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Using Incentive Zoning to Promote Affordable Housing and the Public Good

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1. Introduction.

Following the 2008 financial crisis, development activity slowed while the city continued to grow. In 2008 the city issued 1,190 permits for new construction of single-family developments and 179 permits for new construction of multifamily developments.¹ By 2009, these numbers dropped to 740 permits for new construction of single-family developments and 20 for multifamily developments.² Between 2008 and 2009, the city grew by approximately 28,000 residents with the population growing from 1.253 million to 1.281 million.³ The city has grown by approximately 64,000 residents since 2009, with a 2020 population of 1.345 million.⁴

By 2019 the number of permits issued had come roaring back. In 2019, Dallas issued 63,421 building permits—the most of any city in the country.⁵ Of these, 2,121 permits were for new construction of single-family developments and 732 for multifamily developments.⁶ Despite all of the new construction, the city is still short approximately 20,000 affordable units.⁷

¹ City of Dallas, 2008 Annual Permit Report, *available at* https://dallascityhall.com/departments/sustainabledevelopment/buildinginspection/DCH%20documents/excel/Permits_2008.xlsx (last visited March 9, 2020). These numbers reflect the number of permits issued, not dwelling units constructed. The number of multifamily dwelling units is substantially greater.

² City of Dallas, 2009 Annual Permit Report, *available at* https://dallascityhall.com/departments/sustainabledevelopment/buildinginspection/DCH%20documents/excel/Permits_2009.xlsx (last visited March 9, 2020).

³ Google.com (last visited March 9, 2020).

⁴ World Population Review, *Dallas, Texas Population 2020*, at: <https://worldpopulationreview.com/us-cities/dallas-population/> (last visited March 9, 2020).

⁵ REINation, *Why the Housing Inventory Surge Matters in These Texas Markets*, at <https://blog.reination.com/why-the-housing-inventory-surge-matters-in-these-texas-markets> (April 10, 2019).

⁶ City of Dallas, 2019 Annual Permit Report, *available at* https://dallascityhall.com/departments/sustainabledevelopment/buildinginspection/DCH%20documents/excel/Permits_2019.xlsx (last visited March 9, 2020).

⁷ Jack Fink, *Dallas Council Committee Advanced Plan To Build New Affordable Houses*, CBS 11, at <https://dfw.cbslocal.com/2019/04/15/dallas-council-committee-advanced-plan-to-build-new-affordable-houses/> (April 15, 2019).

Why is the market not producing affordable units? Larry James, CEO of CitySquare described it best: “The combination of increasing production, material and labor costs has resulted in a market that isn’t friendly to affordable and workforce housing.”⁸ Mr. James explained: “Every unit of housing that came online in Dallas in 2017, for instance, was upscale and luxury.”⁹

2. Rent control and mandatory inclusionary zoning generally prohibited under state law.

Many cities around the country confront a lack of affordable housing by either rent control or mandatory inclusionary zoning.¹⁰

Rent control is a government mandated price control that places a maximum price on what landlords can charge tenants.¹¹ Texas generally prohibits rent control except in cases of a housing emergency created by a disaster.¹² The governor must approve the ordinance establishing rent control.¹³ If a rent control ordinance is approved, a city council must continue or discontinue rent

⁸ Dees Stribling, *Dallas Lines Up Developers To Help Create Affordable Housing, But It Will Be a Tough Slog*, BISNOW, at <https://www.bisnow.com/dallas-ft-worth/news/affordable-housing/dallas-lines-up-developers-to-help-create-affordable-housing-but-it-will-still-be-a-tough-slog-96571> (Jan. 10, 2019).

⁹ *Id.*

¹⁰ Mandatory inclusionary zoning is prohibited in Virginia, Texas, Arizona, Tennessee, Kansas, and Wisconsin. See John Infranca, *The New State Zoning: Land Use Preemption Amid A Housing Crisis*, 60 B.C.L.REV. 823, 846 (2019); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1179 (2018).

¹¹ Walter Block, *Rent Control*, The Library of Economics & Liberty, at <https://www.econlib.org/library/Enc/RentControl.html> (last visited March 10, 2020).

¹² TEX. LOC. GOV’T CODE ANN. § 214.902 (Vernon 2020). “Disaster” means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, extreme heat, cybersecurity event, or other public calamity requiring emergency action, or energy emergency. TEX. GOV’T CODE ANN. § 418.004(1) (Vernon 2020).

¹³ TEX. LOC. GOV’T CODE ANN. § 214.902.

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