionary ordinance require that MPDs are evenly distributed throughout the development, or that MPDs average the same number of bedrooms as conventional units. Sometimes the MPDs must harmonize with the surrounding units in external design and landscaping.\(^9\) Finally, most mandatory inclusionary ordinances offer incentives, most notably the provision of density bonuses, to offset the developer’s cost.\(^10\)


3) The most common requirements are 10% to 35%. The primary factors for determining the percentage in California are: market area need, median income, development costs, and type of project
4) Kliven, supra note 2; Mallach, supra note 2, ch. 7.
5) See supra note 2.
6) See Taylor, supra note 2.
7) See Kleven, supra note 2, at 1439-40
8) See Taylor, supra note 2; Hagman, Taking Care of One’s Own Through Inclusionary Zoning: Bootstrapping Low and Moderate Income Housing by Local Government, Urban Law and Policy 5, 169-87, 1982
9) See Kleven, supra note 2; Hagman, note 7.
10) It is generally recognized that the developer participating in an inclusionary housing program, whether voluntary or mandatory, should be offered incentives to foster his participation at least to deflect criticism and discourage the charge that the program is economically ruinous to the developer. Incentives can take a variety of forms, including most notably the provision of density bonuses, expedited processing, waiver of fees or charge, sorts. See Fox and Davis, supra note 2; Mallach, Inclusionary Housing Programs: Polices and Practices (1984). At 17.
A density bonus permits a developer to build at a higher density level than the zoning laws normally allow in exchange for a promise to include in the housing development. In the context of inclusionary ordinances, the density bonus serves the important purpose of rescuing the developer’s land cost per dwelling unit. The saving then can be passed the occupants of the MPDs and the developer is not forced to absorb losses he otherwise would have incurred.

Under a one-for-one density bonus, developers are allowed one additional unit for each extra units for each MPDs.11) Depending on site limitations, the developer may build and sell as many conventional units as he could have absent the MPD requirement of the density bonus. As a result, the actual cost of land for the MPDs is minimal when compared to the land cost of the conventional units.12) In fact, the density bonus may yield a larger profit than the developer could have realized from a conventional project because the extra units could be added at lower cost than the original one.13) In determining whether a density bonus is consistent with sound planning principles, drafters of inclusionary ordinances must consider whether town services such as sewers, roads, and parking facilities are adequate to accommodate higher density development. Environmental factors such as adequate water supply potential for adverse effects on water quality also must be evaluated.

If the density bonus increases the profitability of an inclusionary development14), a developer’s claim of taking without just compensation or denial of due process would be

11) See Kleven, supra note 2, at 1440, 1443.
12) Kleven demonstrated the effect of a 20% density bonus on the land cost of a hypothetical 120-unit housing development in Montgomery County, where a mandatory inclusionary requirement had been in effect since 1973. See Kleven, supra note 2, at 1478-79.
13) Fox & Davis, supra note 2, at 1070-71.
14) The economic feasibility of inclusionary ordinances remains a troublesome question, even when density bonuses are included. Mallach, supra note 9; Kleven concluded that the profitability of inclusionary developments depends on: 1) the extent of the density bonus, 2) the maximum sale prices or rents set by the ordinance, and 3) whether some of the cost can be passed on to the sellers of land affected by the ordinance or the purchasers of the conventional units in the project. Kleven, supra note 2, at 1482-83., a developer’s claim of taking without just compensation or denial of due process would be weakening. In addition, surveys of inclusionary ordinances indicate that those ordinances without a density bonus to be either unworkable because they depend on inadequate or unavailable federal subsidies, or infect because developers avoid the type of projects to which the ordinance applies. See Fox and Davis, supra note 2, at 1036-44.
weakening. In addition, surveys of inclusionary ordinances indicate that those ordinances without a density bonus to be either unworkable because they depend on inadequate or unavailable federal subsidies, or ineffective because developers avoid the type of projects to which the ordinance applies.\textsuperscript{15)}

2. The Ultra Vires Issue

The authority to enact an inclusionary zoning ordinance is derived from the state's police power. This power-to enact legislation that promotes the public health, safety, morals or general welfare—must be delegated expressly by the state to the local government.\textsuperscript{16)} While scope of the enabling legislation usually determines the success of an ultra vires challenge, courts also consider other legislative and judicial expressions of public policy.

