

The Texas Two-Step: Local Resources and Regulations that Increase Affordable Housing



Home built by Guadalupe Neighborhood Development Corporation in Austin, Texas

**By: Heather K. Way
Attorney and Director**

Community Development Clinic, University of Texas School of Law
512-232-1210; hway@law.utexas.edu

American Bar Association
Forum on Housing and Community Development Law
18th Annual Conference:
“Opportunities During Challenging Times”
May 20-22, 2009

The Texas Two-Step: Local Resources and Regulations that Increase Affordable Housing

By: Heather K. Way
Community Development Clinic, University of Texas School of Law

Introduction

In meeting the need for more affordable housing opportunities for lower-income households, many local and state governments have traditionally relied largely on federal funding programs. This is particularly the case in “pull yourself up by the bootstrap states” such as Texas, where as recently as 2007, the state spent more on magazine publications than it did on housing the poor. In addition to providing meager funding for housing, Texas—like many other states—has also done very little to incorporate planning and regulatory tools into its affordable housing toolbox. Unlike states such as California and New Jersey, which utilize aggressive planning tools and regulations to stimulate the production of affordable housing on the local level, the State of Texas’s housing programs have been by and large a conduit for federal funding. The state’s limited involvement in regulating and planning for housing is part of a larger laissez-fair approach when it comes to development.¹ In several instances, the state has even been hostile to regulating the creation and preservation of affordable housing, through laws such as those that bar cities from adopting inclusionary zoning and condominium conversion ordinances.²

At the local level, several Texas cities have begun to provide more local funding and other resources for affordable housing, primarily through general obligation bonds. Cities and counties, however, have also traditionally played a limited role in regulating and planning for the creation and preservation of affordable housing. Texas counties in particular have played a limited role since, with a few exceptions, they lack zoning and land use powers. (Houston, the third largest city in the nation, is also hamstrung by its lack of zoning powers—although arguably the lack of zoning restrictions could actually be in some instances a facilitator to the creation of more affordable, multifamily housing).

The funding and planning of affordable housing that has taken place on the local level has traditionally been disconnected from other local planning efforts, with little focus on providing affordable housing opportunities where it is needed most: near jobs, high performing schools, and transit. In my hometown of Austin, for example, the result of this disconnected approach is increased segregation on the basis of income, race, and

¹ Elizabeth Mueller, “Texas State Planning Framework: A Background Paper,” (Sept. 17, 2008) (unpublished manuscript, on file with author).

² Tex. Local Govt Code, § 214.905 (bar on inclusionary zoning for homeownership units by outlawing the setting of a maximum sales price, with limited exceptions); Tex. Local Govt Code, § Sec. 82.006 (barring regulations that discriminate against condominiums).

ethnicity.³ The vast majority of the government-funded affordable housing developments that have been built in the past 30 years (with the exception of public housing units built under a court desegregation order) have been concentrated in East Austin, an area of the city with high poverty rates, low performing schools, and limited jobs.

Fortunately, there is good news. Even while working in a state and with local governments that have traditionally provided limited tools to create affordable housing—and at times have been hostile to government intervention in housing development—we have seen several new and promising innovations at the state and local levels in Texas. These local approaches are important not only because federal funding is insufficient to address growing housing needs, but also because there are a wide array of funding and planning tools that are only available at the local levels, to governments that are willing to innovate and make affordable housing a priority. State and local governments are also better positioned to link housing to larger comprehensive planning efforts around jobs, transportation, schools, and the environment, and thus ensure that families living in affordable housing have access to the other resources they need to succeed.

In Texas, the new local approaches can be best summed up as the Texas two-step: First, approaches that provide more local resources for affordable housing; and second, approaches that utilize local planning and regulatory tools to create a more holistic approach to housing, resulting in more integration of affordable housing in higher opportunity areas and mixed-income communities. We have got a long way to go here in Texas, but there are efforts underway that are worth sharing:

Step One: Increase Local Resources (Land and Funding) for Affordable Housing

►► Land

The two largest resources that developers (for profit and non profit) need in order to create more affordable housing are land and funding. Historically, in Texas cities, land was not as much of a barrier, especially for single family housing. In the 1980s and even 1990s, developable infill parcels near downtown for single family housing, for example, could be bought for as low as \$10,000-\$20,000. Land is now a much more precious commodity, especially in the urban core. The same infill single family parcels in Austin now go for as high as \$150,000-\$200,000. Thus, developers and advocates are turning to other tools to find inexpensive land that can be transformed into affordable housing.

