

Part of the Solution: Addressing Honolulu’s Housing Crisis Through Inclusionary Housing Legislation

*Pono Arias**

I. INTRODUCTION	73
II. OVERVIEW OF HAWAI‘I HISTORY	74
A. <i>The Māhele and Hawaiian Homes Commission</i>	75
B. <i>Rising Home Prices and the Cost of Living</i>	76
III. INCLUSIONARY HOUSING	79
A. <i>Inclusionary Housing Overview</i>	80
B. <i>Framing Inclusionary Housing</i>	81
C. <i>Inclusionary Housing Programs in the Courts</i>	84
IV. THE CITY AND COUNTY OF HONOLULU’S ORDINANCE 18-10	89
V. ELEMENTS OF SUCCESSFUL INCLUSIONARY HOUSING	100
A. <i>Elements of Successful Inclusionary Housing Programs</i>	101
B. <i>Development Feasibility</i>	103
C. <i>Developer’s Incentives</i>	107
D. <i>Administration of Inclusionary Housing Programs</i>	109
VI. PROPOSED ORDINANCE.....	112
VII. CONCLUSION	118

I. INTRODUCTION

“The resolution of Hawai‘i’s affordable housing crisis is a critical issue for statewide concern.”¹ Local communities are struggling through the cost of living in Honolulu. Yet, luxury developments continue to sprout across Honolulu in places like Kaka‘ako.² These luxury developments do not meet the financial needs of local residents and contribute to a gap between the cost of housing and the needs of the local community.³ Between

J.D. Candidate, Class of 2023, William S. Richardson School of Law. First and foremost, thank you to my Lord and savior Jesus Christ without whom none of this would be possible. A special thank you to both my editors Maddy McKeague, Jimmy Nguyen, and the rest of my team for their hard work and dedication. Finally, thank you to my friends and family for their unwavering support and love.

¹ DAVID CALLIES, *REGULATING PARADISE: LAND USE CONTROLS IN HAWAII* 7 (Univ. of Hawaii Press 2010).

² Condominiums in Kaka‘ako range in price from \$550,000 to \$2.4 million. *New Honolulu Condos For Sale*, COLDWELL BANKERS PROP., <https://www.kakaako.com/new-honolulu-condos/> (last visited April 23, 2022).

³ Ellen Pris, *Fueled by Mainland Buyers, Hawaii’s Luxury Housing Market Continues its hot streak*, *FORBES MAG.*, (Jan 3, 2022).

the rise in home prices and cost of living, local families cannot afford to live in Honolulu and must find relief elsewhere. This crisis runs so deep that one initiative could not resolve the issue alone. Every community member, including the legislature and developers, must strive for an innovative solution. Financial and housing instability are constant sources of stress in local communities, and legislators are tasked with finding solutions that benefit local communities without imposing an unfair burden on developers.

This article analyzes Honolulu's affordable housing ordinance and provides suggestions to improve the availability and affordability of the units that the ordinance provides. Local communities have historically struggled to afford housing in Hawai'i, and the legislature has had difficulty addressing their needs. Meanwhile, developers are willing to create affordable housing but will not do so without proper incentives.⁴ Since developers are the only parties capable of building homes, they are crucial to building affordable housing and must have a role in crafting affordable housing legislation to ensure that construction is feasible. Therefore, the legislature must prioritize the local community's needs and call upon developers to shoulder more of the burden in building affordable housing.

To layout the challenge in creating a meaningful affordable housing solution, Part II gives an overview of past and current issues in land and home ownership in Hawai'i. Legislation has failed to adequately address these longstanding problems faced by local communities.⁵ Part III discusses inclusionary housing as a possible solution to the challenge. Part IV analyzes Honolulu's current inclusionary housing program. The ordinance considers research and developer-input and attempts to provide affordable housing while accounting for developers' desires. Part V considers Honolulu's growing housing market, developer feasibility margins, and housing administration. Part VI proposes an alternative ordinance that targets a sect of the local community that housing issues likely affect the most.

II. OVERVIEW OF HAWAI'I HISTORY

Hawai'i requires meaningful affordable housing solutions to address historical and modern issues. This section will address the history of housing in Hawai'i and the challenges that emerged. This overview will

⁴ *About Stanford Carr*, STANFORD CARR DEV., LLC., <https://www.stanfordcarr.com/about/> (last visited April 23, 2022) (The development firm "strives for excellence by [p]roviding the community with increased affordable housing opportunity").

⁵ "Native Hawaiians" are those of Hawaiian ancestry. One can be "local," or have grown up in Hawai'i, but not have indigenous roots. Under the Hawaiian Homes Commission Act ("HHCA") a "Native Hawaiian" is one who can prove a blood quantum of at least 50 percent. H.J. RES. 32, 105th Cong. 1st Sess. (Haw. 1997). Blood quantum refers to a minimum percentage of one's ancestry that is documented as full-blooded indigenous.

demonstrate the growing need for effective legislation as Hawai‘i faces unique challenges that many states do not. This includes the 1848 Great Māhele, which divided land and established private property in Hawai‘i, and its consequences for Native Hawaiians.⁶ Ultimately the problem has grown beyond the Native Hawaiian community and now affects all races and creeds that live in Hawai‘i.⁷ Finally, this section will discuss modern housing issues such as rising home prices, expenses of landownership.

A. *The Māhele*

Hawai‘i land law developed from the traditional concepts of land stewardship in Hawai‘i and later incorporated the Anglo-American concept of real property.⁸ Native Hawaiians lived in ahupua‘a, which are land divisions that stretch from the mountain to the sea.⁹ Ali‘i, or chiefs, ruled over the land, and the maka‘āinana, or “common people”, were stewards of the land. Land exchanged hands as the ali‘i battled one another for control over the various ahupua‘a until Kamehameha I united the islands.¹⁰ As westerners began to populate Hawai‘i, Western and Hawaiian ideas of land ownership clashed. Thirty-eight years after Kamehameha I united the islands, his son, Kūikeyouli, altered Hawai‘i’s understanding of land use through the Māhele.¹¹

In 1848, the Great Māhele divided the land into three parts: the king received 984,000 acres in the Crown Lands,¹² chiefs received the Konohiki Lands, holding 1.6 million acres; and commoners received the Government Lands, only 28,000 acres.¹³ The king and chiefs received land as private property, while the government held the land in trust for commoners. 13,000 Native Hawaiians applied for Government Lands, but only 9,000 received land.¹⁴ The maka‘āinana received a disproportionately small amount of land

⁶ *Id.*

⁷ 2020 O‘AHU POINT IN TIME COUNT, PARTNERS IN CARE O‘AHU’S CONTINUUM OF CARE, 1, 4 (2020) [hereinafter POINT IN TIME COUNT].

⁸ Robert Bruce Graham, Jr., *Traditional Hawaiian Land Law*, HAWAI‘I REAL ESTATE L. MANUAL VOL. I, §2-3 (Deborah Macer Chun et al. eds., 2008).

⁹ Ahupua‘a are socio-ecological communities within the larger moku, or social-ecological region. These boundaries simultaneously operated as political divisions and resource management systems. Kawika B. Winter et al., *The Moku System: Managing Biocultural Resources for Abundance within Social-Ecological Regions in Hawai‘i*, 10 SUSTAINABILITY no. 3554, 3 (2018).

¹⁰ Graham, *supra* note 8, at §2-3.

¹¹ *Id.*

¹² *Id.*

¹³ U.S. Commission on Civil Rights, *Breach of Trust: Native Hawaiian Homelands*, A SUMMARY OF A PUBLIC FORUM § 2-4 (1980) (hereinafter *Breach of Trust*).

¹⁴ *Id.* at § 2-4.

for two primary reasons. First, Hawaiians did not understand the Western concept of land ownership. Native Hawaiians were previously stewards of the land and did not regard it as a privately owned commodity.¹⁵ Second, many Hawaiians could not afford the necessary land surveying cost.¹⁶ As stewards of the land, Hawaiians did not earn money as an intermediary for subsistence. Rather, Hawaiians relied on fishing, farming, and hunting to provide for their families. But under this new model of land ownership, capital was needed. These two factors dispossessed thousands of Native Hawaiians of the land they stewarded for generations and began a cycle of Native Hawaiian displacement.¹⁷

While the Great Māhele presented challenges for the Native Hawaiian community, Native Hawaiians are not the only class of people that struggle.¹⁸ As natives to the land, Native Hawaiians were merely the first to struggle with issues of houselessness and land scarcity.¹⁹ Today, the problem reaches across racial boundaries, as a variety of races and people struggle with the rising home prices and the cost of living, that ultimately lead to the affordable housing issue.²⁰

B. *Rising Home Prices and the Cost of Living*

Today, Hawai‘i is experiencing skyrocketing home and rental prices.²¹ In December 2021, the median price of a home in Hawai‘i was \$1 million, and this is due, in part, to the increased demand for housing that has been a continuous trend since 1990.²² In comparison, the median price of a home in New York State was \$781,622, twenty percent less than Hawai‘i’s median.²³ The rental market does not fare much better. 40 percent

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 31 percent of homeless people on the night of January 22, 2020 were Native Hawaiian, but only 10 percent of O‘ahu’s population is Native Hawaiian. POINT IN TIME COUNT, *supra* note 7, at 4.

¹⁸ See POINT IN TIME COUNT, *supra* note 7, at 4.

¹⁹ See *Breach of Trust*, *supra* note 13 at § 3-6.

²⁰ See POINT IN TIME COUNT, *supra* note 7, at 4.

²¹ Based on the continuous increase in population since 1990, the demand for housing has continued to increase in Honolulu. Between 2020 and 2030, the DBEDT projects that Honolulu will require over 10,000 new units to meet the population demand. BINSHEG LI ET AL., RESEARCH AND ECONOMIC ANALYSIS DIVISION, HAWAII HOUSING DEMAND: 2020-2030, Department of Business, Economic Development & Tourism 1, 9 (2019).

²² Market Report (December 2021), HONOLULU BOARD OF REALTORS <https://www.hicentral.com/mpr/mpr-2021-12.php>; LI ET AL., *supra* note 23, at 9.

²³ New York Home Values, ZILLOW, <https://www.zillow.com/new-york-ny/home-values/> (last visited March 10, 2022). New York state has the fifth highest cost of living

of Hawai‘i residents are renters,²⁴ and a two-bedroom rental costs about \$2,240 per month. This average cost requires a household to make around \$80,000 annually if it is contributing 30 percent of household income to rent.²⁵ In 2022, Hawai‘i led the nation in home prices and was third in the nation for rent prices.²⁶ On top of these prices, homes are significantly smaller per dollar in Hawai‘i than in other states. For example, for \$200,000, a home buyer in West Virginia could expect four times the square footage of a similarly priced home in Hawai‘i.²⁷ Homes in Hawai‘i are more expensive and disproportionately smaller than in other states, contributing to the significant financial burden of living in Hawai‘i.²⁸

With its high median housing price, Hawai‘i predictably had the highest cost of living in the country.²⁹ The Department of Business, Economic Development, and Tourism published a report in December 2021 to determine self-sufficiency family income standards.³⁰ The study considered family sizes from a single adult to a family of four, and all family units must make significantly more than the current minimum wage to be self-sufficient.³¹ To meet their basic needs, a single adult must make at least \$18.35 per hour while a family of four must make a total of \$41.54 per hour.³² The report found that 43 percent of single adults and 34 percent of families of four live below the self-sufficiency level.³³ The situation is even more dire for non-traditional households. 80 percent of single adults with

and has implemented an inclusionary housing program to combat homelessness. *Cost of Living Data Series*, Missouri Economic Research and Information Center, <https://meric.mo.gov/data/cost-living-data-series> (last visited January 2022).

²⁴ Market Report, *supra* note 22.

²⁵ *Id.*

²⁶ Median Home Price by State, WORLD POPULATION REVIEW <https://worldpopulationreview.com/state-rankings/median-home-price-by-state> (last visited March 2022).

²⁷ *Id.* 2,140 sq ft. vs. 421 sq. Ft.

²⁸ *Id.* The cost per square foot in Hawai‘i is almost \$200 more than California, the second state with the highest Median home price. *Id.*

²⁹ *Cost of Living Data Series*, *supra* note 23.

³⁰ Economic self-sufficiency is the amount of money that individuals and families require to meet their basic needs without government and/or other subsidies. The study assumes a 40-hour work week. Necessities include housing, childcare, food, transportation, health care, miscellaneous, and taxes. Dept. of Business, *Self-Sufficiency Income Standard Estimates for Hawaii 2020*, ECONOMIC DEVELOPMENT AND TOURISM (2021) at ii, 12 [hereinafter *Self-Sufficiency Income Standard*].

³¹ At the highest mark, a single parent with two children must make nearly 300 percent of the minimum wage. *Id.* at 12.

³² \$41.54 per hour is 191.2% above the minimum wage. *Id.*

³³ *Id.*

two children lived below the self-sufficiency level.³⁴ To be self-sufficient, all families must earn wages that are significantly higher than the minimum wage, but many families do not.³⁵

Hawai‘i has the largest homeless population per capita in the nation.³⁶ This problem is directly related to the price of homes, as only 8 percent of Hawai‘i’s population lives below the federal poverty line.³⁷ The poverty level in Hawai‘i does not match the homelessness epidemic that Hawai‘i experiences. This contrast suggests that, although Hawai‘i may have a strong housing market for luxury-seeking individuals or families, the market is not conducive to the needs of local communities.³⁸

This gap between the relatively low number of individuals in poverty and the high number of homeless individuals is largely due to a portion of the population living as Asset Limited, Income Constrained, Employed (“ALICE”).³⁹ About 40 percent of Honolulu’s population currently live above the federal poverty line⁴⁰ but below the minimum survival budget for Hawai‘i.⁴¹ This sect of the population cannot meet basic

³⁴ A single adult with two children needs to make \$82,526 to be self-sufficient. *Id.*

³⁵ On October 1, 2022, the minimum wage increased from \$10.10 per hour to \$12.00 per hour. Dep’t of Lab. and Indus. Relations, *Minimum Wage to Increase to \$12.00 on October 1*, HAWAII.GOV, <https://labor.hawaii.gov/blog/news/minimum-wage-to-increase-to-12-00-on-october-1/>. If two parents in a family of four make the minimum wage, they will make about half of the necessary income to be self-sufficient. *See Self-Sufficiency Income Standard supra* note 30, at 12.

