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Inclusionary Zoning: Identifying Possible Legal Challenges within Canada and How Best to Pre-empt Them

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Abstract: The purpose of this research paper is to explore the legal issues that surround inclusionary zoning. More specifically, the question to be answered through this research is: How can Canadian municipalities shield themselves from legal challenges that may put inclusionary zoning policies at risk of being nullified? Through inductive research byway of qualitative content analysis of 16 American court cases, in which the legal challenges posed to inclusionary zoning ordinances are then extrapolated and applied to the Canadian context, the fundamental legal issues pertinent to Canadian municipalities become illuminated. What has been observed is that there have been a number of different arguments used, against inclusionary zoning, in American case law, however, when applied to the Canadian context, the most relevant one pertains to the purview of municipal authority. In the United States, a number of ordinances have been struck down because of the obligation placed on municipalities to have explicit authority from the state before implementing inclusionary zoning. In Canada, the relationship between a provincial government and its respective municipalities is much the same. In consequence, the most critical legal challenge that inclusionary zoning policies may face, within the Canadian context, is whether explicit authority has or has not been given by the province, to its respective municipalities, to enact such policies.

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Introduction

Inclusionary zoning is a tool sometimes used for the purpose of increasing the stock of affordable housing in a given area. More specifically, "Inclusionary zoning policies (…) require or encourage developers seeking approval for the construction of market-rate homes to also create or set aside a certain percentage of housing units for low- to moderate-income families—often in exchange for cost-saving incentives" (Tuller, 2018). This type of policy was originally developed in the late 1960's as a way to counteract exclusionary policies that had resulted in segregated neighbourhoods, on the basis of race and income, within both the United States and Canada (Lerman, 2006). When this policy is introduced, it often encounters legal challenges; some of the challenges are successful and some are not. These decisions are often precedent-setting for that particular region. The goal of this research is to explore why some policies are upheld, and why some policies are struck down. The cases that will be considered are from the United States, eight of which resulted in the policy being upheld and eight in which it was struck down. Then, extrapolating from the American cases that have been reviewed, the primary arguments used to argue for and against inclusionary policies will be applied to the Canadian context to explore if such arguments could successfully be used as legal challenges in Canada. The question to be answered through this research is: How can Canadian municipalities shield themselves from legal challenges that may put inclusionary zoning policies at risk of being nullified? This research is exploratory in nature because even though there are a number of studies relating to the effectiveness of inclusionary zoning policies, there is very limited research regarding the legal challenges that such policies are sometimes subjected to. Finally, the paper will conclude with a section that makes note of other interesting findings that have been discovered through the course of this research, and could be the subject of research in the future.

Literature Review

The Policy: What Does it Look Like?

Inclusionary zoning is often implemented at the municipal level and can come in a variety of forms. One feature of the policy is whether it is mandatory or voluntary. It has been observed that mandatory policies are often more effective in generating affordable housing, however, such models are more likely to be challenged in court (BPI, 2003). With either model, the developer is given an incentive, such as tax abatements, parking reductions, a rush on the application process, or a density bonus; of these, the most commonly used incentive is a density bonus (Inclusionary Housing Canada, 2019). Density bonusing is when developers can exceed the municipal standard of number of units they are allowed to build; this adds value to the development and it is used as a means for recovering the lost profit from the affordable units, which are priced lower than the market-rate units (Inclusionary Housing Canada, 2019). Density bonusing also adds to the overall number of residential units in a given area, which is beneficial to a community if there is a shortage of housing.

Historically, in the United States, whether the policy is mandatory or voluntary, the developer has to always be given an alternate option for how to provide the affordable housing. These options often take two forms: cash-in-lieu or a designated number of affordable units to be built elsewhere (Lerman, 2006). In regards to the cash-in-lieu option, municipalities have varied in their preferences. Some have set the cash-in-lieu amounts at a high rate to discourage developers from taking this option, while other municipalities have preferred this because they can eventually take the funds and build a larger number of affordable units than the developers would have provided on-site (Grounded Solutions Network, 2019). The criticism of this is that even though it may lead to more affordable units overall, the principle of ‘inclusion’ may be

disregarded, resulting in poverty being concentrated in certain areas, and the goal of greater diversity in other neighbourhoods not being accomplished (Grounded Solutions Network, 2019).