a. Public land: Public land can provide a prime resource for creating affordable housing. In Texas, the city, county, and state all own a lot of surplus and underutilized property in prime locations in urban centers. In Austin, housing advocates and other community leaders have been working to ensure that any city land that is sold or leased for redevelopment includes a minimum of 25% affordable housing. Very preliminary discussions have also taken place about a strategy to incorporate affordable housing onto

³ Kate Bushman and Elizabeth Mueller, “Housing Choices for People of Color in Austin, Texas” (May 1, 2006) (on file with author).

underutilized government tracts, such as parking garages and surface parking lots. In terms of including affordable housing in redeveloped city land, there have been several successes to date, including the following:

- ❖ Mueller Airport Redevelopment: When the City of Austin decided to move its airport and sell the old airport's 711-acre site, the City agreed to require that at least 25% of the residential units in the new development would be set aside for affordable housing.⁴ The housing units are integrated into the new mixed-use development, which is host to 3,000 new jobs including the city's new children's hospital, a physician's office complex, and a retail complex. The affordable homes are green and within walking distance of 140 acres of parks and trails in the development. The city has adopted a TIF for the site, which uses the increased property and sales taxes to reimburse the developer for the infrastructure costs. The developer set up a foundation and partnered with a local nonprofit, People Trust, to manage a shared equity program for the homes, which provides families with an interest-free second mortgage to subsidize the sales price of the home. The second mortgage is repaid when the home is sold, along with a portion of any equity in the property as a result of an increase in the appraised value. The developer also instituted a fee that is assessed upon each resale of any property, which then goes towards subsidizing the affordable housing. When the development is built out, there will be approximately 550 affordable homeownership units, and 1200 affordable rental units.

- ❖ Green Water Treatment Plant Redevelopment: In 2008, the City of Austin selected a developer to redevelop a former city water treatment site located on prime downtown real estate. Of the rental units in the four-block development, 25% will be affordable, and 40% of the property taxes generated from the new development will be dedicated to affordable housing either onsite or within the downtown vicinity.

- ❖ Also in the works:
 - Conversations with state legislative leaders to create a statewide policy requiring inclusion of affordable housing on state land that is sold or leased for redevelopment.
 - Dedication of city-owned property located in the City of Austin's transit-oriented development districts along the city's new commuter rail line. The City has asked staff to evaluate the city-owned land in these districts and is investigating the feasibility of relocating existing city uses on the sites, replacing those uses with affordable housing and possibly other mixed uses that will support ridership on the commuter rail line.

b. Reuse of abandoned and tax delinquent properties. Abandoned and vacant infill properties are a prime opportunity for redevelopment as affordable housing. These

⁴ For general coverage of the Mueller redevelopment and affordable housing program, see Kate Miller Morton, "Ambitious vision for redeveloping former airport site is coming to life," *Austin American-Statesman* (Mar. 1, 2009).

properties are oftentimes close to job centers and mass transit, and their redevelopment can help spur the turnaround of a neighborhood. Texas has been a leader in creating innovative tools to redevelop these properties into affordable housing, such as through the state's Urban Land Bank legislation and pending legislation that would create a community receivership tool.

- ❖ **Land Banking:** In 2003, the state adopted a pilot "Urban Land Bank Demonstration Program" for the City of Dallas, which allows the city to bypass the public auction in a tax foreclosure sale and directly acquire tax delinquent, vacant properties for affordable housing development.⁵ Nonprofit housing developers have a right of first refusal. Since 2005, the City of Dallas has acquired 391 lots for redevelopment as affordable housing through the land bank program, with another 1098 working their way through the tax foreclosure process. The land bank legislation has since been extended statewide.⁶ Receipt of federal Neighborhood Stabilization Program funding has opened up new opportunities for acquisition and redevelopment of these tax foreclosed properties, along with mortgage foreclosed properties. Houston also operates an active land bank program that is acquiring tax- and mortgage-foreclosed properties for redevelopment as affordable housing.

- ❖ **Community Receivership:** A bill filed this spring in the Texas Legislature would give nonprofit housing organizations the ability to file a community receivership action against dangerous properties.⁷ Modeled on laws in Baltimore and Ohio, when a rental or vacant property is creating a serious safety hazard and the owner refuses to address the hazard, the legislation would allow a city-certified nonprofit to file suit in state district court and ask for a receiver to be appointed to fix up the property or, if appropriate in limited situations, to demolish the property and rebuild on the site. For single family properties, the nonprofit can also serve as the receiver. For all properties, the receiver holds a priority lien on the property for the receiver's expenses. At the termination of the receiver action, the court has the authority to sell the property, and the receiver is paid first out of the sales proceeds; liens not covered by the sales proceeds are extinguished.