In California, the authority for mandatory inclusionary ordinances has come from several sources. First, the zoning enabling law expressly gives "maximum control" in the area of zoning to counties and cities without charters.\textsuperscript{17)} Chartered cities and counties enact zoning laws pursuant to a broadly worded home rule provision in the state constitution. Second, California has adopted judicially a regional welfare standard governing zoning matters.\textsuperscript{18)} This standard assigns to California municipalities an affirmative duty to take regional housing needs into account when making zoning decision. Third, and most significant, all local California governments are required by statute to create a "housing element" as part of the general plan.\textsuperscript{19)} The statute provides that the housing element must "make adequate provision for the housing needs of all economic segments of the community."

In 1980, the California legislature enacted several statues that strengthened the duty of local governments to provide for low and moderate income housing. First, each local community must work with the California Department of Housing and Community Development to

\textsuperscript{15)} See Fox and Davis, supra note 2, at 1036-4
\textsuperscript{17)} cal. Gov't Code 65800 (West 1966).
\textsuperscript{18)} See Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 602, 608-09 (1976)
\textsuperscript{19)} Cal. Gov't Code 65300 (West 1966).
include in its housing element precise goal for low and moderate income housing and a five-year schedule of planned action to meet them. These action include the use of zoning and other regulatory concession, as well as state and federal subsidies.\textsuperscript{20)} Second, the court-imposed regional welfare standard has been bolstered by an evidential presumption that any local measures that work to control growth have an region-wide impact; if these measures are challenged, the community has the burden of proving that they are necessary to promote the public, health, safety, or welfare.\textsuperscript{21)} Third, the state zoning law has been amended to require that local zoning standards for vacant residential land reflect the community’s housing needs identified in the General Plan.\textsuperscript{22)} Also, municipalities now are required to provide developers of low and moderate income housing with a twenty five percent bonus or comparable incentives.\textsuperscript{23)}

The California statutes are significant because they go beyond mere authorization of zoning for the needs of lower-income groups that they require it. Also, the housing element, rather than the zoning enabling law, is the direct source of authority for inclusionary zoning ordinances in California. This statutory scheme could serve as well as model for other legislature faced with a shortage of low and income housing.

While authority for inclusionary ordinances in California is established clearly by a set of interrelated statutes, the authority in other states usually has been derived from a single judicial or legislative source. The regional welfare standard enunciated by the New Jersey Supreme Court in Southern Burlington County NAACP v. Township of Mt. Laurel\textsuperscript{24)} provided the basis for a superior court decision, Uxbridge Associates v. Township of Cherry hill\textsuperscript{25)}, that upheld a mandatory inclusionary ordinance in the face of an ultra vires challenge. The Uxbridge court reasoned that the judicially imposed duty of zoning boards to consider regional housing needs indicates that increasing the supply of lower-income housing in a giv-

\textsuperscript{20)} Cal. Gov’t Code 65583(d) (West 1981)
\textsuperscript{22)} Cal. Gov’t Code 65913.1 (West 1981).
\textsuperscript{23)} See Mallach, supra note 9, at 12; Elliekson, supra note 2.
en area is a proper purpose of zoning.

The Virginia Supreme Court has taken an opposite approach. In board of supervisors. v DeGroff Enterprises, a zoning amendment requiring a developer of fifty or more dwelling units to agree to build at least fifteen percent of such units as low and moderate income housing was invalidated as being ultra vires because the enabling act did not expressly authorize the regulation of nonphysical characteristics of buildings, such as classes of occupants, or of compensation for land and improvements. The Virginia Supreme Court is the only court that has addressed the question whether, absent other source of authority, special enabling legislation is necessary to authorize inclusionary zoning. It should be noted, however, that commentators have explained De Groff characterizing power. Thus, other jurisdictions which favor permit system may have authority of inclusinaory ordinances from the expressly delegated power in the state zoning enabling act to promote the "general welfare." Mandatory inclusionary ordinances raise the question whether the general welfare concept is broad enough to allow the regulation of users, as opposed to the regulation of uses or physical characteristics of building. Most zoning enabling acts expressly authorize the later. The United States Supreme Court addressed user classifications in Village of Belle Terre v. Borass. The court upheld a zoning ordinance that prohibited the cohabitation of more than two unmarried adults. The permissible and within the Court's broad interpretation of "public welfare" as long as it did not interfere with the plaintiff's fundamental right.