³⁶ *Homelessness in Hawaii: Facts and Resources*, HAWAII.GOV <https://ltgov.hawaii.gov/homeless-in-hawaii-facts-and-resources/>.

³⁷ *QuickFacts Honolulu County, Hawaii*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/honolulucountyhawaii/INC110219>. For 2022, the federal poverty level for a family of four was income earned that was less than \$27,750 per year. *Poverty Guidelines*, ASSISTANT SEC’Y FOR PLAN. AND EVALUATION, <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines>. The federal government considers those who live below the federal poverty line as extremely poor, while the self-sufficiency standard is the minimum income requirement to meet basic needs without government assistance. *See Self-Sufficiency Income Standard, supra* note 30, at ii.

³⁸ On the night of January 22, 2020, there were about 4,448 people experiencing homelessness. POINT IN TIME COUNT, *supra* note 17, at 4. This number will likely continue to increase as the demand for housing continues to rise. *See Market Report, supra* note 24, at 5;

³⁹ *Hawai‘i State Overview*, UNITED WAY OF NORTHERN NEW JERSEY, <https://www.unitedforalice.org/state-overview/Hawaii> (last visited December 11, 2022) [hereinafter *ALICE State Overview*].

⁴⁰ *Id.*

⁴¹ A family of four, with two children in need of childcare must make, at a minimum, \$90,828 per year. *Id.*

household needs such as childcare or rent payment.⁴² The soaring home prices and high cost of living work in conjunction and contribute to the homelessness epidemic. Thus, Hawai‘i requires affordable housing solutions that utilize many of the advantages that Hawai‘i has at its disposal to address Hawai‘i’s unique problems.⁴³

III. INCLUSIONARY HOUSING

Inclusionary housing is a government regulation that requires developers to set aside a certain percentage of homes in a development for affordable housing. In return developers receive incentives, such as Low Income Housing Tax Credits, density bonuses, and direct subsidies. Though more counties and states are now enacting inclusionary housing ordinances, there has been a wide range of parameters with varying degrees of success. This section will discuss successful inclusionary housing ordinances and the rules that legislative bodies have set. Successful inclusionary housing ordinances increase affordable housing options but have a minimal effect on development.⁴⁴

It is difficult to think of inclusionary housing programs as one category of law because programs vary between municipalities and could undergo several types of legal analyses. Legislators push the boundaries of inclusionary housing ordinances while practitioners and scholars debate the proper legal analysis for inclusionary housing under the current body of law. Practitioners have categorized inclusionary housing programs into several legal doctrine, including exactions, illegal fees, and zoning. Different legal doctrines apply different levels of judicial scrutiny. The level of scrutiny and type of legal analysis will determine whether a state or federal court upholds an inclusionary housing program as constitutional.

The proper legal analysis for inclusionary housing programs remains ambiguous. Inclusionary housing programs vary from municipality to municipality, and these variations force practitioners to craft arguments

⁴² *Id.* (“ALICE households are forced to make tough choices, such as deciding between quality childcare and paying the rent, which have long-term consequences not only for ALICE, but for all.”)

⁴³ The state of Hawai‘i has several programs to finance affordable housing, including the Project Award Program, Capacity Building Grant Program, and the Predevelopment Loan Program. *Rental Housing Revolving Fund*, HAWAII.GOV. <http://dbedt.hawaii.gov/hhfdc/developers/RHTF.html/> (last visited September 12, 2022). Further the state of Hawai‘i is one of a few states that has the Rental Housing Revolving Fund (RHRF). *Id.* This fund delivers gap financing for developments between their construction an permanent phases. *Id.*

⁴⁴ Cities in California that implemented inclusionary zoning ordinances did not experience a decrease in the rate of single-family housing starts but did experience an increase in multi-family housing starts. Antonio Bento et al., *Housing market Effects of Inclusionary Zoning*, 11 REGULATORY INNOVATION AND AFFORDABLE HOUS. 7, 12 (2009). Essentially, these cities were able to produce thousands of affordable units without curtailing development. *See id.*

specific to the municipality's program(s). Many state courts have considered the issue but ultimately relied on local law to reach decisions.⁴⁵ Legislators create inclusionary housing programs with specific parameters and goals when they craft these arguments. In framing inclusionary housing programs with specific parameters and goals, practitioners must also understand the judicial arguments and ambiguities for potential litigation.

A. *Inclusionary Housing Overview*

Inclusionary housing programs require developers to provide affordable housing in exchange for developing market-rate homes in the jurisdiction. Inclusionary zoning⁴⁶ began in 1974 in Montgomery County, Maryland, and has since expanded to twenty-eight states and Washington D.C.⁴⁷ Today, inclusionary programs have expanded beyond zoning and can fall into other categories of land use regulations.⁴⁸

Inclusionary housing programs have four primary characteristics. First, they will either be mandatory or voluntary.⁴⁹ While mandatory programs premise a developer's ability to build homes in the jurisdiction on their ability to create affordable homes, voluntary programs seek to incentivize developers to participate in these programs.⁵⁰ Second, inclusionary housing programs will provide incentives, regardless of whether the ordinance is mandatory or voluntary, though with varying levels of support.⁵¹ These incentives are meant to offset costs to the developer and encourage participation in these programs. Incentives may include density

⁴⁵ For example, Virginia requires municipalities to provide their "fair share" of housing, while California relies on its building code to determine the legality of inclusionary housing programs. *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal.4th 435, 461, 351 P.3d 974, 991 (2015); *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151, 174, 336 A.2d 713, 724 (1975) (*Mount Laurel I*).

⁴⁶ This article will refer to the ordinance and similar legislation as inclusionary housing. Inclusionary housing is the general term for laws, codes, or rules that require developers to set aside a certain percentage of homes for affordable housing, while inclusionary zoning refers to programs that utilize the zoning codes to require set-asides.

⁴⁷ Bento et al., *supra* note 44, at 8; *Inclusionary Housing Map*, INCLUSIONARYHOUSING.ORG, <https://gsn.maps.arcgis.com/apps/webappviewer/index.html?id=83f6a5ace35a4788844db4b7aef3cbb5> (last visited July 30, 2022).

⁴⁸ These can include community land trusts, land conveyance for state created and managed housing, or land use conditions. For example, the Honolulu Ordinance is crafted as a land-use requirement. *See Revised Ordinances of Honolulu* § 18-10 (2018).

⁴⁹ Mandatory programs may provide options for developers to participate in the program at different levels. LISA STURTEVANT, *SEPARATING FACT FROM FICTION TO DESIGN EFFECTIVE INCLUSIONARY HOUSING PROGRAMS* 10 (Center for Housing Policy 2016).

⁵⁰ *Id.*

⁵¹ Generally, "mandatory programs work better than voluntary programs." *Id.* at 8.

bonuses, fee waivers, or expedited permitting processes.⁵² Third, there is often an affordability period requirement.⁵³ The homes must remain affordable for a specified period ranging from five years to forever.⁵⁴ Fourth, inclusionary housing programs typically require a certain percentage of development in a given area to be designated for affordable housing.⁵⁵ Ordinances can require anywhere from 5 percent to 50 percent of units to be affordable.⁵⁶ Jurisdictions with inclusionary housing programs have these specifications, but the parameters vary.⁵⁷ All specifications should balance competing interests of creating affordable housing and minimize its effect on the housing market. Fifty years of inclusionary housing policy has led to litigation in many jurisdictions in the United States.⁵⁸ As the following section will illustrate, there is no uniformity between jurisdictions, which makes it crucial to consider how proponents frame inclusionary housing.

B. Framing Inclusionary Housing

With a lack of regularity to rely on, many courts, proponents, and opponents have framed inclusionary housing programs in a variety of ways.⁵⁹ Inclusionary housing programs do not fall squarely into one legal doctrine, so framing often determines a court's analysis for inclusionary housing programs. Further, while many jurisdictions have dealt with inclusionary housing programs, there is little uniformity across the nation

⁵² For example, developers who comply with ROH 18-10 can receive a waiver for the wastewater system facility charges, which normally costs about \$6,616 per unit. *Affordable Housing Incentive Handout*, CITY & COUNTY OF HONOLULU 1, 4 (October 31, 2018) [hereinafter *AHR Incentive Handout*].

⁵³ *See id.*

⁵⁴ *Mandatory Inclusionary Housing*, CITY OF NEW YORK (March 22, 2016), <https://www1.nyc.gov/site/planning/plans/mih/mandatory-inclusionary-housing.page> [hereinafter *NYC Mandatory Inclusionary Housing*].

⁵⁵ *See id.*

⁵⁶ *See* ROH §18-10 (2018); *Kamaole Pointe Development LP. v. County of Maui*, 2008 WL 5025004 (D. Haw. 2008) (Maui required 50 percent of homes be affordable).

⁵⁷ For example, Honolulu's ordinance allows anywhere from 5 percent to 30 percent of units to be affordable while New York's Mandatory Inclusionary Housing requires no less than 20 percent of new units to be affordable. *Compare* ROH §18-10 *with Inclusionary Housing Program*, CITY OF NEW YORK, <https://www1.nyc.gov/site/hpd/services-and-information/inclusionary-housing.page> (last visited March 20, 2022).

⁵⁸ *See infra* Section II.C for a discussion on the issues that courts have considered in adjudicating inclusionary housing programs.

⁵⁹ Courts have considered inclusionary housing programs under several legal doctrines, including illegal fees, exactions, and regulatory takings. *See infra* Section II.C. Generally, a fee is "a fixed charge" or a sum paid or charged for a service. *Fee*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/fee>.

because many courts have looked to local laws that also vary.⁶⁰ Many jurisdictions design inclusionary housing programs specific to their issues and goals.⁶¹ This specification creates ambiguity in characterizing inclusionary housing programs and invites practitioners to be creative in court.

The ambiguity encourages creativity in situations where developers make payments to affordable housing funds. One example is the use of terms like “impact fee,” “in-lieu fee,” and “linkage fee,” which have all appeared in legislation across the country.⁶² In the context of inclusionary housing, the modifying language of each term invites a different analysis or understanding.

An impact fee is a monetary amount that the government asks from real-estate developers in exchange for a development permit to offset the impacts of development on the area.⁶³ This type of fee is a “monetary exaction”⁶⁴ subject to the Essential Nexus and Rough Proportionality tests set out in *Nollan* and *Dolan*, respectively.⁶⁵ Impact fees are rooted in the government’s eminent domain power, and the court has distinguished these type of fees from the government’s power to tax.⁶⁶ Impact fees occur when a landowner makes an otherwise proper use of their land and the government seeks to limit or prevent use of the land for government benefit.⁶⁷

In-lieu fees are meant to be voluntary alternatives to comply with an ordinance.⁶⁸ Developers may pay in-lieu fees to contribute to the

⁶⁰ Tim Iglesias, *Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and Its Potential to Meet Affordable Housing Needs*, 36 UNIV. OF SAN FRAN. SCH. OF L., 1, 4 (2013) [hereinafter Iglesias, *Framing Inclusionary Zoning*].

⁶¹ *Id.*

⁶² *Id.*

⁶³ Brian Lerman, *Mandatory Inclusionary Zoning – The Answer to the Affordable Housing Problem*, 33 B.C. ENV’T AFFAIRS L. REV. 383, 397 (2006) (arguing that “mandatory inclusionary zoning is the best option and should be valid under an impact fee-like analysis”).

⁶⁴ In *Koontz v. St. Johns River Water Management Dist.*, the Supreme Court of the United States considered Florida’s requirement that a landowner pay a mitigation fee for its impact on nearby wetlands. 570 U.S. 595, 602, 133 S.Ct. 2586, 2593 (2013).

⁶⁵ “A unit of government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a “nexus” and “rough proportionality” between the governments demand and the effects of the proposed land use. *Id.* (citing *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994)); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 107 S.Ct. 3141 (1987).

⁶⁶ *Koontz*, 570 U.S. at 615, 133 S.Ct. at 2600-01 (Distinguishing between the government’s power to tax and to take by eminent domain).

⁶⁷ *Id.*

⁶⁸ Lerman, *supra* note 63, at 397.

jurisdiction's affordable housing stock when on-site or off-site⁶⁹ affordable housing development costs make development infeasible, especially for smaller developments.⁷⁰ While, in-lieu fees seem to suggest voluntary participation, mandatory compliance blurs the lines of voluntary participation. Inclusionary housing programs that provide in-lieu fees alternatives create ambiguity for categorization purposes.⁷¹ In *Koontz*, the Court considered the in-lieu fees as an exaction, because the fees replaced a land use exaction that the government required, as opposed to a different type of governmental requirement.⁷² Thus, an in-lieu fee's validity will depend largely on how a court categorizes the requirement that the fee replaces such as a land use condition or exaction.

A linkage fee is analogous to an impact fee because linkage fees link market-rate real estate development to affordable housing production.⁷³ Linkage fees developed separately from impact fees because linkage fees came about from non-real estate development, such as commercial projects where on-site affordable housing would typically be inappropriate.⁷⁴

The type of fee that a jurisdiction imposes on development and the type of development imposed on could determine the type of fee that is employed. For example, an in-lieu fee may be subject to how the court categorizes the land use requirement, and a commercial linkage fee may endure a different analysis than an impact fee for real-estate development within the same jurisdiction.⁷⁵ In *Koontz*, the Supreme Court considered the type of government action, the reasons underlying the government's decision, and the impact of the requirement to determine the proper legal

⁶⁹ "Off-site" development means "construction or other activities that occur on a zoning lot other than the project site. ROH §18-10 at 3.

⁷⁰ *Id.*

⁷¹ *Koontz*, 570 U.S. at 612, 133 S.Ct. at 2599 ("[A] permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment to the easement's value. Such so-called "in-lieu of" fees are utterly commonplace. . . and they are functionally equivalent to other types of land use exactions").

⁷² *Id.*

⁷³ Linkage fees are ultimately analogous to impact fees but may differentiate in application, depending on the legislation. See *Linkage Fee Programs*, INCLUSIONARYHOUSING.ORG, <https://inclusionaryhousing.org/designing-a-policy/program-structure/linkage-fee-programs/> (last visited November 30, 2021).