►► Money:

With no income tax and with caps on property and sales taxes, Texas state and local governments have limited ability to raise funds for affordable housing and other services. As a result, Texas cities have relied upon two primary avenues to generate funds for affordable housing: general obligation bonds and tax increment financing.

a. General obligation bonds. In three Texas cities, voters have approved city-issued general obligation bonds for affordable housing. Houston: \$18 million (2006), Dallas

⁵ Tex. Local Govt Code, Chapter 379C. Houston also had an active land bank program, but is not utilizing the special tax foreclosure tools provided the Urban Land Bank legislation.

⁶ The different Urban Land Bank Program statutes are located in the Texas Local Government Code, Chapters 379C-E, available at <http://www.statutes.legis.state.tx.us/>.

⁷ Texas Senate Bill 1449, 81st Regular Session, available at <http://www.legis.state.tx.us/>.

\$23.8 million (2003), and Austin: \$55 million (2006). The Austin bond initiative was the first of its kind in the city to be approved the voters (a prior initiative failed). Houston and Dallas voters had each passed prior general obligation bond initiatives for affordable housing.

b. Tax increment financing. Through tax increment financing (TIF), local governments dedicate a percentage of increased tax revenue arising out of appreciating property values in a redevelopment district. The taxes are typically dedicated to funding infrastructure improvements in the redevelopment, which in turn fuel the increased property values. In several instances, governmental entities have required a dedication of a certain percentage of the tax increment towards affordable housing and other community benefits.

Texas has at least four policies in this regards:

- ❖ Houston 30% TIF requirement: When the City of Houston creates a “petition” TIF, state law requires that one-third of the property tax increment from the TIF district (called the “tax increment refinancing zone,” or TIRZ) be spent on affordable housing.⁸ This law generates at least \$4 million a year for affordable housing capital improvements.
- ❖ Austin public land TIF: The Austin City Council has adopted via resolution a requirement that 40% of the tax increment from any city land that is sold or leased for redevelopment will be dedicated to affordable housing, with the anticipation that such a requirement will eventually result in a dedicated stream of ten million dollars a year for affordable housing.⁹
- ❖ Dallas TIF policy: A joint county-city policy in Dallas requires that, for a TIF adopted after 2005, up to twenty percent of residential units in the TIF be set aside for affordable housing.¹⁰ Alternative compliance is also available, resulting typically in the payment of in-lieu fees. One of the city’s newest TIFs includes 559 acres along the city’s rail transit line and will channel tax increment dollars from the northern sectors of the line into the city’s southern and more impoverished sector to spur transit-oriented redevelopment of the area, along with the creation of affordable and mixed-income housing.¹¹
- ❖ Homestead Reinvestment Zone: The Texas Legislature has allowed Dallas and Austin to create a special Homestead Reinvestment Zone,¹² which is a special TIF that can be created in certain gentrifying neighborhoods near downtown. The city

⁸ Tex. Tax Code, § 311.001(f).

⁹ Austin City Council, Resolution #000907-72 (Sept. 7, 2000).

¹⁰ For a complete list of the City of Dallas’s TIF plans and affordable housing components, see http://www.dallas-ecodev.org/area_redevelopment.html.

¹¹ City of Dallas, “TOD Project Plan & Reinvestment Zone Financing Plan,” (Dec. 10, 2008), available at www.dallas-ecodev.org/images/community_redevelopment/area_redevelopment/tif/TOD_TIF_plan.pdf.

¹² Tex. Local Govt. Code, Chapter 373 A. For a presentation on this specific tool for Austin, see http://www.ci.austin.tx.us/housing/downloads/homestead_pres_112008.pdf.

and county can elect to dedicate a certain percentage of tax increment from these neighborhoods to preserve and create affordable housing within the same neighborhoods. The Austin City Council recently approved creation of a Homestead Reinvestment Zone in Austin, which is now awaiting approval of the county.

Step Two: Adopt regulations and planning practices that stimulate production of affordable housing in high opportunity areas

Lessons learned from Texas and other areas around the country are that, without local government action and utilization of a broader set of planning and regulatory tools, affordable housing will typically not be built in high opportunity areas. This has certainly been the case in Austin, Dallas, and Houston, where government-funded and market-driven affordable housing has traditionally been concentrated in high poverty neighborhoods with higher crime and lower performing schools and an overall lower quality of life.

