



Building Inclusive Communities

A Review of Local Conditions, Legal Authority and Best Practices for Pittsburgh

Updated January 2022



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Update – January 2022

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FOREWORD TO THE 2022 UPDATE

This paper was originally prepared for the Housing Alliance of Pennsylvania in the Spring of 2015 to support the work of the Southwest Pennsylvania Building Inclusive Communities Work Group. The purpose of the paper was to provide research, data and evidence on inclusionary zoning (IZ) policies and programs in order to jumpstart a debate about strategies that could be adopted to grow a diverse Pittsburgh.

A great deal has happened since this paper was first published. Pittsburgh has adopted an “incentivized mandatory”¹ inclusionary zoning overlay district (IZOD) in Lawrenceville along with voluntary IZ tax incentives citywide. At the same time, Pittsburgh’s housing market has grown more expensive and thousands of long-time residents have been displaced. As of the writing of this update, legislation has been introduced to expand the Lawrenceville IZOD to two other neighborhoods, and Mayor Ed Gainey has expressed his commitment to reversing the trend of displacement and developing a citywide IZ policy.

The purpose of this update is to help facilitate a discussion of strategies to expand and improve upon Pittsburgh’s existing IZ framework and preserve Pittsburgh’s diverse and vibrant urban character.

¹An incentivized mandatory IZ policy requires that covered developments meet minimum affordability standards while ensuring financial feasibility by offsetting at least a portion of the lost revenue from affordably priced units.

EXECUTIVE SUMMARY

Pittsburgh's strength has long been the diversity and strong work ethic of its residents. From the early days of industrial expansion and immigration, Pittsburgh has been home to a diverse, blue-collar mix of ethnic and cultural traditions that have made the city a unique and vibrant place to live. This rich tapestry has managed to survive deindustrialization and decades of population loss. Due in part to the growth of the city's "eds and meds" economic sectors, Pittsburgh is now seeing a great deal of new housing development, with 7,750 new multifamily rental units built between 2010-2019 (roughly equal to the number of units built in the previous three decades). At the same time, nearly 19,000 working class households are paying more than half of their income on housing costs, Pittsburgh lost over 10,000 Black residents since 2011, and the city's affordable housing continues to be concentrated in areas that have low performing schools and few economic opportunities.

If Pittsburgh is to retain its diverse, vibrant urban life, we must ensure that new housing is accessible to people of all income levels. One way to do that is through inclusionary zoning (IZ). The primary goals of IZ are to expand the supply of affordable housing and to promote social and economic integration. By linking affordable housing to market rate housing development, IZ laws leverage the private market to help achieve these goals.

The purpose of this paper is to review local conditions, legal authority and national practices in order to facilitate the development of an effective, implementable, citywide inclusionary affordable housing policy for the City of Pittsburgh. To that end RHLS reviewed publicly available market data for the City of Pittsburgh, academic studies analyzing the affordable housing supply and demand in Pittsburgh and numerous studies and reports evaluating IZ policies and practices throughout the country. RHLS also researched the statutory authority for the City of Pittsburgh to enact IZ legislation, as well as court decisions addressing various constitutional challenges to IZ laws.

Findings

Pittsburgh's housing market is strong enough to support a robust citywide IZ policy. In 2017, a Mayor-appointed Inclusionary Housing and Incentive Zoning Exploratory Committee evaluated the feasibility of specific IZ policies in light of typical development costs, rents, operating expenses, and investor requirements for multifamily rental developments in the Pittsburgh market. The Committee found that, with an enhanced tax incentive, a 10% set-aside of units affordable to very low-income households would be feasible citywide, and that a 15%

set-aside would be feasible in stronger market neighborhoods. The preliminary results of Lawrenceville's Inclusionary Zoning Overlay District (IZOD) demonstrate that such a policy is in fact feasible in Pittsburgh.

In the years since the IZ Exploratory Committee conducted its evaluation, Pittsburgh's housing market has grown stronger. Gross rents have increased by 16% since 2015. Vacancy rates for Class A apartments were only 5% in 2019 – the lowest they have been since 1980. This has been accompanied by a dramatic increase in home sales prices in several communities. Between 2018 and 2020, for instance, housing prices increased by 55% in Beechview and by 98% in Garfield. It is very likely that the local housing market would support higher IZ set-asides today than those that the Exploratory Committee found to be feasible in 2017.

Pittsburgh has the legal authority to enact IZ and can design an IZ policy that would avoid constitutional challenges. As a home rule municipality, Pittsburgh has legal authority to enact IZ legislation. Such legislation would not be precluded as improper regulation of business under the Pennsylvania Home Rule Law. An incentivized mandatory IZ policy supported by a feasibility analysis should have no problem satisfying constitutional requirements.

Summary of Recommendations

Develop clear and effective informational and compliance documents, finalize cooperation agreements with the URA and HACP, dedicate staff to administer IZ policies, and develop monitoring and outcome reporting procedures. As of the writing of this update, two projects covered by the Lawrenceville IZOD are about to come online – one rental and one for-sale. However, informational materials (explaining developer, renter and homebuyer obligations) and compliance documents (deed restrictions, household income reporting forms, zoning desk forms, checklists, etc.) have either not been prepared or are still being finalized. Nor have cooperation agreements been executed with HACP to verify household income and with the URA to monitor compliance. These items need to be finalized ASAP. There should also be a dedicated staff person at the city or URA who is responsible for ensuring that the IZ process functions smoothly and that systems are in place to monitor and report outcomes.

Align Pittsburgh's enhanced tax incentives with the recommendations of the IZ Exploratory Committee and require recipients to accept housing choice vouchers. The IZ Exploratory Committee's feasibility modeling was based on a typical multifamily rental development with a 35-year IZ commitment, at 50% AMI, and a 10-year enhanced tax incentive. The 2018 amendments to Pittsburgh's LERTA and Act 42 ordinances require only a 10-year

affordability commitment and allow developers to satisfy rental affordability requirements by providing a higher set-aside of units at 80% AMI. The city should amend the ordinances to require at least a 35-year affordability commitment, with rental affordability capped at 50% AMI. In light of recent court decisions invalidating Pittsburgh's source of income anti-discrimination ordinance, the city should also require the owners of rental properties receiving an enhanced tax abatement to accept housing choice vouchers.

Update the IZ set asides and the financial modeling performed by the IZ Exploratory Committee. The market assumptions used by the IZ Exploratory Committee in its financial modeling and designation of "stronger market areas" are already out of date. Pittsburgh's housing market is growing rapidly, and our IZ policies should keep pace. In 2017, the city paid Grounded Solutions to create a Pittsburgh-specific IZ "calculator." Updating that calculator should be relatively easy and inexpensive and would ensure that increased IZ set asides are on solid legal footing. It should also be relatively easy to update the list of stronger market areas where higher set asides are feasible and adjust the IZOD set asides accordingly.

Strengthen and expand Pittsburgh's incentivized mandatory IZ policy citywide. The incentivized mandatory approach used in the Lawrenceville IZOD has worked, the findings of the IZ Exploratory Committee suggest that a citywide policy is feasible, and subsequent market conditions suggest that Pittsburgh's housing market would tolerate higher IZ set asides. Pittsburgh should develop a citywide policy with higher set asides, particularly in strong market areas, along with a mechanism to regularly update IZ requirements to reflect changes to the housing market. In the meantime, the IZOD should be expanded to other neighborhoods that want to opt in.

Set uniform affordability targets at 50% of area median income (AMI) or less for rental housing and 70%-80% of AMI or less for for-sale housing. Studies consistently show that the city's affordable housing gaps are at 30% and 50% of AMI and that there is no shortage of housing that is affordable to households earning 80% of AMI and above. Yet the city, the URA and housing developers often set affordability targets at income levels that are higher than where the need is. Pittsburgh should target its affordable housing subsidies and standards to serve households that are being neglected by the private market.