⁷⁴ *Id.*

⁷⁵ The *Koontz* court recognized the seemingly arbitrary line between the "in-lieu" exaction and the land use requirement. See *Koontz* 570 U.S. at 612, 133 S.Ct. at 2599.

analysis for the government action.⁷⁶ State courts employ a similar evaluation for jurisdiction-specific inclusionary housing programs.⁷⁷

C. *Inclusionary Housing Programs in the Courts*

Courts face the compounding issues of both varying programs and multiple applicable legal doctrines in adjudicating inclusionary housing programs.⁷⁸ Programs are jurisdiction specific, and the mechanisms of each program are fitted to capitalize on the jurisdiction's benefits and minimize its downfalls.⁷⁹ Additionally, the courts have applied various legal doctrines like state housing codes, state constitutions, and the U.S. Constitution. The Supreme Court has refrained from analyzing inclusionary housing programs or providing guidance as to the applicable legal doctrine for these programs.⁸⁰ Together, these issues create significant leeway in crafting inclusionary housing programs that employ the law to its full extent and effect meaningful change. Below are examples of various jurisdictions' analyses of inclusionary housing programs.

Different inclusionary housing programs may be subject to similar analyses but reach opposing results. The New Jersey Supreme Court considered a local inclusionary zoning ordinance under a substantive due process analysis.⁸¹ Under the New Jersey Constitution, municipalities must use land use regulations to provide low- and moderate-income housing.⁸² *Mount Laurel I* made housing a constitutionally protected right so that a

⁷⁶ *See id.*

⁷⁷ Similar to *Koontz*, state courts have categorized in-lieu fees based on the underlying government requirement, whether that requirement be an exaction or fee. *See North End Realty, LLC v. Mattos*, 25 A.3d 527, 534 (R.I. 2011).

⁷⁸ Iglesias, *Framing Inclusionary Zoning*, *supra* note 60, at 3 ("Each paradigmatic ordinance can be modified by changing the primary requirement, altering what types of development it regulates, making alternative means of compliance available, and providing incentives and regulatory relief. Individually and cumulatively, these modifications make the types of local inclusionary ordinance overlap and blur what a "local inclusionary ordinance" is or means").

⁷⁹ *Id.*

⁸⁰ *California Bldg. Indus. Ass'n v. City of San Jose*, Calif, 577 U.S. 1179, 136 S. Ct. 928, 194 L. Ed. 2d 239 (2016), *cert. denied*. In his concurrence for denying Cert, Justice Thomas acknowledges circuit split on whether the *Nollan/Dolan* test applies when the alleged taking arises "from a legislative imposed condition rather than an administrative one." This case did not present the opportunity to address this.

⁸¹ *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151, 174, 336 A.2d 713, 724 (1975) (*Mount Laurel I*).

⁸² The New Jersey court famously crafted its "fair share" requirement, where municipalities must provide reasonable housing opportunities for its "fair share" of lower-income people. *Mount Laurel I* ("We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing.") (*Mount Laurel I*).

substantive due process could stand.⁸³ In *Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp. (Mount Laurel II)*, the court reaffirmed this doctrine and instructed municipalities to comply by removing excessive restrictions and using affirmative measures such as inclusionary zoning.⁸⁴ On the other side of the country, the Court in *Sintra, Inc. v. City of Seattle* instead undertook a three-part substantive due process analysis.⁸⁵ The Court found the inclusionary housing program to be unduly burdensome on the landowner because “one parcel of land does not contribute to homelessness in any pronounced way; the lack of low-income housing was brought about by a great number of economic and social causes which cannot be attributed to an individual parcel of property.”⁸⁶ In *Mount Laurel II*, a judicial mandate for affordable housing played a crucial role in upholding an inclusionary housing program.⁸⁷ But, the *Sintra* Court found a similar program to be unduly burdensome on the landowner and to violate substantive due process.⁸⁸ The opposing holdings illustrate the lack of clarity and guidance that adjudication on inclusionary housing programs has provided.

In *Kamaole Pointe Development*, Maui County ordinances allowed developers to pay an in-lieu fee to avoid the mandatory set-aside requirement.⁸⁹ The Federal District Court relied on a state statute to distinguish the in-lieu fee from an impact fee.⁹⁰ The statute states that “public facility costs do not include expenditures for requiring affordable housing[.]”⁹¹ Impact fees offset public facility improvement costs, while the

⁸³ *Mount Laurel I*, 67 N.J. at 336, 336 A.2d at 713.

⁸⁴ *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 92 N.J. 158, 260-74, 456 A.2d 390, 441-50 (1983) (*Mount Laurel II*).

⁸⁵ *Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1, 20-24, 829 P.2d 765, 776-78 (1992).

⁸⁶ *Id.* at 777.

⁸⁷ *Mount Laurel II*, 92 N.J. at 199, 456 A.2d at 410.

⁸⁸ *Compare Mount Laurel II*, 67 N.J. at 174, A.2d at 724 (affirming that each municipality must create its “fair share” of affordable housing) *with Sintra*, 119 Wash.2d, at 20-24, 829 P.2d at 777 (“We hold that, as a matter of law, the regulation violates the substantive due process test[.]”).

⁸⁹ *Kamaole Pointe Development LP. V. County of Maui*, 2008 WL 5025004 (D. Haw. 2008). The ordinance required developers to set aside forty to fifty percent of homes in developments where the other half of the homes cost more than \$600,000 or pay the in-lieu fees. The court did not have the opportunity to adjudicate the case because the parties settled out of court.

⁹⁰ *Id.* at 12-13 quoting Haw. Rev. Stat. §46-141 (“public facility capital improvement costs *do not include expenditures for required affordable housing*, routine and periodic maintenance, personnel, training, or other operating costs”).

⁹¹ *Id.* at 13 (“Impact fees are “charges imposed upon a developer by a county or board to fund all or a portion of the public facility capital improvement costs required by

in-lieu fee bolsters the County budget for promoting housing needs and enacting affordable housing programs.⁹² Thus, the in-lieu payment was not an illegal fee.⁹³ However, the Supreme Court of Rhode Island found similar in-lieu fees to be impact fees in *North End Realty, LLC v. Mattos*.⁹⁴ The town did not have statutory authority from the general assembly to institute the in-lieu fee.⁹⁵ Both the Hawai‘i and Rhode Island courts considered the ordinances as exactions but reached opposing results based on state law.⁹⁶

Kamaole Pointe Development underscores the importance of fairness in enacting inclusionary housing ordinances.⁹⁷ The City Council on Maui required a 40 to 50 percent set-aside of affordable housing for new developments.⁹⁸ As the law currently exists, it is unclear whether such governmental actions are subject to the unconstitutional takings doctrine,⁹⁹ and opponents have described Maui’s requirement as “an out-and-out plan of extortion.”¹⁰⁰ Opponents to the requirement argue that it is unfair because it imposes a significant burden on those who are not responsible for the underlying problem.¹⁰¹ On the other hand, developers are best fit to address affordable housing issues. Inclusionary housing proponents must question “how far is too far?” as they seek to maximize the number of affordable homes.¹⁰² Despite the ambiguity in applying legal doctrine to inclusionary

the development from which it is collected, or to recoup the cost of existing public facility capital improvements made in anticipation of the needs of a development”).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *North End Realty, LLC v. Mattos*, 25 A.3d 527, 534 (R.I. 2011).

⁹⁵ Note that the Supreme Court of Rhode Island did not reach the issue of whether the in-lieu fee was a tax or a fee. *Id.*

⁹⁶ Compare *Kamaole*, 2008 WL 5025004 (holding that the “in-lieu fees” were not “impact fees” based on state statute) and *North End Realty*, 25 A.3d at 534 (holding that the “in-lieu” fees were a violation of the law because the East Greenwich did not have authority to impose them).

⁹⁷ Joseph A. Dane, *Maui’s Residential Workforce Housing Policy: Finding the Boundaries of Inclusionary Zoning*, 30 U. HAW. L. REV. 447, 450 (2008).

⁹⁸ *Id.* at 451.

⁹⁹ A taking is rooted in the Fifth Amendment of the United States Constitution. The Fifth Amendment states that private property shall not “be taken for public use, without just compensation.” U.S. CONST. amend. V.

¹⁰⁰ *Id.* at 472 (quoting *Nolan v. California Coastal Comm’n*, 483 U.S. at 837 (quoting *J.E.D. Assocs. v. Atkinson*, 432 A.2d 12, 14 (1981))).

¹⁰¹ *Id.*

¹⁰² *Pennsylvania Coal Co. v. Mahon* is the seminal case for a regulatory taking claim. See 260 U.S. 393, 416, 43 S.Ct. 158, 160 (1922) (“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”).

housing programs, the programs must remain fair and conducive to the goal of creating affordable homes.¹⁰³

The California Supreme Court considered San Jose's inclusionary housing program under several legal theories, including the Supreme Court of the United States land use exaction tests.¹⁰⁴ The California Supreme Court upheld a San Jose inclusionary housing program as a valid land use condition and not an exaction.¹⁰⁵ The City of San Jose required that developments of twenty or more units set aside 15 percent of those units as affordable or low-income housing.¹⁰⁶ The court extensively discussed the *Nollan* Essential Nexus test,¹⁰⁷ the *Dolan* Rough Proportionality test,¹⁰⁸ and *Koontz*. In *Koontz*, the Supreme Court of the United States held that the *Nollan* and *Dolan* tests apply when the government conditions approval of a land-use permit upon the owner's payment of money.¹⁰⁹ The California Supreme Court found that increasing affordable housing and promoting economically diverse residential developments were constitutionally permitted purposes, and the ordinance uses a constitutionally permissible means of achieving this purpose.¹¹⁰ Most courts have refused to extend *Nollan/Dolan* to inclusionary housing programs, although opponents of these programs rely on the two cases quite frequently.¹¹¹

Scholars and practitioners debate the implications of *CBIA v. City of San Jose*. Some inclusionary housing proponents offer this case as the

¹⁰³ *Id.* at 473.

¹⁰⁴ Cal. Bldg. Indus. Ass'n v. City of San Jose, 61 Cal.4th 435, 461, 351 P.3d 974, 991 (2015).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* 351 P.3d at 978.

¹⁰⁷ There must be an "essential nexus" between the government's regulation and the purported purpose. *Nolan*, 483 U.S. at 837, 107 S.Ct. at 3149 ("[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes. . . obtaining of an easement to serve a valid governmental purpose, but without the payment of compensation.")

¹⁰⁸ A government's exaction must be "roughly proportional" in nature and extent to the impact of the proposed development. *Dolan*, 512 U.S. at 391, 114 S.Ct. at 2319-20 ("No precise calculation is required, but the city must make some sort of individualized determination that the required dedication is related in both nature and extent to the impact of the proposed development.").

¹⁰⁹ Monetary exactions that replace land-use exactions are subject to the *Nolan/Dolan* tests. *Koontz*, 570 U.S. at 612, 133 S.Ct. at 2599.

¹¹⁰ Tim Iglesias, *Inclusionary Zoning Affirmed: California Building Industry Association v. City of San Jose*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 409, 421 (2016) [hereinafter Iglesias, *Inclusionary Zoning Affirmed*].

¹¹¹ Iglesias, *Framing Inclusionary Zoning*, *supra* note 60, at 4.

roadmap for other state courts to uphold inclusionary housing programs.¹¹² However, there are several limitations in *CBLA*'s applicability.¹¹³ The California Supreme Court relied heavily on California's statutory planning scheme, which is different from other states. Furthermore, the opinion analogizes basic zoning law, which prevents certain uses or limits sizes in an area with workforce housing, which creates an affirmative responsibility for landowners to provide a public benefit.¹¹⁴ Some states may not view the affirmative duty of creating affordable housing as a valid zoning scheme, thus making the decision inapplicable. Scholars have also raised constitutional issues with the decision.

Some scholars believe that the decision weakens a landowner's Fifth Amendment protections under the Unconstitutional Condition Doctrine.¹¹⁵ In *Dolan*, the Supreme Court distinguished legislative and administrative action. This distinction took center stage in *CBLA*.¹¹⁶ The Supreme Court of California found that the unconstitutional conditions doctrine only applies to administrative action, as it did in *Dolan*.¹¹⁷ Scholars are weary of this limited application because it transforms legislative actions into a backdoor to implement otherwise unconstitutional conditions.¹¹⁸ Furthermore, the decision seems to be contrary to growing precedent from *Koontz* and *Lingle*, where the Supreme Court has further clarified the unconstitutional conditions doctrine.¹¹⁹ The controversy and discussion surrounding *CBLA*

¹¹² Iglesias, *Inclusionary Zoning Affirmed*, *supra* note 110, at 410 ("The complex, clearly drafted, and rigorously argued sixty-four-page opinion...may be persuasive authority to other states' courts that have not addressed this issue.").

¹¹³ *Id.* at 428 ("the context of California's land use and housing laws, upon which the *CBLA v. San Jose* relied heavily, may be a limiting factor for the persuasive power of this opinion in other states").

¹¹⁴ *Id.*

¹¹⁵ Kristoffer James S. Jacob, *California Building Industry Association v. City of San Jose: The Constitutional Price for Affordable Housing*, CALIFORNIA L. REV. CIR., 7 CALRC 20, 20 ("this comment argues that the court decided the case correctly within the context of legal precedent, but that the holding was problematic under the Fifth Amendment's guarantee that no "private property be taken for public use, without just compensation.") (2016).

¹¹⁶ *Dolan v. City of Tigard*, 512 U.S. 374, 388-96 (1994); Jacob, *supra* note 115, at 24.

¹¹⁷ Jacob, *supra* note 115, at 20.

¹¹⁸ Iglesias, *Inclusionary Zoning Affirmed*, *supra* note 110, at 434 ("The Court could erase the distinction between legislative enactment and *ad hoc* administrative decisions by deciding that the unconstitutional conditions doctrine applies broadly to any legislative enactment by any legislative body, including Congress, state legislatures, and local governments.").

¹¹⁹ *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 616 (2013) (holding that monetary exactions, but not taxes, are subject to scrutiny under *Nollan* and

demonstrates the difficulty in categorizing inclusionary housing, and how state courts rely primarily on their statutory schemes to make these decisions.¹²⁰

It is difficult to predict the degrees of success for inclusionary housing programs in the Supreme Court or in jurisdictions that have not adjudicated the issue.¹²¹ The type of inclusionary housing program, state statutory schemes, and unclear precedent influence a court's decision.¹²² These considerations, inapposite holdings, and reliance on different legal doctrines underscore the importance of framing inclusionary housing programs. Any one factor can determine the legality of a program. Legislators can justify an ordinance by being conscious of certain phrases and words. For starters, one word to avoid in an ordinance would be "impact" as that may indicate the ordinance requires an exactions analysis.¹²³ Framing inclusionary housing programs is the beginning of litigation, since inclusionary housing programs are subject to state legislation and jurisprudence. An inclusionary housing program cannot rely on uniformity among the courts.¹²⁴ Furthermore, every jurisdiction enacts its own parameters for inclusionary housing programs. Municipalities may require different percentages of set-asides, alternatives, or affordability mechanisms. As municipalities continue to enact programs to meet the needs of their constituents, programs will grow in complexity and make uniformity more difficult. The City & County of Honolulu recently added to the number of inclusionary housing programs across the nation by passing Ordinance 18-10 in 2018.

