



Lawrence Board of REALTORS®

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Comments on the Draft Comprehensive Plan for Unincorporated Douglas County & The City of Lawrence

October 23, 2017

The Lawrence Board of Realtors appreciates the opportunity to provide comments on the Draft Comprehensive Plan for Unincorporated Douglas County & The City of Lawrence, released on August 22, 2017, with public comment due October 23, 2017.

We specifically address Chapter 2 on Growth and Development, as well as language in Chapter 1, the Introduction.

The proposed inclusionary zoning policy may be vulnerable to challenge as being in conflict with Section 12-16,120 of the Kansas Statutes.

Section 12-16,120 of the Kansas Statutes, titled “Rent control by political subdivisions precluded,” states:

- (a) No political subdivision of this state, including, but not limited to, a county, municipality or township, shall enact, maintain or enforce any ordinance or resolution that would have the effect of controlling the amount of rent charged or the purchase price agreed upon between the parties to the transaction for the lease or purchase of privately owned residential or commercial property.
- (b) This section shall not impair the right of any political subdivision to manage and control commercial or residential property in which such political subdivision has an ownership interest.
- (c) This section shall not impair the right of any owner of privately owned property to enter into a voluntary agreement with a political subdivision to agree to requirements that would have the effect of controlling the amount of rent charged or the purchase price agreed upon between the parties to the transaction for the lease or purchase of privately owned property in return for grants or incentives provided by the political subdivision to the owner of privately owned property.
- (d) No political subdivision shall require any owner of privately owned property to agree to any requirements that would have the effect of



controlling the amount of rent charged or the purchase price agreed upon between the parties to the transaction for the lease or purchase of privately owned property, as a condition for consideration or approval of:

- (1) Any building permit or plat; or
- (2) any request for a zoning regulation, boundary, classification or a conditional use permit, or for a change or variance in a zoning regulation, boundary, classification or a conditional use permit.¹

It can be argued that the Proposed inclusionary zoning Policy conflicts with Section 12-16,120(a) and Section 12-16,120(d) of the Kansas Statutes because it would appear to allow the City to require the owner of private property in Tier 2 or Tier 3 to provide affordable housing units (or donate land or money to an affordable housing trust fund or partner) as a condition of annexation. Subsection “(a)” prohibits local governments from requiring that the “owner of privately owned property ... [control] the amount of rent charged or the purchase price ... of privately owned property.” Subsection “(d)” prohibits local governments from requiring that any owner of privately owned property to agree to any requirements that would have the effect of controlling the amount of rent charged or the purchase price agreed upon between the parties to the transaction for the lease or purchase of privately owned property, as a condition for consideration various development approvals, including a “boundary” change.

Implementation of a mandatory inclusionary zoning requirement as recommended in the Proposed inclusionary zoning Policy would be vulnerable to challenge as an unconstitutional exaction under the United States Constitution. Briefly, it is questionable whether a mandatory inclusionary zoning regulation could satisfy the second part of the Nollan/Dolan Dual Nexus Standard, the test for determining whether a regulatory condition or exaction (i.e., a requirement that an applicant give something to the community in order to obtain development approval) constitutes an unconstitutional taking.² In part, the test requires that the affordable housing requirements must be “roughly proportional” in each case to the anticipated impact of the proposed development. In other words, a municipality imposing an inclusionary zoning requirement would have to demonstrate that there is a “rough proportionality” between the specific affordable housing requirement imposed by the inclusionary zoning regulation and the impact of a proposed development. Moreover, in order to satisfy the “rough proportionality” prong of the test, the municipality would have to make some sort of individualized determination that the inclusionary zoning requirement is related in both nature and extent to the impact of that development.

LBOR requests that City or County legal counsel be asked to provide legal opinions as to whether the proposed inclusionary zoning Policy, which as worded would appear to allow the City to require the owner of private property in Tier 2 or Tier 3 to provide affordable housing units (or donate land or money to an affordable housing trust fund or partner) as a condition of annexation,

¹ K.S.A. 12-16,120(a) (emphasis added)

² *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2599-2600 (2013). For further discussion of the *Koontz* decision see BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION § 1:38 (Application of *Nollan* and *Dolan* to Legislatively Adopted Development Exactions) (20th ed. 2017).



conflicts with Section 12-16,120 of the Kansas Statutes. Legal counsel should be consulted on whether the proposed inclusionary zoning policy, if implemented to mandate inclusionary zoning as a condition of annexation in the Tier 2 and Tier 3 areas, would violate the federal standard for development exactions. Further action should be postponed on the Draft Comprehensive Plan until they receive these opinions from legal counsel.

The provision of a Community Benefit is more appropriately used as an incentive for developers, rather than a mandate.

If the City and/or the County wish to use inclusionary zoning as a means of encouraging the production of affordable housing, then they should consider establishing a voluntary inclusionary program that offers incentives for developers to provide affordable housing units, in order to avoid this constitutional concern. Developers may be given the opportunity to create affordable housing, provide land or amenities for a public purpose, preserve environmentally sensitive land or create employment opportunities, in exchange for an allowance or waiver of other regulations or requirements. For example, density bonuses on portions of a housing development may be granted to a developer in exchange for a payment to a housing trust fund. We believe there would be ample use of the program in this manner to achieve the objectives of the Plan, within the law and to the benefit of all.

A mandate to provide a community benefit will have the effect of increasing the cost of housing, instead of making housing more affordable.

As REALTORS®, we are experts on what is happening with the housing market in our community. When growth is not controlled by the market, but instead by the impulses of policy makers, the cost of housing rises.

In particular, mandatory inclusionary zoning can have a significant negative impact on residential development, and could have unintended consequences for housing affordability.