Inclusionary zoning is not just a tool to facilitate income integration within a specific neighbourhood, but it is also used as a way to integrate minorities into neighbourhoods that they have typically been excluded from (Kontokosta, 2014). Not only do minorities have a lower income average statistically, which has posed a barrier for minorities to move into certain neighbourhoods, but in the United States, there were specific exclusionary zoning laws that prevented minorities from living in certain neighbourhoods (Kontokosta, 2014). Inclusionary zoning was originally introduced as a counter-step to this, with the intention of eliminating this kind of discrimination. However, more recently, a study found that when inclusionary zoning laws are implemented in municipalities within the United States, and it is a policy in which each neighbourhood is evaluated and then either labelled an inclusionary zone or not, it is often the case that the most racially integrated neighbourhoods are the ones where inclusionary zoning is applied (Kontokosta, 2014). The neighbourhoods with the least amount of integration are ones in which inclusionary zoning does not apply (Kontokosta, 2014). To avoid such patterns from emerging, advocates often push for either municipal-wide, or state-wide, mandatory legislation, rather than a policy that is only applied to specifically zoned areas. The breadth of the area of which the policy applies to, is another distinguishing characteristic of any inclusionary zoning legislation.

Another varying aspect of the framework is the size of the projects that are subjected to the policy. For example, in the city of San Jose, there is a by-law that makes it mandatory for developers to either include a certain percentage of affordable housing, or pay a fee-in-lieu, for projects of 20 units or more (Keep-Barnes, 2017), whereas in the District of Colombia, projects

of 10 or more units are subjected to the ordinance (DHCD, 2020). This is similar to Ontario because as of September 2019, the provincial government stipulated that any municipal inclusionary zoning by-laws could only be applied to residential developments of 10 units or more (Ontario, 2019). The size of the project that an ordinance will apply to varies from place to place.

Another key aspect of any inclusionary zoning framework pertains to how long the units have to be kept affordable. Sometimes it is the life of the building and in other cases, it is a set timeframe (Lerman, 2006). However, the argument is made that if timeframes are too small, affordable housing stock gains are slow or stagnated in certain areas because even if new units are built, other units move from affordable to market-price (Lerman, 2006).

In sum, the framework for inclusionary zoning can vary based on whether the policy is mandatory or voluntary, the types of incentives provided to developers, alternate options offered (such as cash-in-lieu or offsite units), whether the policy blankets the entire municipality or just specific zones, the size of developments in which the policy applies to, and the timeframe for how long the units have to remain affordable.

The Policy: Why is it Relevant Today?

Inclusionary zoning is often used for the purpose of increasing the amount of affordable housing stock in a given area. Affordable housing is a concern for many people across Canada and the United States. In 2019, according to the Canadian Rental Housing Index, approximately 40% of households spend more than 30% of their income on shelter; in Ontario, the number of households in this financial position is 46%. Meanwhile, 18% of Canadian households spend more than 50% of their income on shelter, and in Ontario, this equates to 21% of households