In sum, a few judicial interpretation of mandatory inclusionary ordinances casts doubt as to outcome of an ultra vires challenge in other states. Nevertheless, an ordinance mandating the reservation of a reasonable percentage of units in some residential developments for low and moderate income families is likely to be found a valid exercise of the zoning power to promote the general welfare. This is particularly true if the ordinance is supported by findings of

27) Ellickson. Supra note2, at 1212.
28) Longstreth showed a reasonable relationship of inclusionary zoning ordinances as a means of promoting the general welfare reasonably can be inferred from the statements in the legislature. Carolyn K. Longstreth, Inclusionary zoning: An Alternative for Connecticut Municipalities, 14 Conn. L. Rev. 800 (1982).
a community need for such housing. Factors supporting this conclusion are the legislative judgment. Finally, the Broad interpretation of general welfare articulated by the United States Supreme Court and jurisdictions\textsuperscript{30} indicates that a mandatory inclusionary ordinance be found permissible.

3. The Constitutional Challenge

Assuming that the zoning body has the authority to enact a mandatory inclusionary ordinance, developers are nevertheless likely to resist. Taking objections and substantive due process are most commonly raised to the mandatory inclusionary zoning. One argument is that the inclusionary zoning requirement is a taking of the developer’s property. Another argument is that the density incentive and mandatory set-aside do not meet the substantive due process objectives of zoning. If the ordinance would also create an equal of a certain size, a developer could argue that the exclusion of smaller developments is a violation of equal protection.

1) The Taking Challenge

There are three most common tests which may apply to the taking cases of inclusionary ordinances\textsuperscript{31}. They include diminution of value, balancing, and harm/benefit. The diminution of value test look to the degree of loss suffered by the complaint. At some unspecific point, a regulation may impose such hardship that it will be declared invalid. Courts differ as to where to draw the line between regulation and taking.\textsuperscript{32} The mandatory inclusionary ordi-


\textsuperscript{31} Micleman identified the four tests in taking: physical invasion, diminution of value, balancing, and harm/benefit. Michelman, Property, utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. l. Rev. 1165 (1967)

\textsuperscript{32} This approach was articulated by the United States Supreme Court in the landmark case of Pennsylvania Coal Co. v. Mahon, 260 U. s. 393 (1922). Mr Justice Holmes’s opinion found a taking that required compensation. “The general rule…is, that while property may be regulated to a certain extent, if regulation
nance may marginally reduce a developer's financial return. However, developers will have a
difficulty proving that they can make no reasonable use of the land. If they fail to make this
proof, a court will not find a taking because the plaintiff is left with some reasonable use of
his property. An ordinance requiring that developments of multi-family housing contain, for
example, fifteen percent MPDs would not be found a taking under the diminution of value
tests; the owner is left with a reasonable use of his property because eighty five percent of
the units are unaffected by the ordinance. If the ordinance included a density bonus, the tak-
ing claim would be weaker.

The second test is a balancing test. The degree of the applicant's economic loss and the
existence of alternative uses of the property are weighed against the extent of the benefit to
the public. For example, in Penn central Transportation Co. v. New York City, the United
States Supreme Court applied a balancing test when it upheld New York City's Historic
Landmarks Preservation Ordinance because the ordinance interfered with the plaintiff's use of
only a portion of the property. An inclusion ordinance that required fifteen percent MPDs
probably would be upheld under the balancing test. In most cases, the impact on the plaintiff,
especially if a density bonus had been given, would not be serve enough to outweigh the
public benefit of lower-income housing.

The third taking test courts may apply to the inclusionary ordinances is the harm-benefit
test. In this test, the inquiry is whether the regulation prevents the plaintiff from inflicting
harm on others with nuisance-type activities, or whether it extracts from him a public benefit.