IV. THE CITY AND COUNTY OF HONOLULU'S ORDINANCE 18-10

The Honolulu City Council passed Bill 58 for Ordinance 18-10 in 2017.¹²⁵ The purpose of the Ordinance is "to increase the production of

Dolan); *Lingle v. Chevron*, 544 U.S. 528, 545 (2005) (holding that "the substantially advances formula is not a valid takings test").

¹²⁰ See *Kamaole Point Development* (Denying Motions for Summary Judgment); *Cal. Bldg. Indus. Ass'n*, 61 Cal.4th at 461, 351 P.3d at 991.

¹²¹ The Supreme Court of Hawai'i has not adjudicated an inclusionary housing ordinance.

¹²² See *Iglesias, Inclusionary Zoning Affirmed*, *supra* note 110, at 428 ("[T]he context of California's land use and housing laws, upon which the *CBIA v. San Jose* relied heavily, may be a limiting factor for the persuasive power of this opinion in other states.")

¹²³ When the government requires land, or a monetary fee in place of the land, to mitigate the *impact* of a development, then it is likely subject to the *Nolan/Dollan/Koontz* analysis. See *Koontz*, 570 U.S. at 612, 133 S.Ct. at 2599.

¹²⁴ Courts have consistently relied on state statutes or regulations to uphold or strike down inclusionary housing ordinances. See *North End Realty*, 25 A.3d at 534; *Iglesias, Inclusionary Zoning Affirmed* *supra* note 110, at 428.

¹²⁵ ROH § 18-10 (2018).

affordable housing, to encourage dispersal of affordable housing throughout the City, and to maintain the units as affordable for a long period of time.”¹²⁶ This section will summarize the research and background behind the Ordinance, its parameters, and input from various sources.¹²⁷ Inclusionary housing ordinances must be based on jurisdiction-specific factors, so this ordinance will provide a basis for a proposed ordinance.

For context, the City is currently constructing a Rail Transit System, which connects Kapolei and Ala Moana Shopping Center.¹²⁸ Along this 20-mile corridor are twenty-one stations, which are each part of the Transit-Oriented Development (TOD).¹²⁹ The City plans to create mixed-use development, which includes shopping, dining, and housing.¹³⁰ Each neighborhood will require affordable housing, whether through Ordinance 18-10 or other mechanisms.¹³¹ Ordinance 18-10 capitalizes on the new transit system by requiring more affordable housing near these new stations, where research indicates that the housing market will strengthen.¹³²

Strategic Economics conducted an affordable housing requirement analysis before implementing the current ordinance.¹³³ The analysis applied a 20 percent set-aside at 120 percent of the Area Median Income (“AMI”) to different types of developments in four areas: Kapolei, Pearlridge, Ala Moana, and Kapālama.¹³⁴ The types of development were low-rise

¹²⁶ *Id.*

¹²⁷ For a list of resources used in creating Ordinance 18-10, see the City & County of Honolulu’s affordable housing page. *Resources on Affordable Housing*, CITY & COUNTY OF HONOLULU, <https://www.honolulu.gov/housing/affordable-housing.html>. See also *ALICE State Overview supra* note 39, at 7 for a list of programs for developer funding.

¹²⁸ *The Project*, HONOLULU AUTHORITY FOR RAIL TRANSPORTATION, <https://honolulutrainsit.org/about/the-project/> (last visited December 15, 2021).

¹²⁹ TOD “refers to compact, mixed-use development within ¼ to ½ mile, or five to ten-minute walk, of a rail station. This form of urban development takes advantage of and helps build transit ridership—creating more options for where we live and how we travel.” *Transit-Oriented Development*, CITY & COUNTY OF HONOLULU, <https://www.honolulu.gov/tod> (last visited December 15, 2021).

¹³⁰ Honolulu refers to these as TOD neighborhoods. *Id.*

¹³¹ For example, Accessory Dwelling Units (ADUs), Ohana Units, and state-sponsored affordable housing projects are other mechanisms that Honolulu has in place to increase the availability of affordable housing. *City & County of Honolulu, Housing Oahu: Affordable Housing Strategy* at 2.

¹³² AFFORDABLE HOUSING REQUIREMENT FINANCIAL ANALYSIS FINAL REPORT, STRATEGIC ECONOMICS (2016), https://www.honolulu.gov/rep/site/dppto/officehousing_docs/ahr_docs/AHR-Financial-Analysis_SE_2016.pdf [hereinafter AHR FEASIBILITY REPORT].

¹³³ *Id.*

¹³⁴ *Infra* Part IV.B for further discussion on AMI.

apartments, mid-rise apartments, and high-rise apartments.¹³⁵ Financial feasibility depended on the percentage of return on cost or return on yield.¹³⁶ An 18 percent or above return on cost or a 7.5 percent return on yield was the feasibility goal.¹³⁷ The feasibility thresholds are based on a percentage of return that would be worthwhile for developers based on interviews with development leaders.¹³⁸

According to the study, the only feasible affordable building in all areas was a forty-story apartment building in Ala Moana.¹³⁹ For both off-site and on-site development with incentives, the development returned 19 percent on cost.¹⁴⁰ The next closest return on cost was a low-rise apartment in Pearlridge, which returned 7 percent on cost with all incentives.¹⁴¹ Based on these numbers, the analysis made several key findings.¹⁴²

First, outside the high-rise projects in Ala Moana, for-sale residential projects were challenging with or without affordable housing requirements.¹⁴³ Developers interviewed for the study gave factors that contributed to the infeasibility of these projects, such as “high construction costs due to shipping prices and labor shortages, a lack of infrastructure capacity in key locations, and a long entitlement process.”¹⁴⁴ Developers already face thin profit margins and other challenges that decrease feasibility.¹⁴⁵ Adding affordable housing requirements to development with thin profit margins may discourage development.

¹³⁵ The study used several variations on the low-rise, mid-rise, and high-rise buildings. Low-rise buildings ranged from three to six stories and four hundred and sixty-two units to six stories and eight hundred and fifty-eight units. AHR FEASIBILITY REPORT, *supra* note 132, at 9. Mid-rise buildings ranged from one hundred forty-three units to two hundred and eighty-six units, and high-rise buildings ranged one hundred sixty units to three hundred and forty-three units. *Id.*

¹³⁶ *Id.* at 10.

¹³⁷ *Id.* at 11.

¹³⁸ *Id.* at 10.

¹³⁹ The combination of the incentives, number of available units, and housing market at Ala Moana made this a feasible project. *Id.* at 13.

¹⁴⁰ AHR FEASIBILITY REPORT, *supra* note 132, at 12

¹⁴¹ *Id.*

¹⁴² The next highest return was a two percent return on cost from a mid-rise in Kapālama. *Id.* All other returns were either zero percent or in the negatives. *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 13.

¹⁴⁵ The U.S. inflation rate, which is 4.7 percent, is one such challenge that affects nearly all parts of affordable housing development. Michael Novogradac, *Effects of High Inflation on Development, Financing, and Operation of Tax Credit-Finance Housing*, NOVOGRADAC (March 1, 2022). The increase in building material costs, interest

Second, it is reasonable to expect development near the new stations to command price and rent premiums over other locations, improving feasibility over the mid-term.¹⁴⁶ Based on studies of cities that have instituted new rail lines, properties near new transit can achieve price and rent premiums ranging from five to twenty percent.¹⁴⁷ These premiums may increase feasibility of projects near the rail line, in places like Kapolei or Pearlridge. Increased feasibility encourages development and increases profit margins. Affordable housing requirements become less of a burden on development when profit margins and feasibility are maximized, so the Ordinance should capitalize on these increases.

Third, the proposed in-lieu fee is set at a level that will encourage condominium developers to provide units directly, with the likely exception of luxury projects.¹⁴⁸ With a full set of incentives available, it is more expensive for developers to pay the in-lieu fees than to build affordable homes.¹⁴⁹ Higher in-lieu fees push developers to include affordable homes in their developments rather than pass on the burden. Based on this information, lawmakers could set in-lieu fees that dissuade developers from opting out of inclusionary housing programs. These fees could be a valuable tool for increasing the number of affordable homes.

Fourth, none of the apartment prototypes tested were feasible under the market conditions at the time due to the challenges of building apartments in Honolulu.¹⁵⁰ Hawai‘i’s rental market “has produced very little new, market-rate apartment development over the last thirty years” besides condominium units.¹⁵¹ Developers are weary of constructing new projects with few examples of comparable projects.¹⁵² Developers are unlikely to

rates, and operating expenses requires higher income and rent limits to cover costs, ultimately leading to thin profit margins. *See id.*

¹⁴⁶ Ordinance 18-10 has specific requirements for special projects related to development in Transit-Oriented Projects. ROH § 18-10 at 8; *see infra* Part IV.B for a deeper discussion on feasibility.

¹⁴⁷ AHR FEASIBILITY REPORT, *supra* note 132, at 14.

¹⁴⁸ The proposed in-lieu fees were \$45 per square foot or an equivalent value in improved land. *Id.* at 14.

¹⁴⁹ *Id.*

¹⁵⁰ According to the Honolulu Board of Realtors, O‘ahu’s sellers had a strong 2021. *Market Reports*, HONOLULU BOARD OF REALTORS, <https://hicentral.com/mpr/mpr-2021-12.php> (last visited April 18, 2022) [hereinafter *Honolulu Market Reports*]. While sales were down 10 percent in from the previous December, the median price of a home went up 20 percent. *Id.* Meanwhile, condo sales were up 15 percent, and the median sale price was up 6.6 percent. *Id.*

¹⁵¹ AHR FEASIBILITY REPORT, *supra* note 132, at 13.

¹⁵² *Id.* (“there are few comparable projects for use in underwriting new apartments, many local developers are unfamiliar with rental projects, and investors consider Honolulu to be a higher-risk market for new apartment development”).

build in a high-risk market and may need more incentives or a smaller burden to continue development.¹⁵³ Honolulu lawmakers must recognize the economic issues and craft an ordinance addressing market conditions.¹⁵⁴

Fifth, the affordable housing requirements are a small percentage of overall development costs.¹⁵⁵ Based on the assumptions and representations in the report, the net cost range for condominiums is between \$23,000 to \$110,000 per affordable unit, or roughly anywhere from 1 percent to 5 percent of total development.¹⁵⁶ For apartments, the net cost ranges from \$91,000 to \$216,000, or three to six percent of total development costs.¹⁵⁷ While affordable housing requirements cut feasibility, they do not stifle development. Affordable housing represents a small portion of the overall development cost, and an ordinance could offset costs through incentives.

The report also considered the financial incentives that the City has proposed. The City has proposed wastewater charges, park dedication fee waivers, building permit fee reductions, and real property tax exemptions.¹⁵⁸ The report provided key findings on these financial incentives. The proposed financial incentives have a modest impact on development feasibility.¹⁵⁹ They provide some benefits, but the incentives did not sufficiently subsidize the project based on the feasibility findings. Also, the proposed financial incentives are higher for condominium projects because the proposal requires more affordable housing units in condominium projects.¹⁶⁰ Additionally, financial incentives have the greatest impact in places with high land costs such as Ala Moana, because

¹⁵³ See Rick Daysog, *Financial Snags Delay Construction of Large Affordable Rental Project in Honolulu*, HAWAII NEWS NOW (Aug. 25, 2022) (Developer Kobayshi Group sought a two-year extension on an affordable housing project because it is “still trying to finalize the building permits with the city Department of Planning and Permitting.”). A lack of rental projects also contributes to a high-risk market as developers are weary of developing without previous examples of success. AHR FEASIBILITY REPORT, *supra* note 132, at 13.

¹⁵⁴ Honolulu lawmakers are currently working towards expediting the bureaucratic struggles that permit-seeking individuals and developers face. Christina Jedra, *Efforts to Reform Honolulu’s Troubled Permitting Office Face an Uphill Battle. Here’s Why*, HONOLULU CIVIL BEAT (Oct. 2022) (where “bureaucratic delays[,] clunky technology. . . severe understaffing, high turnover, a bribery scandal, and a leadership upheaval” contribute to extensive wait periods for developers and individuals to receive permits).

¹⁵⁵ AHR FEASIBILITY REPORT, *supra* note 132, at 13.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 15.

¹⁵⁹ *Id.*

¹⁶⁰ AHR FEASIBILITY REPORT, *supra* note 132, at 15.

the park dedication fee is based on the land cost.¹⁶¹ The real property tax exemption and the park dedication fee are the greatest incentives to developers because they account for a higher percentage of coverage for incentives.¹⁶² The report's findings demonstrate that these incentives alone do not make these affordable housing requirements feasible. In fact, for all projects except the Ala Moana high rise, the incentives covered less than 2.5 percent of total development costs.¹⁶³ Incentives are crucial to feasibly develop affordable housing because they can decrease affordable housing's impact on development and encourage developer participation.

The report was based on interviews with developers in Honolulu, and they reported several factors that stymie development in Honolulu. Factors include "a lack of infrastructure capacity in key locations, and a long entitlement process."¹⁶⁴ Honolulu has a notoriously long permitting process with regulations that may tend to stifle development.¹⁶⁵ Changes in the permitting process will decrease delays and ultimately save developers millions of dollars.¹⁶⁶

A. Report Recommendations

Based on this report, Rick Jacobus, a national expert in inclusionary housing and affordable homeownership,¹⁶⁷ wrote a letter with geographic phasing and administration recommendations to the Department of Planning and Permitting. The letter concludes that "Honolulu is well positioned to successfully implement a new [affordable housing] program. The economics of development on Oahu are somewhat extreme...[but] there is no reason to expect that Honolulu could not successfully require that a significant share of new units be affordable to lower-income residents without overburdening development."¹⁶⁸ Affordable housing is feasible

¹⁶¹ *Id.*

¹⁶² *Id.* at 15. The real property tax exemption accounts for anywhere between 33 and 69 percent of total incentives for condominium developers and between 44 and 67 percent of total incentives for apartment developers. *Id.* The park dedication fee accounts for 14 to 58 percent of incentives for condominium developers and 15 to 41 percent of incentives for apartment developers. *Id.*

¹⁶³ *Id.* at 18. For apartments, financial incentives cover less than 1.5 percent of the total development costs. *Id.*

¹⁶⁴ AHR FEASIBILITY REPORT, *supra* note 132, at 13.