►► Density bonuses and other land use incentives

Restricted by the ability to adopt a comprehensive and mandatory inclusionary zoning ordinance, the City of Austin has been experimenting with a series of voluntary inclusionary ordinances to incorporate a small percentage of affordable housing units into market developments. These programs provide developers with an increase in density and zoning entitlements, in exchange for providing affordable housing onsite or, in some instances, paying an in-lieu fee that goes into the city's housing fund. On some programs, the city also provides fee waivers. These voluntary programs are by and large located in high opportunity areas of the city, where there is high market demand for more density. They include programs in the downtown area, university campus area, transit-oriented development districts, and vertical mixed-use developments.

Many of these density bonus programs are too new to be thoroughly evaluated for their effectiveness, but four primary criticisms have arisen:

- ❖ Loopholes in the ordinances and the availability of waivers means that developers can oftentimes work around the affordable housing requirements. Most notably, in downtown, in every instance in which a development has sought increased height that would otherwise trigger the affordable housing or in lieu of fee, the developer has convinced council to grant a waiver from the affordable housing by seeking approval under another zoning category. Because the in-lieu fee on a development can be in the millions of dollars, the developer has a financial incentive to hire a lobbyist to try and lobby council to waive the fees.
- ❖ The affordable housing benefits from these programs are marginal and do little to address the most pressing needs for affordable housing. The density bonus programs which set affordable rents at 80% of the median family income, or \$1,300 a month, exceed the market rents in many parts of town.

- ❖ Making density contingent on affordability means the city may end up with neither. In all of the areas with density bonus ordinances, the city wants and needs the density, especially in the transit-oriented development districts to provide ridership for the new commuter rail line. Because the city is only able to require affordable housing if it is linked to granting the developer the option of building more densely, the city is unable in these areas to require the density. That means that the city has to be much more conservative in setting the density bonus policy if it wants to be sure and not disincentivize the density, and even then the city may end up with neither the density nor the affordable housing it desires.
- ❖ The lack of a comprehensive density bonus ordinance means that many developments seeking entitlements are not covered by any ordinance. The hodgepodge of existing ordinances also result in a very complex regulatory scheme, making it difficult for developers and city zoning staff to understand the different requirements.

▶▶ Comprehensive Planning

The City of Austin is embarking on an ambitious long-range, comprehensive planning initiative which will include an affordable housing component.¹³ This initiative is a huge undertaking because the city has not adopted a comprehensive plan since 1979. While just in the initial stages, a project of Austin HousingWorks, the Urban Land Institute, and other local stakeholders is formulating a strategy to ensure that the affordable housing component in the comprehensive plan sets targets and creates planning and regulatory tools that will create ranges of affordable housing throughout the city, but especially near high opportunity areas such as job centers and transit corridors.

As a potential model, the City has recently finalized phase one of its downtown plan, which places a priority on creating affordable housing in and near downtown. The affordable housing plan for downtown is being unveiled in May and will include goals and strategies for creating housing for a range of income levels. Another model is the City's planning efforts to create transit-oriented development districts (TODs) along the City's new commuter rail line.¹⁴ As part of the plans, the City Council adopted an ordinance setting a goal that 25% of all new residential units in the TODs will be affordable. The City hired a consultant to create an affordable housing strategy to reach these goals, which includes the density bonus and public land policies mentioned above.

▶▶ Reduce regulatory barriers

While regulations can play an important role in increasing the availability of affordable housing, regulations such as zoning restrictions and impact fees can also deter affordable development. For almost ten years, the City of Austin has utilized a S.M.A.R.T. (Safe, Mixed-income, Accessible, Reasonably-priced, Transit-oriented) Housing Policy Initiative to limit regulatory barriers for affordable housing. Through the initiative,

¹³ For a broad summary of the City of Austin's comprehensive planning efforts, see www.ci.austin.tx.us/zoning/com_plan.htm.

¹⁴ Information on the City's Transit-Oriented Development plans and ordinances is available at: http://www.ci.austin.tx.us/planning/tod/station_area_planning.htm.

developments can qualify for waivers from local development fees and receive expedited review for development and building permits. To facilitate the development of affordable infill development in existing neighborhoods, the city also amended the city's development code.¹⁵

¹⁵ For an overview of the City of Austin's SMART Housing Program, see www.ci.austin.tx.us/ahfc/smart.htm.