A variation of this test has evolved from subdivision exaction case where the municipality
grants a building or zoning permit only if the developer agrees to provide certain community
facilities, such as parks, roads, and or sewers. The developer cannot be forced to confer a
benefit on the public unless the need for the amenity by the municipality is "uniquely attrib-

33) In re Egg Harbor Assocs. (Bayshore Center), 94 N.J. 358, 464 A.2d 1115, 1122 (1983); Second Norwalk
35) See supra note 10.
utable” to the developer’s activity.36)

In the context of a mandatory inclusionary ordinance, the developer probably would argue that the need for lower-income housing is not uniquely attributable to his activity and therefore, the exaction of MPDs crosses the line between permissible regulation and a taking. The success of this argument will depend on whether the court is still to analogize the inclusionary ordinance to an exaction. However, there has been a growing judicial awareness that the harm-benefit distinction is illusory and that the analysis of regulatory purpose it requires belongs more properly to a due process rather than a taking inquiry.37) Another consideration suggests that the uniquely attributable notion was viewed as merely one factor injuring the severity of the ordinance’s impact.38) Therefore, it is unlikely that courts will depart from the usual approach to the taking issue and rely solely on the uniquely attributable factor.

2) Due Process and Equal Protection Challenges

The standards required by the process and equal protection clauses overlap. The American Constitutional Law declares that the area of economic regulation, substantive due process demands that an ordinance bear a rational relation to a legitimate governmental purpose. Similarly, the equal protection clause of the fourteenth amendment in the American Constitutional Law requires that, absent a fundamental interest or suspect classification, an ordinance must have a rational connection to valid public purpose. The value protected by these clauses can be summarized to a valid public purpose, rationality, and equality.39) Another important value in the zoning context is the “deferential standard” enunciated by the Supreme Court in Village of Euclid v. Ambler Realty Co.40) The Court Stated “If the validity of the legislative classification for zoning purpose be fairly debatable, the legislative judgment must be allowed to control.” An inclusionary ordinance would withstand due process claim under the deferential standard of review. The validity of the public purpose is sup-

37) See Mandelker, Land Use Law Ch.9.11-.14 (1982).
38) Longstreth, note 24 supra, at 807..
39) Kleven, supra note 2, at 1492.
40) 72 U.S. 365 (1926).
ported by legislative statements of concern with the shortage of low and moderate income housing and by the link between adequate housing and the general welfare. The ordinance is reasonable in requiring of MPDs. A density bonus further reduces a developer’s claim of unreasonableness by lessening the ordinance’s economic impact on him.

Although the ordinances usually apply only to builders of multi-family residential developments, an equal protection challenge to this classification also fail. This is not an arbitrary classification because an intensified use of land is reasonably related to the objective of reducing housing costs. When inclusionary ordinances single out a particular class of housing developments, such as those of a certain housing type, the classification is justifiable in relation to some aspect of the legislative purpose-reduction of costs, dispersal of lower-income housing, or environmental concerns.

Drafters of an inclusionary ordinance should note carefully that the degree of impact on the developer is crucial to the ordinance’s validity. Consider an ordinance that demands seventy-five percent MPDs without a density bonus, or an ordinance applicable only to builders of single-family homes on five-acre sites. These ordinances would be vulnerable on due process, equal protection, and taking grounds because the developer rightly could claim that he was being singled it to bear the burden of solving a public problem and therefore, the ordinance was “unreasonable, arbitrary, and confiscatory.”

III. Voluntary Inclusionary Zoning

Special permits, floating zones, and planned unit developments (PUDs) are zoning devices that provide for individualized regulation of land use. These devices permit a greater degree of flexibility than district zoning. Under district zoning, if a developer proposes a project that is inconsistent with the zone in which the site is located, the land use control agency

41) Commentators have criticized district zoning as to rigid and urged the use of alternative zoning devices. See Krasnowiecki, Planned Development: A Challenge to Established Theory and Practice of Land Use Control, 114 U. Pa. L. Rev. 48 (1965).
approve certain project the proposal-even if it perceives the project as harmless, or even beneficial, to the neighborhood. Devices such as the special permit allow the agency to approve certain projects after reviewing them carefully in light of the individual circumstances. Municipal control over particular developments is enhanced further by the power to make approval conditional upon certain modifications of the plan.