Continue to forgo the use of in-lieu fees. Policies that allow developers to avoid compliance by paying a fee-in-lieu rarely generate enough revenue to build the same number of affordable units that would otherwise have been built, in a comparable location. The IZ

Exploratory Committee recommended against using in-lieu fees, and the Lawrenceville IZOD does not permit it. Any expansion of Pittsburgh's IZ policy should continue that practice.

Require affordability commitments as a condition of any change to housing-related zoning requirements and development processes. In the 2021 update to the city's Housing Needs Assessment, HR&A Advisors recommends that the city change zoning and development processes to increase the production of multifamily housing and expand by-right development. Studies show that, in the short term at least, so-called "upzoning" has not been effective at lowering housing prices and has in some instances been associated with increased property values and displacement. If HR&A's recommendation is followed, by-right development should be limited to an affordable or inclusionary housing use and relaxed development standards should include robust affordable housing commitments.

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INTRODUCTION

Inclusionary Zoning (IZ) policies require or encourage real estate developers to make a percentage of units in new housing developments affordable to low-income households in exchange for zoning and land use approval or other public benefits. The two goals of IZ policies are (1) to expand the supply of affordable housing and (2) to promote social and economic integration. By linking affordable housing to market rate housing development, IZ laws leverage the private market to help achieve these goals.

Expanding the Supply of Affordable Housing

As of 2019, there were at least 1,019 inclusionary housing policies in 734 jurisdictions nationwide.² At least 20 municipalities in Pennsylvania have adopted IZ policies.³ Since 1974, at least 176,467 affordable IZ units have been created.⁴ This is a relatively small number of units compared to other affordable housing programs, but in some places IZ outperforms other production programs. In Montgomery County, MD, which has the oldest IZ law in the country, more than half of all affordable housing units built between 1974 and 1999 were IZ.⁵ A study of IZ programs in Los Angeles County and Orange County, CA, found that IZ compared favorably to the Low Income Housing Tax Credit (LIHTC) program and in some cases produced more units than LIHTC.⁶ In the state of New Jersey, IZ programs have created more affordable housing than any other production program except LIHTC.⁷

² Wang, Ruoniu and Balachandran, Sowmya, *Inclusionary Housing in the United States: Prevalence, Practices, and Production in Local Jurisdictions as of 2019* (Grounded Solutions Network, 2021), p. 43.

³ RHLS has identified at least 3 mandatory policies (Philadelphia, Pittsburgh and State College) and 19 incentive-based (Brown, College, Ferguson, Gregg, Harris, Honey Brook, Lower Merion, Newtown, Patton, Richland, Spring, Upper Mayfield, West Lampeter and Wrightstown Townships; Litzitz and Mt. Joy Boroughs; and the cities of Bethlehem, Philadelphia and Pittsburgh).

⁴ Grounded Solutions Network at Id.

⁵ Schwartz, et al., *Is Inclusionary Zoning Inclusionary?* (RAND, 2012, hereinafter referred to as "RAND"), p. 8, citing Brown, *Expanding Affordable Housing through Inclusionary Zoning: Lessons from the Washington Metropolitan Area* (Brookings Institution, 2001).

⁶ RAND, p. 8, citing Mukhija, et al., *Can Inclusionary Zoning be an Effective and Efficient Housing Policy? Evidence from Los Angeles and Orange Counties* (Journal of Urban Affairs vol. 32, issue 2, 2010).

⁷ Hickey, et al., *Achieving Lasting Affordability Through Inclusionary Housing* (Lincoln Institute of Land Policy, 2014), p. 5, citing Calavita and Mallach, *Inclusionary Housing in International Perspective: Affordable Housing, Social Inclusion and Land Value Recapture* (Land Lines, 2010).

Promoting Social and Economic Integration

IZ policies can help to deconcentrate poverty and broaden opportunity. A 2012 study by the RAND Corporation of 11 IZ programs across the country found that IZ units tend to be located in low-poverty areas and are assigned to low-poverty schools.⁸ Specifically, RAND found that 75% of the IZ units were located in low-poverty neighborhoods (those with less than 10% of the population below the poverty line).⁹ By comparison, only 34% of LIHTC units, 8% of public housing units, and 28% of housing choice voucher recipients are in low-poverty neighborhoods.¹⁰ RAND also found that schools with IZ units in their attendance zones had slightly better academic outcomes than non-IZ schools in the same jurisdiction.¹¹ A 2010 study of the academic performance of public housing students in Montgomery County, MD, found that those who were randomly assigned to IZ units performed substantially better in math and moderately better in reading than public housing students who were not assigned to IZ units.¹² Studies have also shown that moving from a high poverty to a low poverty neighborhood can have a dramatic increase in a child's lifetime earning potential.¹³ According to RAND, policies with in-lieu fees are less likely to achieve social integration than those without.¹⁴

In order for IZ programs to be effective at achieving both of these goals, there must be sufficient demand for market rate housing and the IZ requirements must not be so onerous as to render development unprofitable. For this reason, IZ laws tend to be found in "hot" real estate markets. There are, however, examples of IZ programs in cities that, like Pittsburgh, have low rates of overall growth and a mix of weak and strong submarkets. Four years ago, Pittsburgh adopted an incentivized mandatory IZ overlay district in Lawrenceville and voluntary IZ tax incentives citywide. The time has come to evaluate the feasibility of expanding and strengthening that IZ framework.

⁸ RAND at pp. 19-20.

⁹ RAND at p. 27.

¹⁰ RAND at Id.

¹¹ RAND at pp. 17-19.

¹² Schwartz, *Housing Policy is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*, in Kahlenberg (ed.), *The Future of School Integration* (Century Foundation, 2012).

¹³ Chetty, Hendren and Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment* (Harvard University, 2015).

¹⁴ RAND at p. 24.

LOCAL CONDITIONS

Pittsburgh's Housing Market

After decades of decline, the number of households in Pittsburgh had begun to grow again.¹⁵ Pittsburgh added 5,200 new households between 2016 and 2019, outpacing the region. The city is projected to add another 9,700 households over the next ten years. The new growth is primarily driven by increases in high-income renter households.

Housing construction has also reversed a decades-long decline. The 2010s saw more housing construction in Pittsburgh since the 1970s. Multifamily rental accounted for 90% of all new construction over the past decade. Since 2010, 7,750 multifamily units have been built in Pittsburgh, roughly the same number that were built in the previous 3 decades combined. The new multifamily housing in Pittsburgh has been well received by the market. Vacancy rates are lower than they have been since 1980. The strong demand for multifamily rental housing is projected to continue, with roughly 7,275 new renters expected to move to the city in the next 10 years. This will cause additional pressure on multifamily rental prices.

Rents for newly constructed 1-bedroom units average around \$1,800 per month, making them only attainable to households earning above 120% of AMI. Pittsburgh's median gross rent has risen by 16% since 2015. The average income of renters without a college degree increased by only 10% over the same time period. The average price of a new home more than doubled between 2011 and 2019. Some areas of the city are appreciating faster than others,¹⁶ with 4 out of 5 neighborhoods demonstrating moderate to strong price growth. The city's IZ policy must take this variation into account.

Affordable Housing Supply and Demand

Pittsburgh has long been considered one of the most affordable metropolitan areas in the country, but that is changing as well. Two out of every five renter households in Pittsburgh are cost burdened (paying over 30% of their income on housing costs), and more than a quarter are severely cost burdened (paying over one-half of their income on housing costs). Pittsburgh

¹⁵ Unless otherwise specified, all data in this section is derived from HR&A Advisors, *Pittsburgh Housing Needs Assessment – Draft Final Report* (hereinafter referred to as "HR&A"), December 2021.