Inclusionary programs can result in the development of affordable housing units. However, the City and the County should understand and recognize the effects on the housing market that may result from shifting the burden of creating affordable housing to the individual developers of new residential projects. Developers faced with the increased cost of incorporating an affordable Component in a residential project—whether by setting aside the required percentage of affordable units or paying the fee in lieu—are likely to seek to recover these costs in order to maintain their profit margins. In order to make up the deficit, affected developers are likely to pass the added costs on to home buyers to a greater or lesser extent, depending on market conditions. Thus, buyers of market rate units end up subsidizing the cost of affordable housing units by paying higher housing prices.

If market factors will not allow developers to increase prices to account fully for the effect of the inclusionary requirement, then developers may look for cost savings in other ways. For example, developers may reduce the amount they are willing to pay for land as a way to offset the costs of inclusionary requirements, which would have the effect of lowering property values in areas where the mandatory inclusionary zoning requirement applies. Developers may also seek to



reduce costs by adjusting the quality of their housing product. If developers are not able to recoup the cost of inclusionary requirements to a sufficient extent, they may choose to build elsewhere or not at all.

These effects are Complex and can vary widely depending on the strength of the local housing market, the regulations in neighboring cities and towns, the supply of developable land, and other factors. It is this very Complexity that underscores the need for a thorough analysis of the economics of the local housing market and the potential impact of an inclusionary zoning regulation on real estate development and property values. City and County officials should also keep the following further policy concerns in mind:

- **Pressure to Develop More Expensive Market Rate Housing.** Mandatory inclusionary zoning could have the effect of encouraging developers to produce even higher-end housing than the market currently demands (assuming that profit margins are higher on higher-end housing), in an attempt to recoup the added cost of making a donation or land or money to an affordable housing trust or the discount on affordable units. This could reduce housing opportunities for buyers or renters who do not qualify for affordable housing units because their incomes are too high, but who also cannot afford the higher priced market rate housing.
- **Disincentive to Produce Moderately Priced Housing.** Mandatory inclusionary zoning could make it difficult to produce moderately priced housing (for buyers who do not benefit from the affordable housing units because their incomes are too high) if profit margins are too low on this type of housing product.
- **Reduction in “Filter” Housing Stock.** If an inclusionary zoning regulation has the effect of decreasing the production of new housing, existing affordable units in the community may become even scarcer if one source of affordable housing is the “filtering” of for-sale or rental units in the existing market rate housing stock down to lower income households, as the wealthier households who originally occupied such units shift to newer housing stock.³ This would be the result particularly if insufficient production of moderately priced housing prevented housing from filtering down to lower income families (see preceding concern).

While ensuring that City’s and County’s needs for affordable housing are met is unquestionably a worthy goal, mandatory inclusionary zoning is not an effective tool for increasing the production of affordable housing for low- and moderate-income families. In comments to the Horizon 2020 Steering Committee delivered by LBOR in November 2014 (attached), we offered many examples of where this result has been quantified in communities around the country. A 2004 study by the Reason Public Policy Institute (RPPI) titled “Housing Supply and Affordability: Do Affordable Housing Mandates Work?” (the “RPPI Study”) also casts doubt on the idea that mandatory inclusionary zoning will lead to the production of more affordable housing.⁴ The RPPI study concluded that inclusionary zoning has not been effective as a solution to an affordability crisis, and that it translates into significantly higher prices for market-rate homebuyers.

³ See Thomas Bier, *Moving Up, Filtering Down: Metropolitan Housing Dynamics* at 6-8 (Brookings Institution, Center on Urban and Metropolitan Policy 2001) (discussing the downward “filtering” of existing real estate).

⁴ Benjamin Powell & Edward Stringham, “Housing Supply and Affordability: Do Affordable Housing Mandates Work?,” REASON PUBLIC POLICY INSTITUTE POLICY STUDY 318 (April 2004).



We are befuddled why policy makers in Lawrence and Douglas County refuse to believe this is happening here. Managing growth through policies such as the Community Benefit requirement will increase costs of housing and decrease the supply of affordable housing for our community's residents. Therefore, the proposed inclusionary zoning policy should be deleted from the Draft Comprehensive Plan.

A Comprehensive Plan should provide a vision and serves as a policy guide for future growth.

According the draft Plan, it “provides a vision and expresses a community’s desire about the future. It provides the foundation and framework for making future physical development and policy decisions.” Yet, the draft Plan also purports to be a “binding land use document” and “All development proposals must Comprehensive with the Comprehensive Plan.” We assert that strict Comprehensive is unlikely to be desirable for developers or the City/County, and a rash of plan amendments will, again, only add delays and additional costs to housing in our community. The Plan should not be considered binding.

The draft Plan needs Chapter by Chapter examination and public/expert input.

We disagree with the assertion that the draft Plan is a product of “substantial public input” or is near being ready for adoption. The opportunity to provide input at Steering Committee meetings was by invitation only, and slanted towards the anti-growth lobby. Objections to schemes such as the Community Benefit requirement and other elements were made to Plan drafters, but ignored. It is a Comprehensive document, with incorporation by reference of thousands of pages of guidelines, some of which did not get public scrutiny.

We strongly urge the Horizon 2020 Steering Committee to engage in a deliberate process of Chapter by Chapter analysis of the Plan draft. We expect thoughtful review of comments and would be glad to make experts in the housing market available to the Steering Committee and answer any questions, in writing or through appearance before the Committee.

Thank you for this opportunity to comment. We urge serious consideration be given to assuring the Plan is in Comprehensive with state law and hope our suggestions are helpful. The Horizon 2020 Steering Committee has an important responsibility, and missteps will have visible, costly consequences for our growing community.

Respectfully submitted,

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