All three devices can be used to implement at inclusionary housing policy. While each would be subject to ultra vires challenges to the legislative purpose\(^{42}\), the validity of the particular techniques also might be challenged. The distinction between mandatory and voluntary inclusionary techniques is not as likely to raise constitutional issues however, because the voluntary techniques use economic incentives to gain cooperation.

1. Special Permits

Special permit regulations authorize certain uses that are not allowed as of right. Examples in residential zones are hospitals, churches, private schools, and landfill and earth removal operation. The special permit is potentially a powerful tool for implementing inclusionary goals. A variety of incentives can be incorporated to encourage developers to voluntarily provide low and moderate income housing.

The designated use can be a residential project that either consists entirely of MPDs or includes a given percentage, usually ten to thirty-five percent.\(^{43}\) The incentives are drafted into the standards for review and consist of cost-reducing, alternative design criteria. These criteria usually include greater density than is normally permitted, and more liberal requirements for floor area ratio, setback, road frontage, parking space, and garages. Other incentives are town provision of public facilities such as roads, sewers, playgrounds, and open space, and the waiver of fees and performance bonds.\(^{44}\) The standards also might allow clustering, the mixture of single and multi-family housing, and other uses. A streamlined procedure for the re-

\(^{42}\) See notes 15-30 supra.
\(^{43}\) See notes 31-38 supra.
view of application is also a cost-saving incentive because the developer’s investment can be recouped sooner.\textsuperscript{45)} Inclusionary special permit regulations could provide for any combination of these incentive features.

The inclusionary requirements could be written into the special permit of the zoning regulations as a condition of approval, filing the municipality added control over specific proposals.\textsuperscript{46)} The standards guiding the agency must be included in the zoning regulations, and are usually required to be sufficiently specific in order to avoid an attack alleging improper delegation of authority.

Use of special permits for inclusionary purpose may be challenged by neighboring property owners who oppose the application of the regulation to a particular site. Those neighbors may allege “spot zoning”\textsuperscript{47)}, that the proposal departs from the comprehensive plan. A municipality can protect itself against this challenge by including in its regulations a “statement of necessity” that describes how the special permit zone furthers the objectives of the comprehensive plan. A challenge based on spot zoning is likely to fail because the plaintiffs would have great difficulty making the necessary showing that the inclusion of low or moderately priced housing is harmful to the interests of the community as a whole. In addition, issuance of a special permit by definition is never spot zoning because the standards are the regulations and those regulations embody the comprehensive plan.\textsuperscript{48)}

\section*{2. Floating Zoning}

The floating zone is similar to the special permit in that a particular of zone of project is

\textsuperscript{45)} Id. At 3.
\textsuperscript{46)} Special permits may be issued subject to conditions, but these conditions must be included in the zoning regulations. Longstreth, supra note 25, at 810.
\textsuperscript{47)} Spot zoning, by definition, is invalid because it amounts to an arbitrary, capricious and unreasonable treatment of a limited area within a particular district.
\textsuperscript{48)} Allegations of spot zoning are degenen against with such contentions as that the change is in accord with the master plan, that conditions in the area have changed drastically since the original zoning thereby justifying the change as to the parcel or parcels involved, that the change meets the criteria of the ordinance allowing a special use permit, and that the change is in the public interest and promotes the general welfare.
described in detail in the zoning regulations. A floating zone is not applied to the zoning map, however, until a property owner or developer so requests. The floating zone can incorporate the same incentive measures as the special permit to encourage voluntary construction of lower-income housing.

Floating zoning device was upheld in New York and Maryland, but it was invalidated in Pennsylvania as constituting spot zoning and upheld it permitted by or not in conflict with the master plan, if the criteria and standards provided for them are adequate, and if the action taken is not arbitrary or unreasonableness. Like special permit, a challenge based on spot zoning is likely to fail if a municipality shows that floating zone is consistent with the objectives of the comprehensive plan.