¹⁶ Between 2018 and 2020, for instance, home sale prices increased by 55% in Beechview and 98% in Garfield. (Multiple Listing Service, median sold home prices for single family homes in selected Allegheny County communities, 2018 and 2020.)

has a shortage of 8,200 housing units that are affordable to households with incomes at or below 30% of AMI and a cumulative shortage of 3,000 units that are affordable to households with incomes at or below 50% of AMI. This shows that an effective housing policy for Pittsburgh should strive to produce units that are affordable to households earning 30% AMI and below.

Supply gaps are significant in neighborhoods that are seeing new multifamily residential development. To quote from the HR&A Housing Needs Assessment:

[N]ew supply alone will not fully address the supply gap for housing for low-income households. ... Much [new housing] development has targeted high-income households, which can increase the overall housing supply in these clusters, but only serves a limited household base. As such, addressing the housing supply gap in these neighborhoods will require promoting a wider array of housing types and price points....¹⁷

Displacement

Rapidly increasing housing costs are driving demographic changes and forcing low-income residents out of the city. Since 2011, Pittsburgh has lost thousands of low-income renter households and low- and moderate-income owner households. Black households have been hit especially hard. Between 2010 and 2020, Pittsburgh lost 10,660 Black residents, a 13.4% decline.¹⁸ Neighborhoods with the highest displacement of low-income renters are those with the greatest market momentum.

Affordable Housing Distribution

Pittsburgh's 2020-24 Analysis of Impediments to Fair Housing Choice (AI) identified residential segregation as a major fair housing issue, stating "Pittsburgh's housing segregation adversely affects minority populations. Segregated populations are more likely to be impoverished and experience other housing problems."¹⁹ It cited a report by the Gender Equity Commission that found extreme disparities between White residents of the City of Pittsburgh and Black residents of the City of Pittsburgh, noting that Pittsburgh ranked significantly below peer cities in health, poverty and income, employment, and education. "These poor outcomes are

¹⁷ HR&A at 26.

¹⁸ University of Pittsburgh Center for Social and Urban Studies (UCSUR), *Pittsburgh Perspectives*, August 12, 2021.

¹⁹ City of Pittsburgh, *FY 2020-2024 Analysis of Impediments to Fair Housing Choice (AI)*, p. 113.

linked to housing segregation in the City. ... Residents of the city that are Black or African American, particularly those that are also women, experience a variety of negative consequences of residential segregation. Segregation affects populations not only on the basis of Race or Color, but on Sex or Gender as well.”²⁰

The AI also found that HUD-assisted housing and LIHTC housing tend to be concentrated in low- and moderate-income areas of the city and that this “illustrates an imbalance and a lack of housing choice for those families and individuals who need publicly assisted housing.”²¹ The two greatest contributors to housing discrimination identified by Pittsburgh residents were the concentration of subsidized housing in certain neighborhoods and the lack of affordable housing in others.²²

A well-designed IZ policy can help address these problems by leveraging market-driven development pressure to produce affordable housing in higher-income areas.

²⁰ Pittsburgh AI, p. 113-16.

²¹ Pittsburgh AI, p. 249.

²² Pittsburgh AI, p. 308.

EXISTING POLICY FRAMEWORK

History of IZ in Pittsburgh

In 2015, City Council created an Affordable Housing Task Force (AHTF) to recommend policy solutions that would preserve and expand affordable housing throughout the city. In May 2016, the AHTF released a set of recommendations, one of which was an inclusionary affordable housing policy, with an overall goal of ensuring that at least 20% of all new housing development in the city be affordable to low-income residents. In February 2017, Mayor Peduto created an Inclusionary Housing and Incentive Zoning Exploratory Committee to evaluate the feasibility of specific IZ policies and to develop more detailed recommendations. The city contracted with Grounded Solutions Network to provide technical support to the IZ Exploratory Committee.

To assist the IZ Exploratory Committee, Grounded Solutions developed a Pittsburgh-specific “IZ calculator” to perform financial modeling based on typical development costs, rents, operating expenses, and investor requirements for multifamily rental developments in the Pittsburgh market. Using the calculator, the Exploratory Committee determined that, with an enhanced tax abatement, a 10% set-aside of rental units affordable to households earning 50% of AMI or below would be feasible citywide, and that a 15% set-aside would be feasible in stronger market neighborhoods.²³

In October 2017, Grounded Solutions delivered a memo to the Mayor and City Council outlining the Exploratory Committee’s recommendations, including the following:

- An “incentivized mandatory” IZ policy, in which developers of residential projects of 20 units or larger should be required to set aside at least 10% of the units at prices that are affordable to households earning 50% AMI or below (rental) or 80% AMI or below (for-sale). In stronger market areas, the set-aside should be 15%.
- To offset the reduced revenue from affordable rents or sales prices, all new projects should be eligible for a pre-determined level of enhanced, by-right tax abatements.
- The IZ units should be required to remain affordable for a minimum of 35 years.

²³ Stronger market neighborhoods were defined as those designated in market clusters A, B or C in the Pittsburgh Market Value Analysis (“MVA”) prepared for the URA by Reinvestment Fund. Reinvestment Fund has since revised its criteria in order to develop a combined MVA for Pittsburgh and Allegheny County. Under the current MVA, the comparable designations would be clusters A through D. (Email from Colin Weidig, Reinvestment Fund, dated December 16, 2021).

In July 2018, Pittsburgh adopted two IZ policies: a mandatory inclusionary zoning interim planning overlay district (IZ IPOD) for Lawrenceville, and enhanced tax incentives to encourage affordable housing citywide. The IZ IPOD has since been made a permanent inclusionary zoning overlay district (IZOD). The features of the various policies are outlined below.

As of the writing of this update, two housing developments covered by the Lawrenceville IZOD are nearing completion: Arsenal 201 phase 2 (a 343-unit rental development that will include 35 affordable units) and Holy Family (a 45-unit condo development that will include 5 affordable units). It is not known how much, if any, affordable housing has been produced outside of the Lawrenceville IZOD as a result of the enhanced tax subsidies.

Lawrenceville IZOD

Applicability: All new developments (new construction, substantial improvement, or adaptive reuse) in Lawrenceville with 20 or more housing units.

Set-Aside: 10%, rounded up.

Income Limits:

- Rental: 50% of AMI.
- For-Sale: 80% of AMI.

Allowable Pricing:

- Rental: Monthly rent, utility allowance, and mandatory or essential fees and charges cannot exceed 30% of household income for a household earning 50% of AMI.
- For-Sale: The pricing must be such that monthly principal, interest, taxes, insurance and mandatory or essential fees and charges (including condo/HOA dues) do not exceed 28% of household income for a household earning 70% of AMI.

Affordability Period: 35 years; resets to an additional 35 years upon any sale or transfer.

Developer Incentives and Cost Off-Sets: See Enhanced Tax Exemptions below

Incentives for Deeper Affordability: If a rental subsidy is provided, the total of all housing costs may exceed the Allowable Pricing so long as the portion paid by the household does not.

Incentives for Family-Sized Units: Studio and micro units count toward the total units for purposes of determining the number of IZ units required but cannot be used to meet the IZ obligation. (Under the ordinance, IZ units must satisfy the allowable pricing, which is based on bedroom count. Studios and micros do not have bedrooms and therefore cannot qualify as IZ units.)

Alternative Compliance Mechanisms:

- Off-site: Developers can comply by developing affordable units off-site if (1) they build or finance 20% more affordable units than would have been required on-site, (2) they have site control, (3) the certificate of occupancy for the affordable units is issued before the certificate of occupancy for the market-rate development, (4) the off-site units are located no more than ¼ mile from the market-rate development, and (5) the off-site property has comparable public transit service as the market-rate development.
- Sale or master lease: Developers can comply by selling or master leasing affordable units to a community land trust or approved affordable housing provider.
- In-lieu fees: Developers cannot opt out by paying a fee-in-lieu.