¹⁶⁵ CALLIES, *supra* note 1, at 1 ("Land use in Hawai'i continues to be the most regulated of all the fifty states").

¹⁶⁶ AHR FEASIBILITY REPORT, *supra* note 132, at 13.

¹⁶⁷ Rick Jacobus, IMPACT JUSTICE, <https://impactjustice.org/people/rick-jacobus/> (last visited February 2, 2022).

¹⁶⁸ Memorandum from Rick Jacobus on Policy Options related to Affordable Housing Requirements to Harrison Rue (Dec. 23, 2016) [hereinafter Policy Options Memo].

despite Honolulu's extreme housing market, but it requires strategic implementation.¹⁶⁹ Geographic phasing recognizes that the City has various levels of production and feasibility depending on location.¹⁷⁰ Jacobus provides seven strategies to combat these market differences.

First, affordable housing requirements could be limited to high-growth areas.¹⁷¹ Some cities only impose affordable housing requirements on neighborhoods with strong market conditions.¹⁷² Inclusionary housing programs rely on market-rate development and have the potential to limit development.¹⁷³ High growth areas in Honolulu will likely be able to support the market-rate development and the potential limitations on feasibility that inclusionary housing programs present.¹⁷⁴

Second, the requirements could vary by zone.¹⁷⁵ Some jurisdictions have imposed requirements covering the whole jurisdiction, but the requirements vary based on the strength of the market locations.¹⁷⁶ This variance connects to the idea of targeting high-growth areas. Inclusionary housing programs would be more onerous in zones that do not have as strong market forces.¹⁷⁷ Zoning requirements, height restrictions,

¹⁶⁹ These recommendations are based on a "two-day site visit" where Jacobus "met with housing developers, housing advocates, state agency partners, and key City staff from several departments in order to better understand the City's need and current capacity to implement [an affordable housing] program."). *Id.*

¹⁷⁰ *Id.* at 1.

¹⁷¹ High growth areas are areas with strong market conditions. *Id.* at 3. New York and Seattle's inclusionary housing requirements only apply in areas that are zoned for higher density development. *Id.* The higher density developments in Honolulu are the Ala Moana and Downtown area, while development along the rail line, in areas such as Kapolei, will likely become high growth areas over the coming years. *Id.* at 4-5.

¹⁷² *Id.* at 3. For example, New York's ordinance applies to high density areas, so that buildings of seven stories or higher are available. NYC HOUSING DEVELOPMENT CORPORATION, MARKET AND FINANCIAL STUDY NYC MANDATORY INCLUSIONARY HOUSING 27 (2015) [hereinafter NYC MARKET STUDY].

¹⁷³ For example, when Boston implemented its inclusionary housing program between 1987-2004, Boston saw up to a 10 percent decrease in housing starts. STURTEVANT, *supra* note 57, at 7. Descriptive studies have also found that, in some instances, inclusionary housing programs can increase the price of homes in the general area. *Id.*

¹⁷⁴ AHR FEASIBILITY REPORT, *supra* note 132, at 14 ("Based on the experience of other cities with new rail lines, it is reasonable to expect that development near the new stations will command price and rent premiums over other locations, improving feasibility over the mid-term").

¹⁷⁵ Policy Options Memo, *supra* note 168, at 3.

¹⁷⁶ *Id.*

¹⁷⁷ For example, "Boston adopted different requirements for different zones based on the average market price for new condo units in each area." *Id.* at 3.

surrounding opportunities, and the community can influence the market strength, so an ordinance that varies between specific areas is ideal.¹⁷⁸

Third, the City could impose a project-by-project approach and ensure that every project maximizes the affordable housing requirements.¹⁷⁹ Each project has a different feasibility threshold, price, and purpose. These considerations can influence the inclusionary housing policy's effect on the overall development.¹⁸⁰ For example, in-lieu fees may be beneficial for smaller projects because they may not be able to develop affordable housing cost-effectively.¹⁸¹ A project-by-project approach allows flexibility in the policy's application and does not stifle growth.¹⁸²

Fourth, the City could vary requirements by rent or prices.¹⁸³ The amount and price of affordable housing could vary by project, so projects with higher market rates could produce more housing than those with lower market rates.¹⁸⁴ The annual rent or prices of the units, which are the primary sources of revenue in development projects, can vary based on location, size, and purpose of the development.¹⁸⁵ Thus, an affordable housing ordinance should account for the various revenue levels that developers may receive.¹⁸⁶

Fifth, the City could provide hardship waivers or appeals. Developers may produce evidence that the requirements would make their project infeasible.¹⁸⁷ Jacobus presents New York City as an example of an area that provides an appeal process for developers that assert affordable housing requirements would make their development infeasible.¹⁸⁸ However, Honolulu's lengthy permitting and planning process places a

¹⁷⁸ STOCKTON WILLIAMS ET AL., THE ECONOMICS OF INCLUSIONARY DEVELOPMENT 1, 4 (Urban Land Institute 2016).

¹⁷⁹ *Id.*

¹⁸⁰ The sixth suggestion, "vary requirements by project size" while distinct in the recommendation is encompassed in this paragraph. See Policy Options Memo, *supra* note 168, at 4.

¹⁸¹ Lerman, *supra* note 71, at 390.

¹⁸² Policy Options Memo, *supra* note 168, at 4

¹⁸³ *Id.* at 3.

¹⁸⁴ *Id.*

¹⁸⁵ WILLIAMS ET AL., *supra* note 178, at 2.

¹⁸⁶ See *id.* at 7 ("Most [inclusionary housing] policies primarily focus on households earning between sixty and one hundred and twenty percent of AMI," but municipalities can craft ordinances to target lower income units with proper incentives and fees.).

¹⁸⁷ Policy Options Memo, *supra* note 168 at 3.

¹⁸⁸ *Id.*

burden on development before it ever breaks ground.¹⁸⁹ The additional administrative burden of hardship waivers and appeals may ultimately do more harm than good unless Honolulu can expedite the process.¹⁹⁰

Sixth, the City could vary requirements by project size, so projects that include more units must build more affordable housing. The City could phase in requirements and adapt them as markets improve or decline.¹⁹¹ Finally, the letter notes that the Rail will improve the market in areas that were not feasible when the letter was written.¹⁹² The recommendations strategically capitalize on Honolulu's growing infrastructure and recognize that different locations face different challenges. This research and the subsequent recommendations led to Ordinance 18-10.

B. *ROH § 18-10 Elements*

The Ordinance applies to developments of ten or more dwelling units. The developments are categorized as either special projects or all other areas.¹⁹³ The bill contemplates three special projects. Interim planned development-transit projects ("IPD-T Projects") are projects where the developer has applied for a permit. Planned development-transit projects ("PD-T Projects") are projects where the developer has submitted an application pursuant to Section 2109.100-10.¹⁹⁴ IPD-T and PD-T Projects are "redevelopment projects within the Special District that would not be possible under a strict adherence to the development standards of the Land Use Ordinance."¹⁹⁵ The City provides a permit to create a mixed-use development.¹⁹⁶ The Transit-Oriented development special district projects ("TOD special district projects") are projects where the developer has submitted an application pursuant to Section 21-9.100.9.¹⁹⁷ The TOD special district modifies the zoning regulations in areas near the rail station to provide for height and density bonuses in the area, and TOD special district projects are development projects in these areas.¹⁹⁸ The City sets a

¹⁸⁹ See Jedra, *supra* note 154.

¹⁹⁰ *Id.*

¹⁹¹ Policy Options Memo, *supra* note 168, at 4.

¹⁹² *Id.*

¹⁹³ ROH § 18-10 at 8.

¹⁹⁴ *Id.*

¹⁹⁵ TRANSIT-ORIENTED DEVELOPMENT SPECIAL DISTRICT DESIGN GUIDELINES (City & County of Honolulu Department of Planning and Permitting 2018)

¹⁹⁶ *Id.*

¹⁹⁷ ROH § 18-10 at 8.

¹⁹⁸ *TOD Special District, CITY & COUNTY OF HONOLULU* <https://www.honolulu.gov/tod/zoning-policies/zoning-special-district/tod-special-districts.html> (last visited January 18, 2022).

higher percentage of affordable housing for projects that fall into these special project categories compared to all other areas.

The Ordinance provides a range of options, and developers can use a combination of options to satisfy the requirements. The developer can either provide units on-site, off-site, or convey land.¹⁹⁹ The units can also be for-sale or for-rent.²⁰⁰ The affordability period will be five years, ten years, or thirty years, depending on the percentage of units developers set aside for affordable housing.²⁰¹ In special use projects where units are for-sale and on-site, developers can set aside 10 percent, 20 percent, or 30 percent of units for affordable housing.²⁰² For off-site production tied to special use projects, developers can set aside between ten percent and thirty-five percent. Affordability relies on this percentage,²⁰³ a lower percentage increases the affordability period.²⁰⁴ Rental units are at a fifteen percent set-aside. Developers may also convey land of equal value.

In all other projects, the percentage is lower. For on-site and for-sale units, developers can set aside between 5 percent and 15 percent, subject to the same affordability requirements as the special use projects.²⁰⁵ The range for off-site and for-sale units is 5 percent to 20 percent.²⁰⁶ A developer is required to set aside 5 percent of rental units, and they may also convey land of equal value.²⁰⁷ Given Honolulu's current zoning and development situation, development outside of the rail transit line is unlikely and probably difficult.²⁰⁸ A higher set-aside requirement accounts for lower profit margins and decreased feasibility while still providing affordable housing units, or, at the very least, a contribution from those developments.²⁰⁹

¹⁹⁹ On-site means construction or activities that occur on the project site. ROH § 18-10 at 3. Off-Site means construction or other activities that occur on a zoning lot other than the project site. *Id.* Developers may also convey real property to the City & County of Honolulu. *Id.* at 9.

²⁰⁰ ROH § 18-10 at 8.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ For example, developers who set-aside 30 percent of on-site units must keep the units affordable for at least 10 years. *Id.* at 9. Conversely, developers who set-aside 10 percent of on-site units must keep the units affordable for at least 30 years. *Id.*

²⁰⁵ *Id.* at 8.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See Policy Options Memo *supra* note 168, at 5.

²⁰⁹ See *id.*

The Ordinance also sets the level of affordability. The United States Department of Housing and Urban Development determines AMI, the mechanism that the City employs to determine what is affordable in an area.²¹⁰ This Ordinance sets the price for affordable housing units at 120 percent and below the AMI and sets the price of half of those units at 100 percent and below the AMI. The Ordinance sets the price for rentals at 80 percent and below the AMI. This is higher than most inclusionary housing programs across the nation. For example, New York City's inclusionary housing program goes as low as 40 percent of the AMI.²¹¹ In Honolulu, some households that make above the AMI are still eligible for affordable housing.²¹² Households that live above the threshold still require affordable housing, while developers cannot provide affordable housing for lower income levels without destroying feasibility.²¹³

The City adopted all incentives in the Ordinance. Briefly, the first incentive waives the wastewater system facility charges, and the next incentive waives the water system facility and meter charges.²¹⁴ Both incentives are one-time, per-unit charges for new construction, with the amount determined by the Board of Water Supply.²¹⁵ Next, developers may waive building permit and plan review fees to potentially average around \$2,000 per unit.²¹⁶ The next incentive waives park dedication requirements.²¹⁷ Developers will also be exempt from real property tax increases during construction.²¹⁸ During the construction period, real property taxes will stay at the initial assessment, and developers could save

²¹⁰ ROH § 18-10 at 8.

²¹¹ New York has the fifth highest cost of living, while Hawai'i has the highest. *Cost of Living Data Series*, *supra* note 29. New York's high-density markets allow New York City to require much lower affordability levels than Honolulu. *See* NYC MARKET STUDY, *supra* note 172, at 34.

²¹² Under ROH § 18-10, affordable dwelling units are still available to purchasers who make up to 20 percent above the AMI. ROH § 18-10 at 8. At its lowest, purchasers who make up to 80 percent of the AMI qualify for affordable housing. *Id.*

²¹³ For 2022, Honolulu's Area Median Income is \$113,000 per year for a family of four. *Annual AMI, Stats*, HAWAII.GOV (2022), <https://dbedt.hawaii.gov/hcda/annual-ami-stats/>.

²¹⁴ The wastewater system facility waiver can save up to \$6,616 per unit, while the water system facility and meter charges can save between \$4,200 and \$8,000 per unit. *AHR Incentive Handout*, *supra* note 52, at 4.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Normally, projects must dedicate 110 square feet of land per unit or pay an equivalent fee, but developers will not have to pay this fee for affordable units and will save between \$24,000 to \$57,000. *Id.*

²¹⁸ *Id.*

about \$1,000 per unit.²¹⁹ Finally, developers will be exempt from annual taxes for affordable rental units as long as they remain affordable, so they could save, on average, anywhere between \$2,300 to \$69,000.²²⁰ Developers will also have density and height bonuses to increase the number of units per development. Unfortunately, these incentives are a drop in the bucket of multi-million dollar development projects.²²¹

The Ordinance follows the report's recommendations closely, and many parameters make sense considering the thin feasibility line. Legislators took the data, recommendations, and reports to craft Ordinance 18-10 and attempted to strike the balance between feasibility and building affordable homes. Unfortunately, Hawai'i faces daunting homelessness and affordability issues that the ordinance does not sufficiently address.²²² The proposed ordinance will call on developers to shoulder more of the burden in uplifting Hawai'i.²²³

V. ELEMENTS OF SUCCESSFUL INCLUSIONARY HOUSING

A successful inclusionary program is one step in resolving a complex web of issues in Honolulu's housing crisis. Rather than resolving these issues, this article provides a small part of the larger solution. This section will begin with common factors in jurisdictions with successful inclusionary housing ordinances. These factors appear in Hawai'i and support the argument for a stronger inclusionary housing ordinance. Furthermore, inclusionary housing programs make feasibility difficult, and developers will need flexibility and incentive to participate. The following proposed ordinance attempts to balance maximizing affordable housing with efficient, flexible, up-and-coming development. With developer cooperation, the City could create more affordable housing, improve communities, and ensure affordable housing for current and future generations.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ For condominiums, financial incentives range from 1.5 percent to 2.75 percent of the total construction costs. AHR FEASIBILITY REPORT *supra* note 132, at 18. For apartments, financial incentives range between 1 and 1.5 percent of the total construction costs. *Id.*

²²² Ideally, the proposed ordinance will address the ALICE population. This portion of the population lives above the federal poverty line, but below the minimum survival line in Honolulu. See *ALICE State Overview*, *supra* note 39.