3. Planned Unit Development

The concept of a planned unit development (PUD) adds further flexibility to a zoning scheme. PUDs are projects conceived and built on a neighborhood scale and detached homes. They include various types of housing, such as open space for recreation. Sometimes they also include commercial or service facilities scaled to meet the needs of the residents. PUDs are inconsistent within a single zone.

PUDs may be particularly well-suited to the inclusion of low and moderate income units because cost-saving and higher density designs are fundamental to the concept. Inclusionary PUD regulations require a policy statement in the statement of objectives that detail the community's need for lower-income housing and sets forth the intention of the appropriate agency to implement the policy in review of PUD proposals. The standards guiding the agency must be included in the regulations and designate a percentage required MPDs and set forth the chosen incentive measures. The regulation also must list the conditions that may be attached to approval of the project.

51) Id. at 143.
In many jurisdictions, special enabling legislation has been enacted to authorize localities to adopt PUD regulation.\(^{52}\) In judicially evaluating challenges to local actions approving PUDs, the most important role of the courts is to determine whether they are dealing with a device which conforms to the intent behind and the criteria for a PUD.

Assuming the general welfare clause of the zoning enabling act permits zoning for the benefit of lower-income groups, an inclusionary PUD should be upheld.

IV. Current Trends and Guidelines for the Inclusionary Zoning Ordinance

A municipality wishing to use the zoning power to increase its supply of low and moderate income housing can enact either mandatory or voluntary inclusionary zoning regulations. The first such ordinances appeared in the early 1970’s in California, Maryland, and Virginia. However, in recent years inclusionary zoning has gained popularity across the nation. However, they are not without legal challenges.

1. Trends of Inclusionary Zoning Practices

In crafting an inclusionary housing program, every community faces a major decision that which program between mandatory and voluntary is more effective to provide low-income housing. Every community engages in its own legal authority to determine its position on mandates and voluntaries. In the inclusionary zoning practices, many local governments are turning to mandatory as an effective tool for creating much needed affordable housing. A 2003 study by California Coalition for Rural Housing (CCRH) and Nonprofit Housing Association of Northern California (NHANC) found that only six percent of the 107 com-

\(^{52}\) Id. at 140.
munities had voluntary program. According to the National Housing Conference, in Montgomery County, Maryland, over 13,000 housing units were produced during the past 30 years through a mandatory program requiring a 12.5-15 percent affordability component in large development. The current trend in inclusionary housing program has been toward mandatory in small and medium sized cities until 1990’s. However, with the 1990’s resurgence of many urban centers as vibrant locations for new investment, inclusionary housing has surfaced as a policy solution to rising housing costs in big cities.\(^{53}\) The large cities-Boston, Denver, Sacramento, San Diego, San Francisco chose mandatory ordinances in the severe housing shortages.

This decision reflects both the perceived and documented effectiveness of requiring devel-

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<td>Denver, Colorado</td>
<td>2002</td>
<td>10%</td>
<td>up to 15yr</td>
<td>N/A</td>
<td>550,000</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Source: Assembled by Ross (2003), U.S. Census Bureau for Demographics Information Source

\(^{53}\) Brunick, Zoning Practice, APA, 2004
opers to set aside affordable units or pay a fee in lieu of building units on-site. The reasons why big cities adopt mandatory program include the need to preserve the livability and attractiveness of cities for capital investment and people. Large cities adapting the programs experienced that housing costs outpaced incomes growth for low and medium income households. Through the use of creative cost offsets such as density bonuses, flexible zoning standards, and expedited permitting processes, large cities can create affordable housing while preserving the federal fund and preserving more of the local tax bases pressing public needs. To be competitive in a global economy, urban communities need a sufficient supply of affordable housing for every level of the workforce and a consumer class. Inclusionary can mitigate the racial and economic segregation many American cities have today. The programs help to reverse exclusionary development pattern that discourage companies and moderate income groups from choosing to locate or remain in the city.