Program Administration: The ordinance designates HACP as the administrative agent for rental housing and the URA as the administrative agent for for-sale housing, but authorizes the Director of City Planning to designate another qualified entity to serve either function.

Enforcement: As a pre-requisite to receiving a certificate of occupancy, the developer must record a deed restriction against the property allowing enforcement of the ordinance by the city and by Eligible Households.

Enhanced Tax Exemptions

Applicability: New rental or for-sale developments (new construction or improvement that increases the tax valuation) in which the owner requests a tax exemption and the property is either located in a designated area or satisfies “program enhancement guidelines.” For rental developments, at least 50% of the gross square footage must be for commercial residential (i.e., multifamily rental) use.²⁴ New for-sale developments must be owner occupied.

Set-Aside, Income Limits and Allowable Pricing (Program Enhancement Guidelines):

- Rental: Either 10% of the units affordable to households earning at or below 50% of AMI or 60% of the units affordable to households earning at or below 80% of AMI.
- For-Sale: 10% of the units affordable to households earning at or below 80% AMI.

Affordability Period: 10 years.

²⁴ An enhanced tax exemption is also available for non-residential commercial properties. Only the residential enhanced exemption is outlined here.

Incentives for Deeper Affordability: None.

Incentives for Family-Sized Units: None.

Alternative Compliance Mechanisms: Developments do not have to satisfy the affordability requirements if they are located in CDBG eligible census tracts (for-sale only) or in the Lower Hill District (rental or for-sale).

Program Administration: Director of Finance

Enforcement: Property owners must complete an application for tax abatement accompanied by an Affidavit of Minimum Affordability Unit Verification. They must also submit a "Letter of Certification for Affordability" from HUD every year for the duration of the abatement.

There are also current and proposed development standards with affordability targets that are higher than those recommended by the IZ Exploratory Committee and that fail to address Pittsburgh's documented affordable housing needs. For example:

- *Affordable Housing Development Standards* (Section 915.07.D.4 of the City Code): Provides bonus points that can be used for height bonuses in certain zoning districts. While the for-sale affordability standards are the same as those recommended by the Exploratory Committee, the rental affordability standards are 60% or 80% of AMI, depending on the set-aside.
- *Proposed Oakland Crossing Public Realm District* (Proposed Section 908.03.D.5: Would require at least 10% of the units in new multifamily housing developments to qualify as "Walk to Work Housing." While the units would be required to be affordable to the occupants of those units, there is no income cap.

IZ Program Administration, Monitoring and Enforcement

As of the writing of this update, there is no program administrator for the Lawrenceville IZOD. The Department of City Planning will monitor compliance during the lease-up of Arsenal 201, but the Department does not have dedicated staff to perform IZ compliance monitoring and reporting long-term. The Department has basic information about IZOD requirements on its website, but there are no informational materials describing the process and documentation/compliance requirements for developers of covered projects. The Department has drafted a lease addendum and sample marketing plan. A deed restriction has been drafted for rental developments, but it has not been finalized, and there is no for-sale deed restriction. No systems have yet been established to verify incomes, monitor compliance or report outcomes.

The enhanced tax exemption process is further along in that it has an administrator and materials informing applicants of the documentation they must provide. However, it is unclear what a HUD “Letter of Certification for Affordability” is, how such letters may be obtained, and whether HUD even provides them. It is also unclear how affordable units are marketed and how incomes are verified. As of this writing there is no public information on what developers have applied for the exemptions or the number of affordable units that have been produced.

PolicyLink has published an excellent report on the administration of IZ programs.²⁵ They found that staffing varies greatly among IZ programs (from one full-time staff person in many programs to over six full-time equivalent staff in one of the largest IZ program in the country). They also found that homeownership programs require far more staff time than rental programs. Administrative responsibilities include the following:

- *Overseeing production of IZ units.* This includes helping developers understand their obligations, evaluating feasibility, applying incentives, and monitoring the design, placement and timing of affordable units. Some municipalities require developers to create an affordable housing plan that details how IZ units will be integrated into the project and how they will be maintained as affordable. This plan is then incorporated into an affordable housing agreement that is recorded against the property prior to development approval, which makes IZ requirements easier to enforce.
- *Pricing.* Rental programs need to inform developers of maximum rent limits and of annual revisions to those limits. Homeownership programs need to establish an initial maximum sales price and a formula for calculating the maximum resale price and a process to allow the homeowner to recoup the value of any capital improvements.
- *Marketing.* For rental projects, some programs help property managers market IZ units and some develop fair marketing standards for them to follow. For homeownership, many programs assume responsibility for marketing the IZ units in order to avoid favoritism, discrimination and other abuses.
- *Home buyer education.* Aside from coordinating general homebuyer education, for-sale programs need to ensure that potential low-income homebuyers understand program requirements.

²⁵ Jacobus, *Delivering on the Promise of Inclusionary Housing: Best Practices in Administration and Monitoring* (PolicyLink, 2007). All material here is derived from that report. This material was included in the original paper but is reprinted here because it is still relevant.

- *Eligibility determination.* Some programs require developers to collect documentation and determine eligibility, some require developers to forward documentation to them for review, and some handle the application and selection process themselves.
- *Financing and refinancing.* Homeownership programs often require approval of any financing, to ensure that homebuyers don't borrow more than the allowed resale price and to protect them from predatory loans that could lead to foreclosure. Such programs also need to work with mortgage lenders to make sure that they understand restrictions on resale.
- *Monitoring.* Rental programs must monitor projects to ensure that rents do not exceed maximum limits and that occupants continue to be income eligible. For-sale programs must ensure that homeowners continue to occupy IZ units as their primary residence, and must regularly check property records to ensure that no new liens have been recorded against the IZ units.
- *Resale management.* PolicyLink calls this "one of the most time-consuming tasks of post-purchase administration of homeownership units." Responsibilities include responding to the homeowner's notice of intent to sell; ordering home inspections and appraisals; determining the value of any credits for capital improvements or deductions for damage; marketing; and qualifying new homebuyers. Programs can reduce their administrative burden by (1) using shared appreciation loans (where the unit is sold at market value and the program receives a predetermined share of the proceeds) instead of resale restrictions, and/or (2) exercising an option to purchase the unit.
- *Enforcement.* This can include taking action against a property owner for violating IZ requirements or intervening in a foreclosure process in order to preserve affordability. Enforcement issues are far more common with for-sale housing. PolicyLink recommends that programs invest in the preparation of strong legal documents up front in order to save on enforcement costs down the road.

Some municipalities reduce ongoing administrative requirements by giving public housing authorities and/or community land trusts an option to master lease or purchase IZ units. Sample staffing requirements for IZ programs are contained in the PolicyLink report, available online at <https://www.policylink.org/resources-tools/delivering-on-the-promise-of-inclusionary-housing-best-practices-in-administration-and-monitoring>.

LEGAL FRAMEWORK

Pittsburgh's Legal Authority to Enact IZ Legislation

The Pennsylvania Constitution vests every municipality with the right and power to frame, adopt and conduct its affairs pursuant to a home rule charter.²⁶ This delegation of legislative power is very broad. A home rule municipality is empowered to exercise any and all powers or functions of government that are not denied by the Pennsylvania Constitution, by the home rule charter or by an act of the General Assembly.²⁷ Pittsburgh has adopted a home rule charter that claims the full extent of powers permitted under Pennsylvania's Home Rule Law.²⁸

The Pennsylvania Home Rule Law places certain limitations upon the power of home rule municipalities. One such limitation is the so-called Business Exclusion, which states:

Regulation of business and employment.--A municipality which adopts a home rule charter shall not determine duties, responsibilities or requirements placed upon businesses, occupations and employers ... except as expressly provided by statutes which are applicable in every part of this Commonwealth or which are applicable to all municipalities or to a class or classes of municipalities.²⁹

IZ, like all zoning,³⁰ determines the duties, responsibilities and requirements placed upon businesses. However, Pittsburgh's authority to enact IZ legislation is not proscribed by the Business Exclusion, because municipal authority to enact local zoning laws that promote housing affordability and socially balanced communities is specifically delegated to PA municipalities.