²²³ Developers and opponents of inclusionary housing argue that this is not the developer's burden to carry because the developers are not entirely at fault for housing issues. Dane, *supra* note 97, at 450 ("Maui's ordinance improperly shifts the burden of providing affordable housing away from the community and onto developers..."). While true, developers must carry the brunt of the burden because they are the only entities that can produce housing.

A. *Elements of Successful Inclusionary Housing Programs*

Successful inclusionary housing programs provide affordable housing with minimal effects on developers. Before addressing that issue, this article will first discuss factors that contribute to successful programs. Inclusionary housing programs work best when the following four factors are present: strong housing markets, mandatory programs, incentives that offset costs, and predictability.²²⁴ Honolulu currently has a strong housing market, and the rail will further improve the market conditions.²²⁵ Hawai‘i should capitalize on this growth to ensure affordable housing in the future.

First, inclusionary housing programs work best in areas with a strong housing market.²²⁶ Inclusionary housing programs “link the production of affordable housing to market-rate development.”²²⁷ Development must be feasible in a housing market to impose affordable housing since inclusionary housing programs cut into feasibility. Strong housing markets are based on the demand for housing that drives development, and requirements of inclusionary housing programs capitalize on this demand.²²⁸ Effective inclusionary housing programs capitalize on strong markets by requiring affordable housing in feasible developments.²²⁹

Second, mandatory programs work better than voluntary programs.²³⁰ About 83 percent of all inclusionary housing programs are mandatory. On average, these programs provide more affordable housing units than voluntary programs.²³¹ Mandatory programs usually require developer participation, while voluntary programs allow developers to opt out.²³² Mandatory programs generally do not stifle development because these programs are targeted at strong housing markets, where developers know they will receive a return on investment.²³³

Third, effective inclusionary housing programs include incentives that offset the cost to developers. Effective incentives that offset costs can

²²⁴ STURTEVANT, *supra* note 49, at 8.

²²⁵ AHR FEASIBILITY REPORT, *supra* note 132, at 14.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Strong housing markets are areas where “the rents and prices are high enough to cover the cost of constructing a newer higher-density building.” WILLIAMS ET AL., *supra* note 178, at 4. A supportive zoning policy, low land costs, and available land can contribute to creating a strong housing market. *See id.*

²²⁹ *Id.*

²³⁰ STURTEVANT, *supra* note 49 at 8.

²³¹ *Id.*

²³² *Id.*

²³³ *See id.* (“mandatory inclusionary housing programs generally do not depress new construction in strong housing markets.”)

vary depending on the housing market.²³⁴ Development in weak housing markets requires more incentives than development in strong housing markets because developers will not make money in these areas without incentives.²³⁵ These costs cut into the overall profit that a developer may enjoy without the affordable homes.

Fourth, flexible compliance options work best.²³⁶ There is no generic inclusionary housing program. Legislators must build programs that account for the housing market, development needs, and other factors.²³⁷ Providing the developer with options to comply with inclusionary housing programs allows them to maximize profits while still being willing to participate.²³⁸ Even in mandatory programs, flexibility can range from the percentage of affordable housing required, the types of housing, income targets, and rent restrictions.²³⁹ Flexibility is crucial because developers have different goals or develop in different areas. Stringent inclusionary housing ordinances cannot account for these differences and are ineffective. These programs may also have opt-out options that provide developers with the ultimate level of flexibility.²⁴⁰

These factors are subject to the jurisdiction's housing market, over which the legislature, city council, or other governing body has limited control. The best these bodies can do is anticipate growth through development projects and community building. Honolulu's City Council has planned for this growth and has implemented development plans that capitalize on the new transit system.²⁴¹ While decision makers implementing inclusionary housing programs should consider these factors

²³⁴ *Id.*

²³⁵ Factors that indicate a strong housing market include commercial development, rapid increase in the population, high housing prices (sometimes), and loose zoning requirements. See STURTEVANT, *supra* note 49 at 9; WILLIAMS ET AL., *supra* note 178, at 7. These factors are ultimately missing in weak housing markets. See WILLIAMS ET AL., *supra* note 178 at 7.

²³⁶ STURTEVANT, *supra* note 49, at 10.

²³⁷ WILLIAMS ET AL., *supra* note 178, at 7.

²³⁸ STURTEVANT, *supra* note 49, at 10.

²³⁹ New York's mandatory inclusionary housing program is an example of a stricter program than Honolulu's. MANDATORY INCLUSIONARY HOUSING, NEW YORK CITY COUNCIL (last visited April 21, 2022).

²⁴⁰ THE ECONOMICS OF INCLUSIONARY DEVELOPMENT refers to "opt-out" options as in-lieu fees, land conveyances, or material improvements to other affordable housing areas. 17. These options do not allow a developer to circumvent the affordable housing requirement. Instead, they allow a developer to contribute to the community's affordable housing solution while maintaining feasibility for the developer. Lerman, *supra* note 63, at 390.

²⁴¹ See *supra* Part IV.B for a discussion on planning for development around the rail project.

in crafting and implementing an inclusionary housing program, developers are concerned with the feasibility of development projects.

B. *Development Feasibility*

Development feasibility is the determinative factor in deciding whether developers will build in an area, and the feasibility calculation relies on a variety of factors. Developers play a crucial role in affordable housing initiatives since they build the homes and absorb the majority of costs, so understanding development feasibility becomes crucial in an affordable housing decision. A good inclusionary housing program must account for the needs and desires of developers to encourage development. As a result, developers have become influential players in the political realm and are heavily involved in the decision-making process. While this result encourages developers' participation in these programs and should continue, legislators must recognize the power and influence that developers have. Decision makers run the risk of over-compensating developers to ensure participation.²⁴² This article takes developers' participation into account and recognizes that successful programs will meet developer needs as much as possible. Before beginning a project, developers determine feasibility based on a set of calculations.²⁴³

Feasibility is a "set of calculations that assess whether the program has (a) sufficient demand to cover construction and operating costs and (b) can provide financial returns for the effort and risk undertaken by the developer and the project's funding."²⁴⁴ To make these calculations, rules that set zoning, density, and design requirements must first be favorable for developers.²⁴⁵ Second, there must also be a strong development market.²⁴⁶ Developers need to know that consumers will purchase or rent the units once they build them, so they will tend to stay away from low-income areas or stagnant markets.²⁴⁷ Third, the developer must control the site with reasonable acquisition costs, including fees, taxes, and limits on land use

²⁴² Some writers find that this role has hindered affordable housing development. Developers are political actors and heavily involved in the decision-making process. Audrey McFarlane and Randall K. Johnson, *Cities, Inclusion and Exaction*, 102 IOWA L. REV. 2145, 2145 (2017).

²⁴³ WILLIAMS, *supra* note 178, at 2.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 1.

²⁴⁶ *Id.*

²⁴⁷ Low-income areas or stagnant markets indicate that consumers are not purchasing or renting homes in the area.

that directly affect the value or profitable use of the land.²⁴⁸ Fourth, developers must have the capital necessary to fund development.²⁴⁹

For projects to be feasible, sources of financing must be greater than expenditures.²⁵⁰ Developers may rely on construction sources, like investors, developer equity, construction loans, or permanent sources.²⁵¹ These sources must be greater in monetary value than the fees, hard costs, soft costs, carry, and land.²⁵² Hard costs cover construction components like labor and material. Soft costs pay for professional services, permits, taxes, and fees.²⁵³ The “carry” is the interest on financing a construction loan.²⁵⁴ Developers must also pay for the land. Hard costs, soft costs, and land are the primary costs associated with development.²⁵⁵ Developers can source projects differently and should maximize their sources to ensure they cover costs.²⁵⁶

Once developers obtain sufficient capital to fund these projects, they must consider project costs and revenue. This cash flow must cover costs and sufficiently compensate lenders or investors. Developers will look at the net operating income, which is the revenue of a project minus the costs and expenses, to determine feasibility.²⁵⁷ Market rates drive revenue because developers cannot generate revenue unless people are buying or renting homes.²⁵⁸ Developers may look to generate revenue through parking

²⁴⁸ *Bridge Aina Le'a* is an illustrative example of how a government regulation can affect the value and profitable use. The government entity rezoned the land from residential to agricultural and caused the property to lose significant value and eliminate the landowner's intended profitable use. The Court held that a taking did not occur, although the landowner could no longer make its intended profitable use of the land, because the land still had value.

²⁴⁹ *Id.*

²⁵⁰ WILLIAMS ET AL, *supra* note 178, at 7.

²⁵¹ Permanent source “pay off the construction loan when the project is operational.” *Id.* at 2. This generally will include long term financing, debt forgiveness or grants. *Id.*

²⁵² *Id.* at 2.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Together, they total about 90% of the total costs. *Id.*

²⁵⁶ Potential sources for development include investors, construction or long-term loans, and state or municipality funds designated for affordable housing. *Economics* at 2. Most developments will have a combination of the three when affordable housing is involved. *See id.*

²⁵⁷ *Id.* at 3.

²⁵⁸ CALLIES, *supra* note 1, at 7 (arguing that mandatory set-asides cannot provide affordable housing because they are dependent on “a robust development economy”).

or retail leases as well.²⁵⁹ The primary costs and expenses in a new development are the ongoing debt service from the initial project sources. Other costs of development include operating expenses like administration and property taxes. Feasibility determinations are complex and must consider current costs and future revenue.

Development feasibility also depends on the submarket.²⁶⁰ For example, high-density areas with height restrictions decrease feasibility. The limited availability of land increases land price while height restrictions limit the number of units a developer may create.²⁶¹ Another lower density city within the same jurisdiction may have a higher feasibility. This availability issue underscores the importance of capitalizing on certain areas. Development feasibility is delicate, and lawmakers looking to craft these ordinances must pay close attention to areas that best support feasibility, rather than imposing broad requirements.²⁶²

Developers will use the costs, sources of revenue, and market strength to determine whether a project is possible. But calculations cannot account for all potential situations. Legislators must be aware of the feasibility of projects to ensure that the inclusionary housing program is not stifling development. Feasibility studies can positively affect inclusionary housing programs by predicting the effects of an inclusionary housing program on development. When legislators can understand how

²⁵⁹ Mixed-use zoning allows developers to create higher density buildings that provide housing, commercial services and parking. *See* TOD East Kapolei Plan. Along with the housing profits, developers may receive additional revenue from parking or commercial services that they otherwise would not receive in areas zoned for residential use only. *See* WILLIAMS ET AL, *supra* note 178, at 3.

²⁶⁰ Submarkets are smaller areas within a jurisdiction and can vary by density, zoning policy, and price among other things. *Id.* at 3.

²⁶¹ New York City's inclusionary housing ordinance is an illustrative example of the benefits of a limited height restriction. New York City can offer affordable apartment units at 40 percent of the AMI, compared to 80 percent of the AMI in Honolulu, because of the skyrise rental market. *See* NYC MARKET STUDY, *supra* note 176 at 27 (testing financial feasibility for buildings that range from seven to thirty stories high).

²⁶² New York City underwent a similar financial feasibility analysis that reflects the market capabilities of the city. *See generally* NYC MARKET STUDY, *supra* note 172, at 18. That financial feasibility analysis demonstrated that New York City was better equipped to develop low-income housing than Honolulu. *Compare id.* at 27 ("In Very Strong and Strong market conditions, set-asides ranging from 20 to 30 percent are supportive of rental development feasibility in all scenarios") with AHR FEASIBILITY REPORT, *supra* note 132, at 14 (where affordable housing development was not feasible anywhere but a high-rise by Ala Moana). New York's market is different from Honolulu's and their inclusionary housing program reflects those differences through lower affordability threshold and less flexible requirements. *See NYC Mandatory Inclusionary Housing*, *supra* note 54 (New York City has four compliance options).

inclusionary housing will affect development in their market, they can craft programs that better reflect the community's needs.²⁶³

The Urban Land Institute conducted a hypothetical study for a four-over-one podium building,²⁶⁴ which provides 177 units of housing.²⁶⁵ The study compared how different percentages of set-aside effect feasibility in different areas.²⁶⁶ Ultimately, the percentage of set-aside had a drastic effect on the feasibility of the project.²⁶⁷ In both areas, the amount per square foot a developer could pay to make the project feasible dropped drastically.²⁶⁸ Thus, inclusionary housing programs can quickly demolish development feasibility without proper incentives.²⁶⁹

The study considered the same scenario but added the affordability requirements. It considered 120 percent, 100 percent, 80 percent, and 60 percent of the AMI to create an illustrative range of its effect.²⁷⁰ In Area B with a 10 percent set-aside, the price per square foot ranged from \$250 to \$210 per square foot.²⁷¹ A 20 percent set-aside kept a similar range. In Area A, the range within the set-aside was identical to the range in Area B.²⁷² However, at 60 percent of the AMI and a set-aside of 20 percent, the price that a developer would be able to pay dropped below zero.²⁷³ Both the set-aside and affordability requirements will significantly impact feasibility for development. To combat this issue, developers must receive incentives to sufficiently offset these costs and maintain feasibility.²⁷⁴

²⁶³ For example, New York City's ordinance can require significantly lower affordability thresholds because it capitalizes on the strong rental market and skyrise environment. See *NYC Mandatory Inclusionary Housing*, *supra* note 54.

²⁶⁴ A four-over-one podium building is four to five story building with a lower story made of steel and the higher stories made of wood. This construction saves developers money by using less expensive materials.

²⁶⁵ WILLIAMS ET AL., *supra* note 178, at 3.