The experience of municipalities and counties nationwide demonstrates that mandatory inclusionary zoning works as a practical and effective tool for creating affordable housing. However, voluntary programs can be successful with enough of a subsidy or when they are implemented as if mandatory.\textsuperscript{54)

\section*{2. Guidelines for Legal Zoning Ordinance}

Challenges to both approaches would question the authority of the local zoning board to regulate nonphysical characteristics of buildings. If properly supported by legislative findings on the need for lower-income housing and related to the comprehensive plan, the authority for the ordinances can be inferred from the general welfare clause of the zoning enabling act. This view is supported by legislative and judicial expressions of public policy on lower income housing and by case law upholding the regulation of housing occupants. The statute in California would be a useful model which other states could follow.

Both mandatory and voluntary forms of inclusionary zoning should incorporate a density

\textsuperscript{54) Examples are Irvine, California, Chapel Hill, North Carolina and Lexington, Massachusetts, see Zoning Practices, 2004, APA}
bonus or other incentives. In the mandatory form, these incentives can help withstand allegations of taking of property or denial of substantive due process, and in the voluntary case, help spur developers to provide lower-income housing.

When designing an inclusionary zoning ordinance, drafter should note carefully the following suggestions in order to provide legal bases that such ordinance falls clearly within constitutional bounds.

1. Established a Good Statutory scheme, State's legislature not only should explicitly provide the authority to zone for the benefit of lower-income groups, but should impose a duty on local governments to do so. In the absence of express authorization, the power must come from the broad delegation of the authority to enact zoning regulations for the promotion of the public health, safety, and general welfare.

2. Adopt a Regional Welfare Standard. The judicially imposed duty of zoning boards to consider regional housing needs indicates that increasing the supply of lower-income housing in a given area is a proper purpose of zoning.\(^{55}\) Similarly, several commentators have urged that the authority for inclusionary ordinances be inferred from the regional welfare standard adopted in several states.\(^{56}\)

3. In designing a mandatory inclusionary zoning program, drafters must consider a series of relatively straightforward tests in order to provide reasonable assurance that such an ordinance falls clearly within constitutional bounds.

1) Make an economically feasible development. Based on a reasonable level of economic analysis and thoughtful consideration, it should be at least indicated that the provision of the required no less on the developer's part, or alternatively, that the loss is modest enough so that a rational and efficient developer could reasonably be expected to undertake it. It should be ordinance's validity. An ordinance requiring high percent MPDs would be vulnerable on due process, equal

\(^{55}\) Supra note 25.

\(^{56}\) For enunciation of regional welfare standard in New Jersey and Pennsylvania, see Oakwood Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975); Appeal of Girsth, 437 Pa. 237, 263 A. 2d 395 (1970)). For California, see note 17 supra. For California, see supra note 18.
protection, and taking grounds.

2) Make sure that the ordinance is flexible. The developer should have the opportunity, based on specific circumstances, to seek modification of the inclusionary provision; or there should be an alternative land use for the parcel that can be utilized by the developer. There are factual circumstances affecting a development parcel that may not be anticipated by the regulatory body and which may affect the economic feasibility of carrying out an inclusionary program in the precise manner, of to the precise degree, required by the ordinance. Fairness dictates that a developer should have the opportunity to present such circumstance to have a body that is empowered to modify the conditions governing the proposed development on the basis of appropriate finding rather than zoning litigation. Such a body typically the municipal planning board of governing body—could modify the ordinance provisions, retain the provision as set force but provide additional incentives to balance the apparent hardships, or retain the provisions as set force without modification.

4. PUDs, special permit, and floating zone all are worthwhile devices for encouraging developers to build more low and moderate income housing. They offer economic incentives while placing the initiative for change on the developer. One advantage of utilizing these devices instead of a mandatory inclusionary ordinance is that the developer is less likely to mount an ultra vires or constitutional challenge because he agrees to build the lower income units in exchange for incentives or a permit. This approach has been effective in some jurisdictions. The success of voluntary inclusionary ordinance depends on how carefully the incentives are tailored to the conditions of the local housing market.

These three devices should normally be upheld; a) if they amount to an proper delegation of legislative authority, b) if they are not in conflict with the comprehensive plan, c) if the criteria and standards provided for them are adequate, and d) if the actions taken are not arbitrary, capricious, or unreasonable.
V. Conclusion

The provision of decent housing for all people in a society, whatever their income, is an important goal of the society. It is also important that those housing opportunities be provided in a manner that will foster both racial and economic integration, in the interest of a fairer and saner society.