Using the Lawrenceville IZOD as an example, it can be assumed that a citywide IZ policy would place the following burdens on developers and landlords with residential development projects of 20 units or more:³¹

²⁶ Pa. Constitution Art. IX, §2.

²⁷ Pa. Constitution at Id.

²⁸ Pittsburgh Home Rule Charter §101.

²⁹ 53 Pa. C.S. §2962(f).

³⁰ See *Swade v. Springfield Township, Zoning Bd. of Adjustment*, 140 A.2d 597, 598 (1958) ("By its very nature zoning impinges upon the right of a land owner to use his land in any way that he desires so long as he does not unduly interfere with his neighbor's right to use and enjoy his land. To this extent, zoning imposes a hardship on every land owner subject to the provisions of a zoning ordinance.")

³¹ Pittsburgh City Code Section 907.04.

Affordability restrictions: At least 10%-15% of the housing units must be set aside for use as affordable housing. Inclusionary rental units may only be leased to eligible households (low-income or very low-income households who provide income eligibility documentation to the city). Inclusionary for-sale units may only be sold to eligible households for owner occupancy. Tenants/homebuyers are selected by the developer or landlord, not by the city.

For inclusionary rental units, monthly housing costs cannot exceed 30% of household income for a household earning 50% AMI. For inclusionary for-sale units, the sale price must be such that monthly principal, interest, taxes and insurance do not exceed 28% of household income for a household earning 70% AMI, assuming a conventional 30-year mortgage. Owners of inclusionary for-sale units must occupy the unit as their principal residence and are restricted in the amount of additional debt that can be secured against the unit during the affordability period. Landlords and unit owners are entitled to an enhanced tax abatement to help offset the cost of these use and occupancy controls. If a developer determines that subjecting the property to affordability restrictions would not be feasible, provision of the inclusionary units offsite is permitted as a special exception.

Deed restriction: As a pre-requisite to receiving a certificate of occupancy for an IZ unit, the developer must record a deed restriction against the property allowing enforcement of the ordinance by the city and by eligible households. It is likely that the deed restriction will also include reporting, monitoring and inspection requirements. In lieu of a deed restriction, the developer has the option to master lease inclusionary rental units to a city-approved affordable housing provider or to sell inclusionary for-sale units to a city-approved community land trust. The deed restriction (or the master lease, if a rental developer chooses that option) must remain in effect for 35-years, which period resets for an additional 35 years if the property owner sells the property during that time.

There can be no dispute that Pittsburgh's IZ regulations determine the duties, responsibilities and requirements placed upon developers and landlords. The question, then, is whether the power to impose such burdens is expressly authorized by statutes which are applicable in every part of the Commonwealth, to all municipalities, or to a class or classes of municipalities.

Legislative delegation of authority is “express” if it is “clear and unmistakable.”³² The language does not have to be specific: “a grant of authority can be express in its general terms while nonetheless ambiguous regarding the particular incidents that the authority might permissibly encompass.”³³ If there is ambiguity in the grant of municipal authority, the ambiguity must be resolved in the home rule municipality’s favor.³⁴ There must, however, be a substantial connection between the local ordinance and the intention of the authorizing statute, and the statute must specifically authorize the enactment of ordinances to achieve that intention.³⁵

There is at least one statutory delegation of zoning authority in Pennsylvania that clearly and unmistakably authorizes classes of municipalities to enact zoning ordinances ensuring that housing is provided for people of all income levels in a balanced and inclusionary manner: the Municipalities Planning Code (“MPC”).³⁶ The MPC delegates planning and zoning power to all classes of municipalities in Pennsylvania except for Pittsburgh and Philadelphia.

The MPC empowers municipalities to “enact, amend and repeal zoning ordinances to implement comprehensive plans and to accomplish any of the purposes of [the MPC].”³⁷ The purposes of the MPC include to “provide for the general welfare,” and to “permit municipalities to minimize such problems as may presently exist or which may be foreseen.”³⁸ Section 10604 of the MPC states a number of specific zoning purposes, including to “promote, protect and facilitate ... the public health, safety, morals, and the general welfare [and] coordinated and practical community development” and to “accommodate reasonable overall community growth, including population and employment growth.”³⁹ Section 10603 of the MPC states that zoning codes “may permit, prohibit, regulate, restrict and determine,” among other things, the “use of structures.”⁴⁰

³² *Pa. Restaurant & Lodging Assn. v. City of Pittsburgh*, 211 A.3d 810, 829 fn 19 (PA 2019).

³³ *Pa. Restaurant & Lodging Assn* at Id.

³⁴ *Pa. Restaurant & Lodging Assn* at Id.

³⁵ *Apartment Assn of Metropolitan Pittsburgh v. City of Pittsburgh*, 26 WAP 2020 (Pa. Oct. 21, 2021), p. 14.

³⁶ 53 P.S. §10101, et seq.

³⁷ 53 P.S. §10601.

³⁸ 53 P.S. §10105.

³⁹ 53 P.S. §10604.

⁴⁰ 53 P.S. §10603(b)(2).

The MPC's delegation of zoning power to implement comprehensive plans includes an express authorization for the use of zoning power to provide housing for people of all income levels. The MPC states that a comprehensive plan shall include, among other things, a "plan to meet the housing needs of present residents and of those individuals and families anticipated to reside in the municipality, which may include ... *the accommodation of expected new housing in different dwelling types and at appropriate densities for households of all income levels*" [emphasis added].⁴¹

The provision of housing for people of all income levels, in a balanced and inclusionary manner, is also well within the MPC's delegation of zoning power for the purposes of providing for the general welfare. Municipalities have wide discretion to determine what zoning regulations are necessary to provide for the general welfare. In *Village of Belle Terre v. Boraas*, the Supreme Court stated:

The concept of the public welfare is broad and inclusive.... The values it represents are spiritual, as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.⁴²

It is indisputable that IZ policies promote the general welfare. IZ policies increase the supply of affordable housing, thereby easing the financial burden on low-income households.⁴³ They promote economic integration by producing affordable units in low-poverty areas and creating opportunities for low-income children to attend low-poverty schools.⁴⁴ Studies show that moving from a high poverty to a low poverty neighborhood can have a dramatic increase in a child's lifetime earning potential.⁴⁵ Moreover, preserving the character of a residential

⁴¹ 53 P.S. §10301(a)(2.1).

⁴² *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

⁴³ See, e.g., Wang, Ruoniu and Balachandran, Sowmya, *Inclusionary Housing in the United States: Prevalence, Practices, and Production in Local Jurisdictions as of 2019* (Grounded Solutions Network, 2021).

⁴⁴ See, e.g., Schwartz, et al., *Is Inclusionary Zoning Inclusionary?* (RAND, 2012); Kontokosta, Constantine, *Mixed-income housing and neighborhood integration: Evidence from inclusionary zoning programs* (Journal of Urban Affairs, 2013).