²⁶⁶ *Id.*

²⁶⁷ Area A required a developer to pay \$118 per square foot of land, while Area B required a developer to pay \$295 to make development feasible. *Id.*

²⁶⁸ At a 20 percent set-aside in Area A, a developer can only pay \$10 per square foot to make the development feasible. *Id.* In Area B, a developer can pay only \$150 per square foot. *Id.*

²⁶⁹ *Id.*

²⁷⁰ WILLIAMS ET AL., *supra* note 178, at 3.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ The set-aside requirements refer to the percentage of affordable units that a developer will create, and the affordability requirements are a designated percentage of the Area Median Income.

C. *Developer's Incentives*

Incentives focus on offsetting costs and primarily deal with how developers may use the space or direct funds.²⁷⁵ These incentives should offset the inclusionary housing program's effect on the development, so that investors, lenders, and developers can feel confident that the project will generate enough revenue to cover costs and provide a substantial return on investment.²⁷⁶ There are several incentives to developers such as direct subsidies and density or height bonuses, that are common in inclusionary housing programs.²⁷⁷

Direct subsidies are one-time infusions of funding for construction costs.²⁷⁸ They can enhance feasibility but may be expensive, especially considering the set-asides' negative affect on feasibility. A 10 percent difference in the set-asides can cut the feasible price per square foot in half.²⁷⁹ Direct subsidies would need to offset the difference in the feasible price per square foot and the actual price per square foot, likely resulting in millions of dollars in direct subsidies.²⁸⁰ Direct subsidies are likely the ideal incentive for developers because they provide the most significant impact, but place a significant burden on lawmakers.²⁸¹ Most legislatures do not have an affordable housing fund that can entirely offset the impact of inclusionary housing programs, so most must find other incentives.

Tax abatements or tax credits can also increase feasibility. Tax abatements can lower the overall costs by significantly cutting the amount of taxes that a developer must pay.²⁸² Tax credits "may be used to obtain dollar for dollar reduction in income tax liability for ten years for federal tax credits, and five years for state tax credits."²⁸³ The federally funded Low-Income Housing Tax Credit ("LIHTC") program provides federal tax credits to affordable housing developers.²⁸⁴ To receive this funding,

²⁷⁵ See WILLIAMS ET AL., *supra* note 178, at 12.

²⁷⁶ See *id.* at 3.

²⁷⁷ *Id.* at 12

²⁷⁸ *Id.* at 13.

²⁷⁹ *Id.* at 9.

²⁸⁰ *Id.* at 13.

²⁸¹ See WILLIAMS ET AL., *supra* note 178, at 13.

²⁸² To offset a percentage set-aside, tax rate abatements must range between 0.2 percent and 0.6 percent, depending on the percentage of set-aside. *Id.* at 14.

²⁸³ *Low-Income Housing Tax Credit Program*, HAWAII.GOV, https://dbedt.hawaii.gov/hhfdc/developers/lihtc_html/.

²⁸⁴ The LIHTC Program provides over \$8 billion for rental housing targeting lower income households. *Low-Income Housing Tax Credit*, OFFICE OF POLICY DEVELOPMENT AND PLANNING, <https://www.huduser.gov/portal/datasets/lihtc.html> (last visited April 21, 2022).

developers must comply with certain requirements like income and rent restrictions.²⁸⁵ Tax credits have become a regular source of funding for affordable housing developments.²⁸⁶

Density bonuses allow developers to build larger buildings than the area would typically allow in exchange for affordable housing development. But, these incentives require special consideration to make density bonuses most beneficial to developers.²⁸⁷ For example, developing additional square feet must be profitable. In areas where market rates are not strong, density bonuses may over-provide housing but increase production costs, decreasing profit. Also, the material for taller buildings may be more expensive because ensuring the safety and stability of the taller structure requires additional support.²⁸⁸ Next, density bonuses may encourage developers to overcrowd an area with tall buildings. This overcrowding could lead to decreased availability for open spaces, courtyards, or amenities and may lower the value of the overall property. Such decreased availability would mitigate the effectiveness of the bonuses that increased density should provide.²⁸⁹ When implemented effectively, density bonuses help developers create affordable housing in areas not feasible without the bonuses because they allow developers to build more units in a smaller area.

Most incentives fall into these three categories, but legislators and scholars have created other solutions. For example, parking reduction may enhance feasibility where excess parking is unnecessary.²⁹⁰ Generally, building parking structures or lots costs money with no return on investment, so eliminating parking requirements saves time and money.²⁹¹

²⁸⁵ *Id.*

²⁸⁶ The LIHTC can be split into two separate credits: nine percent and four percent. These credits pay roughly nine percent and four percent of the project's eligible costs annually over a period of ten years. Taken with costs excluded from LIHTC, a nine percent credit covers 70 percent of a project's cost while a four percent credit covers 30 percent of its costs.

²⁸⁷ WILLIAMS ET AL., *supra* note 178, at 13.

²⁸⁸ *Id.* at 2.

²⁸⁹ In "many urban markets," parking lots can cost between \$30,000-\$50,000. WILLIAMS ET AL., *supra* note 178, at 13. The East Kapolei TOD plan is an example of a community plan that seeks to eliminate the high cost of parking by capitalizing on the proximity of a transit system. *East Kapolei Neighborhood TOD Plan*, PBR Hawaii & Associates, Inc., July 2020, at 103-04. ("Reducing parking can lower overall construction costs[.]").

²⁹⁰ *Id.* at 16.

²⁹¹ In "many urban markets," parking lots can cost between \$30,000-\$50,000. Economics at 16. The East Kapolei TOD plan is an example of a community plan that seeks to eliminate the high cost of parking by capitalizing on the proximity of a transit system. *East Kapolei Neighborhood TOD Plan*, PBR Hawaii & Associates, Inc., July 2020, at 103-04. ("Reducing parking can lower overall construction costs[.]").

Opt-out options are another common incentive and occur through in-lieu fees, offsite provisions, or land conveyances.²⁹² Parking reduction or opt-out options can be effective in certain situations but may not universally apply. Legislators must continue crafting innovative incentives to meet the needs of individual development projects.²⁹³

Incentives should enhance feasibility for development projects by providing incentives that offset the costs of inclusionary housing programs. A feasible development project is one where a developer has the necessary capital to offset the production costs and generates sufficient profit to support investment expectations and continued administration. Incentives can be construction subsidies, tax abatements, or density bonuses, or project-specific incentives such as lower parking requirements. However, developers may need to cut profit margins to address the ongoing and ever-expanding housing issues here in Hawai'i. The proposed ordinance will impose higher burdens but ideally provide greater flexibility in compliance options.

D. *Administration of Inclusionary Housing Programs*

Inclusionary housing programs also have administrative responsibilities such as monitoring parties and enforcing regulations.²⁹⁴ A legislative body or agency must ensure that developers comply with the ordinance and maintain affordability requirements. Since inclusionary housing programs mix income levels, administrators must make equitable considerations that account for different economic, ethnic, and racial backgrounds.²⁹⁵ Administrators should be aware of key responsibilities in administering inclusionary housing programs.²⁹⁶

²⁹² *Id.*

²⁹³ Each development project requires an infrastructure that can support the development, including the increased demand in utilities, increase in traffic and transportation necessities, and population growth. To ensure that the developments are sufficiently supported, decisionmakers must call on a multitude of offices and departments to build out the surrounding area, and this may come in the form of an overall development plan. *See id.* at 103-04.

²⁹⁴ Rick Jacobus, *Delivering on the Promise of Inclusionary Housing*, POLICYLINK, 1, 3 (2007). Administration will depend largely on the affordable housing program, the governmental system in charge, and the decision makers' determination as to the best administrative practices. *See id.* at 16-19 (discussing examples of municipality administration).

²⁹⁵ Tim Iglesias, *Maximizing Inclusionary Zoning's Contributions to Both Affordable Housing and Residential Integration*, 54 WASHBURN L.J. 585, 593 (2015) (Discussing the relationship between inclusionary housing and integrating diverse backgrounds) [hereinafter Iglesias, *Maximizing Inclusionary Zoning*].

²⁹⁶ To ensure maximum efficiency, Jacobus suggest employing non-profit organizations to administer some of these duties. Jacobus, *supra* note 294, at 10. For example, the Town of Mammoth created Mammoth Lakes Housing, a nonprofit

First, an agency must oversee production. Some developments may mix the units into the market-rate units, while others delegate one section of the development for affordable housing.²⁹⁷ Integrating affordable housing units into market-rate housing presents several challenges. Developments that relegate affordable housing units to one area of the development may perpetuate the stigma around affordable housing, especially when the area is the less desirable portion of the development project.²⁹⁸ Additionally, administrators must oversee the production of the housing and ensure that the houses meet the necessary standards.²⁹⁹ Policing production ensures that the affordable housing units are equitable, proper, and liveable.³⁰⁰

Second, agencies must consider appropriate pricing for these affordable homes.³⁰¹ As tenants or owners move in and out of these units, agencies must consider the resale prices and capital improvements that owners may have made. If the homeowner sells the unit, the agency must determine how to address the market value of the home and an affordable rate of purchase. Homeowners may make capital improvements to their home and, thus, increase the value of the units. Affordable housing administration will require extensive ongoing monitoring.

Third, agencies must monitor the marketing process for affordable homes.³⁰² The relationship between the agency in charge of administering the affordable housing program and sellers varies, but the agency's focus is generally on ensuring that these homes are filled with applicants that

organization dedicated to administering and overseeing the town's affordable housing requirements. Jacobus, *supra* note 294, at 18.

²⁹⁷ In New York, a developer created a "poor door" model, which envisioned a condominium with an entrance for the affordable housing sector and the market-rate sector. Public backlash led to a redesign. Iglesias, *supra* note 295, at 595.

²⁹⁸ A "poor door" may appear to be discriminatory because it separates lower income households from others. *See id.*

²⁹⁹ In California, a developer provided low-income housing without kitchen cabinets. Jacobus, *supra* note 294, at 3.

³⁰⁰ Community integration is an important component of community building as it encourages diversity and a unique community. *See East Kapolei Neighborhood TOD Plan*, PBR Hawaii & Associates, Inc., July 2020, at 32.

³⁰¹ The resale price may depend on the affordability period.

³⁰² In Honolulu, the Hawaii Housing Finance & Development Corporation (HHFDC) is responsible for administering the state and federal tax credits, as well as advertising for developers. *Get Tax Exemption*, HAWAII.GOV, <https://dbedt.hawaii.gov/hhfdc/get-tax-exemption/>. Through their website, homebuyers can find information on mortgages and loans, while developers can get information on tax credits and other funding programs. *Id.*

qualify.³⁰³ Some jurisdictions require developers to draft affirmative market plans, which “outline the steps that will be taken to ensure that all eligible households in the area have an equal opportunity to apply for the units.”³⁰⁴ As part of compliance, agencies must screen and select potential buyers.³⁰⁵ For example, some programs may use a lottery system to select occupants.³⁰⁶ The agency would determine whether the applicants are eligible, select the applicant from the pool, and communicate the eligibility and requirements to the applicant. This process must be fair, impartial, and transparent to protect against fraud.

Fourth, agencies must monitor compliance among homeowners.³⁰⁷ Since inclusionary housing integrates lower-income households into development projects, homeowners on the lower fringes of income may struggle to meet fees and demands of ownership.³⁰⁸ Furthermore, agencies must ensure that homeowners occupy these homes. Without monitoring, individuals could purchase homes at affordable housing rates and rent these homes for a profit. This practice defeats the purpose of creating affordable housing and decreases availability of affordable homes. Agencies must ensure that homeowners do not exploit affordable housing.

Fifth, agencies must enforce these rules on developers and homeowners.³⁰⁹ This enforcement begins before the developer builds the first unit. Strong and clear legal documents ensure that developers and homeowners are aware of the expectations and consequences of non-compliance.³¹⁰ Enforcement may include fees, foreclosures, or legal consequences that require large swaths of time and dedication.³¹¹ Ideally,

³⁰³ For example, the staff of the Affordable Dwelling Units program in Fairfax County, Maryland “market affordable units, manage a waiting list of eligible buyers, [and] execute the random selection process” among other things. Jacobus, *supra* note 296, at 16.

³⁰⁴ *Id.* at 7.

³⁰⁵ For example, the Orange Community Housing and Land Trust in North Carolina “is responsible for marketing homes to eligible buyers [and] maintaining a waiting list of interested households,” among other things. *Id.* at 19.

³⁰⁶ For example, Ho‘opili is a masterplanned community located in the Kapolei and Ewa Beach area where Horton holds lotteries for available affordable units. See *Ho‘opili Living*, COLDWELL BANKER REALTY, <https://www.hoopililiving.com/>.

³⁰⁷ *Id.* at 6.

³⁰⁸ Homeowners have have to “maintain certain level of homeowner’s insurance, pay homeowner association fees, taxes, and other assessment on time.” *Id.* at 7.

³⁰⁹ Homeowners could refinance for more than a restricted resale price, illegally sublet the apartment, or sale the property to an ineligible buyer, among other things. *Id.* at 8.

³¹⁰ *Id.*

³¹¹ *Id.*

enforcement will be easy for agencies due to developer, community, and homeowner cooperation.

An expedited approval process would decrease costs and improve efficiency in administration. Development takes anywhere from two to four years with government regulations, zoning requirements, and hearings. An expedited process may save millions for developers by saving on interests from loans, property taxes, and other fees. Legislators may further incentivize development by reforming laws or regulations that impede or slow down construction.³¹²

Proper administration ensures efficiency and maximizes the potential of affordable housing programs while integrating competing values. Production, marketing, monitoring, and enforcement are continuous responsibilities of an agency overseeing administration. Administration must have clear and concise rules for administrators, homeowners, and developers. Administration must also encourage participation among all parties, while considering the diverse challenges that mixed-income communities face.

VI. PROPOSED ORDINANCE

With this background, this article will attempt to synthesize the previous information and craft an inclusionary housing program to address the complex issues that Honolulu faces. The rail system provides an opportunity for Honolulu to increase its affordable housing availability because the planned developments surrounding the stations will likely create a strong housing market.³¹³ There are three goals that this ordinance attempts to achieve: maximizing development in high-growth areas, targeting the ALICE section of the population, and maintaining flexible compliance options to avoid stifling development.

Below is a table of a rudimentary proposed ordinance, detailing the total number of dwelling units set aside as affordable, the affordability range in terms of the percentage of the AMI, and the affordability periods.³¹⁴

³¹² CALLIES, *supra* note 1, at 1 (“Land use in Hawai‘i continues to be the most regulated of all the fifty states”).