Inclusionary zoning is a recognition that land-use controls must be used to accomplish necessary social goals. It can best serve production objectives in areas in which subsidize or other moderately priced housing would not be build due to high land costs and stringent land use regulations, and in which a substantial amount of new development is occurring. In a decreased federal support of the U.S.A., local government found inclusionary zoning to be a cost-effective way to produce homes and apartments for citizens including seniors, public employees, and working poor households, who would be excluded from the housing market.

Korea has a similar problem that there are no enough lands and money for the low-income housing provision. There has been a continuous discussion for the housing problems in Korea. The national government of Korea has established a Special Act for rent housing construction in 2003. According to the Urban and Residential Improvement Act amended in 2005 housing redevelopment should provide a portion of low-income housing in the redevelopment. In order to meet the requirement of Act the government has declared a plan for providing one million unit for rent of low-income housing. The government searches for various methods in order to provide lands, easy for a project procedure, construction costs, and rent housing development. It may consider inclusionary zoning ideas and methods as a tool for the rent housing construction. However, there are some preconditions for an adaption of the inclusionary zoning practices of the U.S.A. The most important thing to be considered is that inclusionary housing policy operates well with a consensus of all society members. In the realistic approach a regional municipality should recognize the housing problem as its own burden and tries to find out a solution in its own way. This American case study indicates that the housing problem has a geographically regional nature in the long term so that
the role of the national government limits within support of subsidy for the low-income housing development and municipality should have an own effort to solve the problem.

Housing policy such as inclusionary housing is a effective tool for low-income housing development. However, it is a highly controversial and complex. Administrative costs may be very high. But it may earn the support of these for whom in-kind redistribution of housing is appealing. If properly supported by legislative purposes for lower-income housing, the authority for the ordinances can be inferred from the general welfare clause of the enabling act. It raises constitutional problem, but they are not insurmountable. Site-specific, such as mandatory and voluntary regulations along with density incentives, should survive constitutional attack under well-established principles applicable to taking, due process, and equal-protection objections.

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국문요약

미국 저소득층 주택공급을 위한 조닝기법과 법적쟁점

우리나라와 마찬가지로 미국에서도 주택가격의 급등으로 인하여 저소득층에 있어서 주택구입은 더욱더 어려워지고 있으며 심각한 사회적인 문제로 받아들여지고 있다. 더욱이 중앙정부로부터의 지원감소, 물가 상승, 저자체의 토지이용의 규제강화 그리고 재정 감축 등은 더욱더 저소득층으로 하여금 주택구입을 어렵게 만들고 있다. 이러한 문제는 시장경제화의 미국에서도 저소득층을 위한 주택공급방안을 시장이외의 다양한 측면에서 강구하게 만들고 있는 실정이다. 이에 한 방안으로 몇몇 대도시권의 자치단체에서는 지구제(Zoning)를 통한 저소득층 포괄 주택공급방식(Inclusionary zoning)을 도입하고 있다. 여기에는 크게 자발적(Voluntary)인 방식과 강제적(Mandatory)방식으로 운영이 되고 있는데 실제 시행에 있어서는 여러 어려움을 겪고 있다. 특히 시장경제에 반하는 강제적 방식에 있어서는 주택공급자들의 법적 대응이 주요 현안문제로 대두되고 있다. 우리나라에서도 저소득층을 위한 주택공급방안이 이와 유사한 형태로도 강구되고 있는 시점에서 미국의 사례를 통하여 미국 대도시권에서 도입한 적극적인 주택공급방식의 형태를 알아보고 그에 대한 제도적 법적문제점을 검토해 Simone 해서 향후 우리나라 저소득층 주택공급에 시사점을 도출하였다.

결론적으로 현제 미국의 대도시를 포함한 여러 지방자치단체에서는 강제적 주택공급 방식을 도입하고 있으며 법적 관점에서 좀 더 엄밀한 검토가 요청되고 있는 실정에 있다.