⁴⁵ Chetty, Hendren and Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment* (Harvard University, 2015).

neighborhood is a valid exercise of zoning power, and a zoning ordinance may define or limit who may live in a residential district.⁴⁶

While no Pennsylvania courts have addressed this specific issue,⁴⁷ courts in other states have held that promoting the general welfare in the context of zoning includes the provision of housing for people of all income levels and the promotion of social and economic inclusion.⁴⁸ As all zoning regulations must find their justification in the public health, safety or welfare,⁴⁹ the hundreds of jurisdictions throughout the country that have adopted IZ policies,⁵⁰ including many in Pennsylvania,⁵¹ have presumably made similar determinations.

In addition to the grant of zoning power for the general purpose of providing for the general welfare, the MPC articulates a number of specific purposes that, by their plain meaning, would logically encompass the power to legislate for the provision of housing for people of all income levels in a socially inclusive manner. These are “to promote, protect and facilitate ... coordinated and practical community development,”⁵² and to “accommodate reasonable overall community growth, including population and employment growth.”⁵³ A city’s legitimate

⁴⁶ *Lantos v. Zoning Hearing Board*, 621 A.2d 1208, 1211-12 (Pa. Comm. 1993).

⁴⁷ Pennsylvania courts have held that municipalities are not *required* to zone for people of all incomes (see e.g., *Precision Equities inc. v. Franklin Park Borough ZHB*, 646 A. 2d 756 (1994)), but to our knowledge none have considered whether municipalities are *empowered* to do so if they determine that the general welfare requires it.

⁴⁸ See, e.g., *S. Burlington County NAACP v. Mt. Laurel*, 336 A.2d 713, 727 (N.J. 1975) (“It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation”); *Britton v. Town of Chester*, 134 N.H. 434, 441 (N.H. 1991) (Ordinance which excluded development of affordable housing was invalid as it “flies in the face of the general welfare provision” of the authorizing statute); *Board of County Commissioners v. Crow*, 65 P.3d 720, 734-35 (Wyoming, 2003) (Promoting or preserving “social and economic diversity by lessening the demand on affordable housing” is encompassed within the legislative grant of authority to ensure the general welfare); *California Building Industry Association v. City of San Jose*, 351 P.3d 974, 991 (Cal., 2015) (Increasing the amount of affordable housing and dispersing new affordable housing in economically diverse projects are reasonably related to the general welfare).

⁴⁹ See *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 387 (1926).

⁵⁰ As of 2019, there were a total of 1,019 inclusionary zoning policies in 734 jurisdictions throughout the U.S. Grounded Solutions Network.

⁵¹ As of this writing, at least 20 municipalities in Pennsylvania have adopted IZ policies. (RHLS review of reported IZ ordinances, January 2022)

⁵² 53 P.S. §10604.

⁵³ *Id.*

interests in reducing economic and racial segregation, avoiding poverty concentration, ensuring that businesses in high rent areas have ready access to employees and that employees can reach their places of employment with minimum time, cost and traffic congestion – these are all “practical” community development objectives in the plainest sense of that word. These factors are also essential to a municipality’s ability to manage population and employment growth.

The MPC also states one of its purposes is to “permit municipalities to minimize such problems as may presently exist or which may be foreseen.”⁵⁴ This shows that the legislature knew that it could not anticipate every legitimate use of delegated zoning power and that it intended to confer broad authority to municipalities to identify local problems and address them through zoning legislation.

Section 10603 of the MPC states that zoning codes “may permit, prohibit, regulate, restrict and determine,” among other things, the “use of structures.” This includes the power to regulate post-construction occupancy,⁵⁵ and involves more than just a division of a community into use districts.⁵⁶ IZ laws are use regulations.⁵⁷ The U.S. Supreme Court has characterized an ordinance that limits the rents that a landlord may charge as a regulation of the “use of their land.”⁵⁸

Zoning enabling legislation, as opposed to zoning ordinances themselves, must be liberally construed in order to effect its purposes, and it must be presumed that the legislature intended to favor the public interest as against any private interest.⁵⁹ By granting broad authority to enact zoning ordinances that regulate the use of structures for the purpose of providing for the general welfare and implementing plans for the accommodation of new housing for households of all income levels, the MPC clearly and unmistakably authorizes the enactment of local legislation to ensure that people of all incomes have adequate housing, are

⁵⁴ 53 P.S. §10105.

⁵⁵ See, e.g., *Lower Merion v. Harrison*, 84 Pa. Super. 574, 579 and 581 (Pa. Super. 1925) (A statute authorizing the regulation of building construction did not impliedly authorize the regulation of use and occupancy after construction, but the Act of June 29, 1923, which authorized boroughs and townships of the first class to adopt and enforce zoning ordinances regulating the “location, construction and use of buildings,” presumably did).

⁵⁶ See *Edgeworth v. MacLeod*, 456 A.2d 682, 684 (Pa. Comm. 1983).

⁵⁷ See *California Building Industry Assn v. City of San Jose* (“CBIA”), 351 P.3d 974, 991 (Cal. 2015).

⁵⁸ *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992).

⁵⁹ *Naylor v. Twp. of Hellam*, 773 A.2d 770, 774 (2001).

not segregated, and are able to live in areas with employment opportunities, good schools and other amenities. Having granted that legislative authority, it does not matter whether the legislature anticipated the precise means by which it might be exercised.⁶⁰

For a non-home rule municipality that enacts an IZ ordinance pursuant to powers delegated under the MPC, Pennsylvania courts would use a “substantive due process” analysis to determine whether the burdens imposed on property owners exceed the municipality’s zoning power:

When presented with a challenge to a zoning ordinance, a reviewing court presumes the ordinance is valid. The burden of proof is on the party challenging the ordinance, and where its validity is debatable, it must be upheld. A zoning ordinance is a valid exercise of a municipality’s police power when it promotes public health, safety or welfare, and its regulations are substantially related to the purpose the ordinance purports to serve. To determine if these factors have been met, Pennsylvania courts use a substantive due process analysis balancing the public interest served by the zoning ordinance against the confiscatory or exclusionary impact of the regulation on individual rights or, in other words, examine the reasonableness of the restriction on land use in light of the deprivation of the landowner’s freedom thereby incurred. The party challenging the constitutionality of a zoning provision must establish that it is arbitrary, unreasonable and unrelated to public health, safety, morals and general welfare. [Citations omitted.]⁶¹

Pittsburgh’s IZ requirements would surely survive a substantive due process analysis. First, there is ample evidence that Pittsburgh’s affordability restrictions promote the general welfare and are substantially related to the purposes that the ordinance purports to serve.⁶² Two out of

⁶⁰ *Pa. Restaurant & Lodging Assn* at 829 fn 19.

⁶¹ *Main St. Development Group, Inc. v. Tinicum Twp. Bd. of Supervisors*, 19 A.3d 21, 27-28 (Pa. Comm. 2010)

⁶² 907.04.A.3 (Purpose and Intent) states:

“The intent of the Inclusionary Housing Planning Overlay District is to promote the public health and welfare by increasing the supply of affordable housing for a range of family sizes and promoting economic integration within the District boundaries. Due to the unique circumstances involved with development within this area, the existing zoning mechanisms do not serve to carry out the purpose and intent of Chapter 901 (General Provisions) and all provisions of this Zoning Ordinance. Specifically, the intent of the Inclusionary Housing IZ-O is to encourage quality, economically-balanced development by:

five renter households in Pittsburgh are cost burdened (paying over 30% of their income on housing costs), and more than a quarter are severely cost burdened (paying over one-half of their income on housing costs).⁶³ Pittsburgh has a shortage of more than 8,000 housing units that are affordable to low-wage households.⁶⁴ Supply gaps are significant in neighborhoods that are seeing new multifamily rental development.⁶⁵ Rapidly increasing housing costs are forcing low-income residents out of the city.⁶⁶ Since 2011, Pittsburgh has lost thousands of low-income renter households and low- and moderate-income owner households.⁶⁷ Between 2010 and 2020, Pittsburgh lost 10,660 Black residents, a 13.4% decline.⁶⁸ Neighborhoods with the highest displacement of low-income renters are those with the greatest market momentum.⁶⁹ As previously mentioned, numerous studies show that IZ policies increase the supply of affordable housing and promote social and economic integration.