³¹³ AHR FEASIBILITY REPORT, *supra* note 132, at 14. (“Based on the experience of other cities with new rail lines, it is reasonable to expect that development near the new stations will command price and rent premiums over other locations, improving the feasibility over the mid-term”).

³¹⁴ Infrastructure and processing improvements would improve Honolulu’s ability to create affordable housing development. *See* AHR FEASIBILITY REPORT, *supra* note 132, at 13 (developers reported “a variety of factors that contribute to the challenge of building new development in Honolulu, including high land costs due to limited supply, high construction costs due to shipping prices and labor shortages, a lack of infrastructure capacity in key locations, and a long entitlement process”).

AFFORDABLE HOUSING REQUIREMENT PROVISIONS AS A PERCENTAGE OF THE TOTAL NUMBER OF DWELLING UNITS IN THE PRINCIPAL PROJECT ³¹⁵				
Principal Project Location	Homes for sale or for rent	On-Site Production	Off-Site Production	Alternative Compliance Option
IPD-T projects, PD-T projects, or TOD Special District projects seeking bonus height or density, or both	For Sale	25 percent ^{a,f}	25 percent	landowner conveys land to the City & County
			30 percent	
		15 percent ^{b,g}	15 percent	
			20 percent	
	5 percent ^{c, h}	5 percent		
		10 percent		
	For rent ^{d,e}	10 percent		
All areas, excluding IPD-T projects, PD-T projects, or TOD special district projects seeking bonus height or density, or both	For Sale	15 percent ^a	15 percent	landowner conveys land to the City & County
			20 percent	
		10 percent ^b	10 percent	
			15 percent	
	5 percent ^c	5 percent		
		10 percent		
	For Rent ^{d,e}	5 percent		
a. For-sale affordable dwelling units must be sold to households earning 75 percent or below the AMI. ³¹⁶ At least one-third of those units must be sold to households earning 70 percent or below the AMI.				

³¹⁵ Ordinance 18-10 includes another compliance option, where developers can convey land that they own to the City & County. ROH § 18-10 at 8. For clarity purposes, this option has been omitted but remains a valid alternative.

³¹⁶ The AMI in Honolulu is \$113,300 per year for a family of four. *Hawaii Community Development Authority*, HAWAII.GOV, https://dbedt.hawaii.gov/hcda/files/2022/05/HCDA-2022-AMI_Income-Limits.pdf. Yet,

- b. For-sale affordable units must be sold to households earning 70 percent or below the AMI. At least one-third of those units must be sold to households earning 65 percent or below the AMI.
- c. For-sale affordable units must be sold to households earning 65 percent or below the AMI. At least one-third of those units must be sold to households earning 60 percent or below the AMI.
- d. All affordable rental units must be sold to households earning 75 percent or below the AMI.
- e. All rental units will be permanently affordable.³¹⁷
- f. For-sale affordable dwelling units must remain affordable for not less than thirty years after the date when the unit is initially sold to a qualified buyer.
- g. For-sale affordable dwelling units must remain affordable for not less than forty years after the date when the unit is initially sold to a qualified buyer
- h. For-sale affordable dwelling units must remain affordable for not less than fifty years after the date when the unit is initially sold to a qualified buyer.

Connecting affordable housing development to these growing areas will optimize effectiveness.³¹⁸ Ordinance 18-10 has requirements for special projects tied to the rail project, and this ordinance would do the same to maximize development in high-growth areas.³¹⁹ Furthermore, the City looks to revitalize these areas as mixed-use communities, where residents can enjoy dining and shopping within walking distance of their homes.³²⁰ Developers may capitalize on this planned use by developing residential and commercial buildings in conjunction with one another. Revenue from the commercial aspects of these planned communities can further offset affordable housing costs. The ordinance must also be flexible.³²¹ Ordinance

40 percent of the population lives with an income between \$25,104, the federal poverty line, and \$90,828, the minimum survival budget in Hawai'i.

³¹⁷ To combat permanent affordability's effects on development, a possible solution is extending the tax holiday on real property taxes beyond the construction period. AHR Incentive Handout at 4.

³¹⁸ *Id.* ("Development in other locations along the rail line may therefore be possible in the relatively near future, particularly if sales prices increase to reflect the value of the enhanced access provided by the Honolulu Rail Transit project").

³¹⁹ See ROH § 18-10 at 8.

³²⁰ East Kapolei is an example of a planned community that capitalizes on anticipated growth. *East Kapolei Neighborhood TOD Plan*, PBR Hawaii & Associates, Inc., July 2020, at 2.

³²¹ "To increase effectiveness and efficiency, inclusionary housing programs should provide flexibility and allow a range of alternative methods of providing affordable

18-10 allows developers to choose their compliance mechanism through on-site or off-site options, set-aside percentages, and affordability.³²² This flexibility allows a range of developers to comply with the ordinance and should encourage developers to participate without significantly stifling development.³²³

The proposed ordinance would follow the percentage set-asides set forth in Ordinance 18-10.³²⁴ As research indicates, setting aside a percentage of homes for affordable housing significantly decreases development feasibility.³²⁵ Most inclusionary housing programs do not go beyond 40 percent, with the lone exception being Maui's workforce housing policy, which required a 50 percent set-aside.³²⁶ A higher set-aside requirement will likely stifle development in Honolulu since developers are on thin profit margins without an inclusionary housing program.³²⁷

The proposed ordinance would target the ALICE sect of the population and set affordable units for both for-sale units and for-rent units at 75 percent of the AMI. As the number of homes set-aside for affordable housing decreases, the affordability of for-sale homes will decrease to 60 percent. 75 percent of the AMI in Honolulu is \$89,300 for a family of four.³²⁸ \$89,300 is right below the \$90,828 minimum survival threshold.³²⁹ This income threshold will provide more housing opportunities for families and individuals that are more likely affected by homelessness than those above the threshold.³³⁰

units.” *On Common Ground: Joint Principles on Inclusionary Housing Policies*, HOME BUILDERS ASSOCIATION, 1, 3 (2005).

³²² ROH § 18-10 at 8.

³²³ Honolulu's ordinance is much more flexible than New York City's inclusionary housing program. See *supra* note 266. New York City has four options for developments, while Honolulu allows developers to choose how they comply. *Id.* The degree of flexibility reflects the higher degree of difficulty for affordable housing development in Honolulu.

³²⁴ See ROH § 18-10 at 8.

³²⁵ WILLIAMS ET AL., *supra* note 178, at 15.

³²⁶ Dane, *supra* note 97, at 451; *NYC Mandatory Inclusionary Housing*.

³²⁷ See AHR FEASIBILITY REPORT, *supra* note 132, at 12.

³²⁸ *ANNUAL AMI, STATS*, HAWAII.GOV (2022), <https://dbedt.hawaii.gov/hcda/annual-ami-stats/>.

³²⁹ *Hawai'i Household Budgets 2018*, UNITED WAY OF NORTHERN NEW JERSEY, <https://www.unitedforalice.org/household-budgets/hawaii>.

³³⁰ These households do not make enough income to meet the necessities and may suffer from homelessness as a result. See *id.* Departments that support Native Hawaiians, such as Department of Hawaiian Homelands and the Office of Hawaiian Affairs could work with the City & County to support Native Hawaiians in the application process, raising awareness, and ensuring qualification. See Jacobus, *supra* note 294, at 10 (suggesting that local departments can take on responsibility for oversight and administration, such as

The predominant difference between ROH §18-10 and the proposed ordinance is the price of the affordable homes.³³¹ The AMI for Honolulu is \$113,000, but about 42 percent of the population lives as ALICE households.³³² By lowering the affordability requirements and targeting this section of the population, the proposed ordinance is better suited to meet the needs of Honolulu's local population simply by making affordable units unavailable to those who live above the ALICE threshold.³³³

The proposed ordinance would require some affordable homes to be permanently affordable.³³⁴ Permanent affordability ensures affordable housing for future generations.³³⁵ Furthermore, the proposed ordinance would require off-site development in areas with higher homelessness populations. Promoting affordable housing in these areas provides opportunities for families to receive housing within their communities.³³⁶ The planned development projects along the rail stations are close to lower income communities.³³⁷ Legislators must approve these developments in low-income areas and determine the level of affordability, the number of units, and the length of affordability. The off-site set-aside would be equivalent to, or greater than, the on-site percentage set-aside to ensure that on-site development remains a priority.

Another off-site alternative is to improve or increase existing affordable housing. In land-constrained areas, with dwindling development sites, this has become a popular option.³³⁸ Rather than build new affordable homes, developers may invest in substantial rehabilitation, repair, efficiency, and safety in existing developments sites. Especially after

marketing and ensuring compliance).

³³¹ See ROH § 18-10 at 8.

³³² FY 2022 Income Limits Documentation System. <https://www.huduser.gov/portal/datasets/il/il2022/2022summary.odn> (Last Visited Dec. 11, 2022).

³³³ See ALICE State Overview, *supra* note 39.

³³⁴ New York also requires homes to be permanently affordable. *NYC Mandatory Inclusionary Housing*, *supra* note 54.

³³⁵ NYC MARKET STUDY, *supra* note 145, at 7 (“Requirements for units to remain permanently affordable will ensure that these affordable units remain a source for the community into the future, promoting neighborhood economic diversity even as economic conditions may change”).

³³⁶ Robert Hickey, *Making Inclusionary Housing More Flexible*: Four ideas for Urban Settings, CENTER FOR HOUSING POLICY, July 2015, 1, 3 (“low-poverty neighborhoods with access to core amenities such as transit services, jobs, or above-average schools”).

³³⁷ Nānākuli is an example of a lower-income community that is relatively close to Kapolei and may stand to benefit from housing connected to the rail project.

³³⁸ Robert Hickey, *Making Inclusionary Housing More Flexible*: Four ideas for Urban Settings, CENTER FOR HOUSING POLICY 1, 4 (July 2015).

extensive affordability periods, structures may begin to break down. This option may appeal to developers who own affordable housing or market-rate units in lower-priced buildings. Maintaining the infrastructure and the affordability of these homes will ensure that future generations will have access to them. Off-site affordable housing improves the surrounding communities and can be as beneficial as on-site building.

The proposed ordinance allows developers to convey land in the same manner as Ordinance 18-10 and will dissuade big developments from paying in-lieu fees by using a tiered in-lieu system.³³⁹ Instead, the proposed ordinance would allow developers to convey land or pay an in-lieu fee. Affordable housing requirements make small developments difficult, and the ordinance should encourage affordable housing.³⁴⁰ In-lieu fees will go towards a fund that promotes affordable housing. This fund may go towards direct construction subsidies, infrastructure improvements, or administrative costs.

To provide flexibility, all requirements will have a waiver option when reasonable. A waiver recognizes that feasibility for development is difficult to achieve when the government imposes stringent restrictions on the developer.³⁴¹ Furthermore, a waiver option underscores the importance of developer and legislator cooperation in creating affordable housing. Affordable housing feasibility is delicate and dependent on a several factors that are specific to areas or jurisdictions.³⁴² Because of the delicate and dependent nature of feasibility, developers may not hit the magic feasibility number in every development. Legislators must be flexible and willing to give waivers to ensure that an ordinance does not stifle development all together.

Developers should also have leeway in complying with the ordinance.³⁴³ For example, developers may combine in-lieu fees and off-site affordable housing to comply with the ordinance. Maximum flexibility increases feasibility for developers, and legislators should keep that in mind

³³⁹ This requires extensive cooperation between administrators and developers to determine appropriate, in-lieu fees. The ordinance should encourage either on-site or off-site affordable unit development.

³⁴⁰ New York's Mandatory Inclusionary Housing Ordinance applies to developments of 10 units or more. For Units between 11 and 25, developers may pay in-lieu fees, while developments with more than 25 units must include affordable housing. *NYC Mandatory Inclusionary Housing*, *supra* note 54.

³⁴¹ See *supra* Section V.B. Waiver options and in-lieu fees ultimately relate back to development feasibility.

³⁴² Hawaii's extensive and lengthy permitting process is one such example of a jurisdiction specific obstacle. See David L. Callies, *REGULATING PARADISE: LAND USE CONTROL IN HAWAI'I*.

³⁴³ This further ensures flexibility for developers.

as these projects require approval or permitting. This flexibility requires a collaborative, project by project effort.

Developers should have a plethora of incentives available.³⁴⁴ Along with the incentives connected to Ordinance 18-10, legislators should continue researching additional incentives and create them with developers.³⁴⁵ Incentives must meet the needs of each development, and some housing developments may require more incentives than others. The in-lieu fee fund may provide small construction subsidies to large developments or developments on the fringe of feasibility.

The proposed ordinance is not all-inclusive. There are many components that the ordinance does not consider. Rather than providing a clear-cut alternative, this ordinance is a call to action for legislators. Hawai'i requires real efforts to find a solution, and an inclusionary housing ordinance that requires more from developers can provide part of this solution.

VII. CONCLUSION

Hawai'i is in desperate need of a solution to its affordable housing issues. Hawai'i law switched from the traditional concepts of Native Hawaiian land ownership to the western concepts in 1848. This switch began a downward trend in housing and land availability, beginning with Native Hawaiians and evolving to the situation today. Middle- and low-income families of every ethnicity struggle to live in Hawai'i. Hawai'i boasts the highest cost of living, exorbitant home prices, and an influx of competition for homes. While some Hawai'i legislation has addressed affordable housing to a certain extent, Hawai'i requires innovative solutions and meaningful help from participating parties.

An inclusionary housing program is one strand of a larger web in addressing housing issues, but its application in court remains largely ambiguous. Proponents characterize inclusionary housing programs as land-use restrictions, while opponents characterize these programs as exactions. State courts decide the doctrine that applies to specific state inclusionary housing programs as the Supreme Court has never ruled on the issue. As of this writing, no Hawai'i court has adjudicated the issue.

In one aspect, pushing boundaries of inclusionary housing will force the Hawai'i Supreme Court, or the Supreme Court of the United States, to adjudicate the issue. Litigation should provide clarity and outline the proper boundaries of inclusionary housing ordinances. In another aspect, inclusionary housing programs are meant to maximize affordable housing and attempt to offset costs developers face. The goal should always be

³⁴⁴ See *AHR Incentives Handout*, *supra* note 52, at 4.

³⁴⁵ This article will point to the permitting and approval process as a good place for legislators to start supporting the development process. See *CALLIES*, *supra* note 1, at 7.

creating and optimizing affordable housing, and aggressive and targeted legislation is one way to do so.