It is also clear that, under a substantive due process analysis, Pittsburgh's affordability restrictions would be considered reasonable in light of the burdens placed upon property owners. The restrictions are supported by financial modeling and property owners are eligible for enhanced tax abatements designed to offset the lost revenue resulting from them. The preliminary results of Lawrenceville's IZOD demonstrate that the affordability restrictions have not rendered multifamily rental or for-sale development unprofitable.

(a)Leveraging development pressure by connecting the production of affordable housing with the current market production of housing units;

(b)Encouraging diverse and balanced housing available for households of all income levels and ensuring that when developing the limited supply of developable land, housing opportunities for persons of variety of income levels are provided; and

(c)Utilizing sites in IZ-O as opportunities to build mixed income developments. Because remaining land appropriate for residential development within in [sic] the IZ-O is limited, it is essential that a reasonable proportion of such land be developed into housing units affordable to low and moderate-income people."

⁶³ HR&A Advisors, *Pittsburgh Housing Needs Assessment – Draft Final Report*, p. 108.

⁶⁴ *Id.* at 105.

⁶⁵ *Id.* at 107.

⁶⁶ *Id.* at 22.

⁶⁷ *Id.* at 9 and 54.

⁶⁸ University of Pittsburgh Center for Social and Urban Studies (UCSUR), *Pittsburgh Perspectives*, August 12, 2021.

⁶⁹ HR&A at 22.

Pittsburgh's affordability restrictions are no more burdensome than other zoning regulations that have been upheld by Pennsylvania courts. The Pennsylvania Supreme Court has found that an ordinance requiring owners of farmland tracts greater than ten acres to set aside 50% to 60% of their land as a "non-buildable site area" reasonably advances a legitimate interest in protecting agricultural land.⁷⁰ Excluding 60% of a property owner's land from development is far more burdensome than subjecting 10%-20% of a developer's housing units to affordability restrictions, the cost of which is offset by an enhanced tax abatement. With respect to the deed restriction, the typical means of enforcing post-construction occupancy regulations is through revocation of the occupancy permit, and zoning restrictions typically remain in effect indefinitely. Requiring a property owner to record a 35-year deed restriction that allows the city and eligible households to enforce affordability standards through court action is far less severe.

Home rule municipalities may invoke the authority that any municipality or class of municipalities has been given,⁷¹ If a non-home rule municipality proceeding under the MPC would have the authority to enact IZ legislation, Pittsburgh cannot be found to have less power merely by virtue of its home rule status.⁷²

For these reasons, Pittsburgh's IZ legislation is well within the scope of zoning authority granted under the MPC, and the Home Rule Law's Business Exclusion should not bar Pittsburgh's use of home rule power to enact IZ legislation.

Takings Clause

The "takings clause" of the Fifth Amendment to the U.S. Constitution requires the government to pay just compensation when private property is taken for public use.⁷³ This is made applicable to the states by the Fourteenth Amendment. A land use regulation may amount to a Fifth Amendment taking if it causes a "permanent physical invasion" of the property,⁷⁴ if it deprives the owner of all economically beneficial or productive use of land,⁷⁵ or if

⁷⁰ *C & M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143, 148-156 (Pa. 2002).

⁷¹ *Pa. Restaurant & Lodging Assn* at 825.

⁷² *Pa. Restaurant & Lodging Assn* at 824.

⁷³ "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

⁷⁴ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982).

⁷⁵ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

a court finds that there has been a taking after considering the facts and circumstances set forth in *Penn Central Transp. Co. v. City of New York*: (1) the economic impact of the policy (2) the extent to which the policy interferes with investment backed expectations and (3) the nature of the regulation.⁷⁶ Explaining the factors in *Penn Central*, the U.S. Supreme Court has said “where the government merely regulates the use of property, compensation is required only if considerations such as the regulation’s purpose or the extent to which it deprives the owner of the property’s economic use suggests that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.”⁷⁷

The U.S. Supreme Court has never considered a takings challenge to an IZ ordinance, but it has upheld rent control ordinances on many occasions.⁷⁸

In *Block v. Hirsh*, the Court held that a law that temporarily prohibited residential evictions for end of lease term and restricted the rents that could be charged did not amount to a taking of private property for public use.⁷⁹ Acknowledging that such a law could go “too far” and that if “pressed to a certain height, might amount to a taking without due process of law,”⁸⁰ the Court stated “if the public interest be established, the regulation of rates is one of the first forms in which it is asserted.”⁸¹ The Court compared rent regulation with other types of permissible regulation: “if, to answer one need, the legislature may limit height to answer another, it may limit rent.”⁸²

Bowles v. Willingham, the Court upheld a wartime law that empowered a Price Administrator to fix maximum rents for housing accommodations in defense rental areas, stating “We are not dealing here with a situation which involves a ‘taking’ of property. [Citation omitted.] By § 4(d) of the Act, it is provided that ‘nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.’ There is no requirement that the apartments in question be used for purposes which bring them under the Act. Of course, price control, the same as other forms of regulation, may reduce the value of the

⁷⁶ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978).

⁷⁷ *Yee v. City of Escondido* at 522-23.

⁷⁸ *Block v. Hirsh*, 256 U. S. 135 (1921); *Bowles v. Willingham*, 321 U. S. 503 (1944); *Yee v. City of Escondido*, 503 U.S. 519 (1992).

⁷⁹ *Block*, at 156.

⁸⁰ *Block* at Id.

⁸¹ *Block* at 157.

⁸² *Block*, at 156.

property regulated. But, as we have pointed out in the *Hope Natural Gas Co.* case [citation omitted], that does not mean that the regulation is unconstitutional.”⁸³

In *Yee v. City of Escondido*, the Court considered whether a state law that allows the owner of a mobile home to sell their home to a new resident, in place, combined with a local rent control ordinance, amounted to a physical taking of the mobile home park owner’s property by forcing the landlord to lease to prospective tenants that it did not select, at a below-market rent.⁸⁴ The Court held that there was no physical taking because the landlord is voluntarily opening the property to occupation by others.⁸⁵ While the combined restrictions may be relevant to the multifactor analysis under *Penn Central*, that question was not before the Court.⁸⁶ However, the Court did acknowledge that the restrictions would not normally be considered a taking:

“This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge or require the landowner to accept tenants he does not like without automatically having to pay compensation.” [Citations omitted.]⁸⁷

Although there are no Pennsylvania court decisions applying a regulatory takings analysis in the context of IZ, the Third Circuit Court of Appeals has considered at least two rezoning cases under the *Penn Central* criteria and held that there was no taking, as the burden applied to all landowners within the rezoned district⁸⁸ and the property owners were not deprived of all economically viable use of their property (despite the fact that one alleged an 89% reduction in value).⁸⁹

⁸³ *Bowles* at 517.

⁸⁴ *Yee* at 526-27.

⁸⁵ *Yee* at 531.

⁸⁶ *Yee* at 534-38.

⁸⁷ *Yee* at 528-29.

⁸⁸ *Rogin v. Bensalem Township*, 616 F.2d 680, 691 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981).

⁸⁹ *Rogin* at 692; *Pace Resources v. Shrewsbury Twp*, 808 F.2d 1023, 1031 (3d Cir. 1987).

Courts considering takings challenges to IZ ordinances have held that they do not constitute a compensable taking.⁹⁰ Pittsburgh’s IZ affordability restrictions, which include cost offsets and were based on an economic feasibility analysis, should easily survive a takings challenge.

Exactions

An “exaction” is a demand that is made for the performance of a public service in the ordinary course of duty. In *Nollan v. California Coastal Comm’n.*, the U.S. Supreme Court held that government may not require a property owner to provide an easement over property as a condition to approval of a land-use permit unless there is an “essential nexus” between the condition and a public need generated by the proposed development.⁹¹ The Supreme Court considered a nearly identical situation in *Dolan v. City of Tigard* and added an additional requirement that there be “rough proportionality” between the government’s demand and the effects of the proposed development on the community.⁹² In *Koontz v. St. Johns River Water Management District*, the Court extended this doctrine to monetary exactions (payment to restore wetlands off-site).⁹³

Where municipalities have imposed impact fees on commercial developments to support the production of affordable housing, some courts have applied an exactions analysis and required the showing of a nexus and rough proportionality.⁹⁴ Other courts have required that the municipality merely demonstrate a “reasonable relationship”.⁹⁵ In the traditional IZ

⁹⁰ See, e.g., *2910 Ga. Ave. LLC v. D.C.*, 234 F. Supp. 3d 281, 305 (D.C. Cir. 2017); *Home Builders Assn of Greater Chicago v. City of Chicago*, 213 F. Supp. 3d 1019 (N.D. Ill. 2016); *CBIA*, 351 P.3d at 991.

⁹¹ *Nollan v. California Coastal Comm’n*, 483 U. S. 825, 837 (1987).

⁹² *Dolan v. City of Tigard*, 512 U. S. 374, 391 (1994).

⁹³ *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013).

⁹⁴ See, e.g., *California Building Industry Association v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) (Impact fee was an exaction but Sacramento met its burden by basing its fee on the results of a “nexus study”).

⁹⁵ See, e.g., *Holmdel Builders Assn. v. Twp. of Holmdel*, 583 A.2d 277, 288 (N.J. 1990) (A “reasonable relationship,” not a strict “but-for” nexus, is the appropriate standard for reviewing impact fees; the Court took judicial notice of the fact that there is a reasonable relationship between unrestrained nonresidential development and the need for affordable residential development); *San Remo Hotel L.L.P. v. City & County of San Francisco*, 27 Cal. 4th 643 (2002) (Impact fee imposed on the conversion of residential units to hotel use must bear a “reasonable

context, courts have so far rejected exactions challenges, holding that the imposition of price controls as a condition of receiving a permit is not an exaction where their imposition on property owners not seeking a permit would not have constituted a regulatory taking.⁹⁶

In the Supreme Court's land use exactions cases, the conditions that were found to be exactions would have constituted takings if the municipality would have required them through legislation rather than in exchange for a building permit.⁹⁷ The rationale behind the Supreme Court's exactions holdings was to prevent municipalities from using their land use process to coerce property owners into relinquishing Fifth Amendment rights. As the Supreme Court explained in *Koontz*:

*[L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation.*⁹⁸

As long as an IZ law is designed to survive a *Penn Central* takings analysis, there is no Fifth Amendment right that housing developers would be coerced into giving up, so an exactions challenge should fail.

relationship," in both intended use and amount, to the deleterious public impacts of the development; the city had demonstrated that relationship through a nexus study).

⁹⁶ See, e.g., *Alto Eldorado Partnership; 2910 Ga. Ave.; Home Builders Assn of Greater Chicago; CBIA*.

⁹⁷ See *Alto Eldorado* and *CBIA*. A regulation that results in a permanent physical occupation of property (as would have been the case in *Nollan* and *Dolan*) is a "per se" taking. *Loretto* at 435. A demand for money linked to a specific property interest is also a per se taking. *Koontz* at 133 S.Ct. 2600.

⁹⁸ *Koontz* at 133 S.Ct. 2594.

RECOMMENDATIONS

Near Term

Develop clear and effective informational and compliance documents, finalize cooperation agreements with the URA and HACP, dedicate staff to administer IZ policies, and develop monitoring and outcome reporting procedures. As of the writing of this update, two projects covered by the Lawrenceville IZOD are about to come online – one rental and one for-sale. However, informational materials (explaining developer, renter and homebuyer obligations) and compliance documents (deed restrictions, household income reporting forms, zoning desk forms, checklists, etc.) have either not been prepared or are still being finalized. Nor have cooperation agreements been executed with HACP to verify household income and the URA to monitor compliance. These items need to be finalized ASAP. There should also be a staff person at the City or URA who is responsible for ensuring that the IZ process functions smoothly and that systems are developed to monitor and report outcomes.

Align Pittsburgh's enhanced tax incentives with the recommendations of the IZ Exploratory Committee and require recipients to accept housing choice vouchers. The IZ Exploratory Committee's feasibility modeling was based on a typical multifamily rental development with a 35-year IZ commitment, at 50% AMI, and a 10-year enhanced tax incentive. The 2018 amendments to Pittsburgh's LERTA and Act 42 ordinances require only a 10-year affordability commitment and allow developers to satisfy rental affordability requirements by providing a higher set-aside of units at 80% AMI. The city should amend the ordinances to require at least a 35-year affordability commitment, with rental affordability capped at 50% AMI. In light of recent court decisions invalidating Pittsburgh's source of income anti-discrimination ordinance, the city should also require the owners of rental properties receiving an enhanced tax abatement to accept housing choice vouchers.

Update the IZ set asides and the financial modeling performed by the IZ Exploratory Committee. The market assumptions used by the IZ Exploratory Committee in its financial modeling and designation of "stronger market areas" are already out of date. Pittsburgh's housing market is growing rapidly, and our IZ policies should keep pace. In 2017, the city paid Grounded Solutions to create a Pittsburgh-specific IZ "calculator." Updating that calculator should be relatively easy and inexpensive and would ensure that increased IZ set asides are on solid legal footing. It should also be relatively easy to update the list of stronger market areas where higher set asides are feasible and adjust the IZOD set asides accordingly.

Longer Term

Strengthen and expand Pittsburgh's incentivized mandatory IZ policy citywide. The incentivized mandatory approach used in the Lawrenceville IZOD has worked, the findings of the IZ Exploratory Committee suggest that a citywide policy is feasible, and subsequent market conditions suggest that Pittsburgh's housing market would tolerate higher IZ set asides. Pittsburgh should develop a citywide policy with higher set asides, particularly in strong market areas, along with a mechanism to regularly update IZ requirements to reflect changes to the housing market. In the meantime, the IZOD should be expanded to other neighborhoods that want to opt in.

Set uniform affordability targets at 50% of area median income (AMI) or less for rental housing and 70%-80% of AMI or less for for-sale housing. Studies consistently show that the city's affordable housing gaps are at 30% and 50% of AMI and that there is no shortage of housing that is affordable to households earning 80% of AMI and above. Yet the city, the URA and housing developers often set affordability targets at income levels that are higher than where the need is. Pittsburgh should target its affordable housing subsidies and standards to serve households that are being neglected by the private market.

Continue to forgo the use of in-lieu fees. Policies that allow developers to avoid compliance by paying a fee-in-lieu rarely generate enough revenue to build the same number of affordable units that would otherwise have been built, in a comparable location. The IZ Exploratory Committee recommended against using in-lieu fees, and the Lawrenceville IZOD does not permit it. Any expansion of Pittsburgh's IZ policy should continue that practice.

Require affordability commitments as a condition of any change to housing-related zoning requirements and development processes. In the 2021 update to the city's Housing Needs Assessment, HR&A Advisors recommends that the city change zoning and development processes to increase the production of multifamily housing and expand by-right development. Studies show that, in the short term at least, so-called "upzoning" has not been effective at lowering housing prices and has in some instances been associated with increased property values and displacement. If HR&A's recommendation is followed, by-right development should be limited to an affordable or inclusionary housing use and relaxed development standards should include robust affordable housing commitments.