(Canadian Rental Housing Index, 2019). As the issue continues to grow in severity, different strategies are considered by all three tiers of government to help rebalance the housing market. In 2017, the federal government announced a National Housing Strategy that will span 10 years and is budgeted for $40 billion (Canada, 2019). Then, in 2019, royal assent was given to the *National Housing Strategy Act* which formalized the federal government's commitment to ensuring that all Canadians have access to adequate and affordable housing (Government of Canada, 2020). On the provincial level, in 2016, the Liberal government of Ontario passed the *Promoting Affordable Housing Act,* which gave municipalities the option of developing and implementing inclusionary zoning policies, increasing the tools that municipalities have at their disposal to address affordable housing needs (Ontario, 2020). The City of Toronto is currently in the development stages of the policy-making process (City of Toronto, 2019). However, on September 3rd, 2019, new legislation was passed by the Conservative government of Ontario, the *More Homes, More Choice Act*, and this repealed the *Promoting Affordable Housing Act*; authority to implement inclusionary zoning policies remained, however, the process became more prescriptive in terms of what areas can and cannot be subjected to such zoning, and the size of developments that the policy can apply to (Ontario, 2019). After the passing of this legislation, the City of Toronto announced that they will have to redraft their inclusionary zoning policy before they conduct anymore public consultations (City of Toronto, 2019).

Low affordability rates are not unique to Canada but many cities in the United States are experiencing this issue as well. According to the Joint Center for Housing Studies of Harvard University, in 2017, 46% of people in Los Angeles, California, were spending more than 30% of their income on shelter, and 24% of the city's population was spending more than 50%. In the areas of New York City (New York), Jersey City (New Jersey), and Newark (New Jersey), 42%

of people were spending more than 30% of their income on housing, and 22% were spending more than 50% of their income (Joint Center for Housing Studies of Harvard University, 2017). In Miami, Florida, 45% of households were spending more than 30% of their income on housing, and 24% were spending more than 50% (Joint Center for Housing Studies of Harvard University, 2017). These numbers demonstrate that the unaffordability of housing is wide ranging and not just a concern in one concentrated area.

Another element of the housing issue that has been identified is, not just the lack of affordability but, the lack of available housing in general. The National Low-Income Housing Coalition published "The Gap" report in 2019 which analyzed data from 2018. One of the findings for the U.S. is that only 35 rental units are affordable and available for every 100 low-income households, and for households at 50% of the area medium income, only 56 units are available and affordable for every 100 households (2019). A healthy vacancy rate is considered to be 7-8% for rental units, and 2% for owned-homes (CityLab, 2018). Vacancy rates vary widely across the U.S.; one of the lowest vacancy rates is in San Jose, California, where the rental vacancy rate is 3.1% for rentals, and 0.3% for owned-homes, as of 2017 (U.S. Department of Housing and Urban Development). Low vacancy rates are seen in cities within New Jersey, Wisconsin, Massachusetts, Florida, and various other states (U.S. Department of Housing and Urban Development, 2017). A similar trend is observed in Canada; in 2018, the lowest rental vacancy rate was found in Charlottetown, P.E.I. where it is 0.1% (Government of Canada, 2019); in Kingston, Ontario, it is 0.6%, and Vancouver, B.C is 1%. Toronto, Ontario has a recorded vacancy rate of 1.1% for 2018 (CMHC, 2018).

Aside from rental-income ratios and decreasing vacancy rates, another measure that indicates a strong need for some form of governmental intervention in the housing market, is the

number of people on waitlists for affordable housing. For example, in Toronto, Ontario, approximately 90,000 households are on a waitlist for subsidized housing (CityLab, 2018). Waitlists such as this translate to 7-10 years of waiting time (Settlement.org, 2019). This issue is further exacerbated by the history of development in Toronto; only 2% of built or approved housing, in the past 5 years, is considered affordable (City of Toronto, 2018). The situation is similar in other cities, such as New York City, where as of 2016, the average wait time for affordable housing was 18 years (University of Pennsylvania, 2016). In many other cities and states, such as New Jersey, California, and Massachusetts, applications for affordable housing are not available and waitlists are closed due to the overwhelming need (Section 8 Assistance, 2019). Some waitlists will remain closed for years and data regarding wait times for when the lists will reopen, or for how long a person may wait on the list, is not available (Section 8 Assistance, 2019). In many of the states and provinces mentioned, municipalities have introduced inclusionary zoning as one of the means to mitigate the low availability and low affordability of housing stock. Some of these areas still have this policy in place, while others do not, which is sometimes a result of legal challenges to the policy.

Inclusionary zoning is not just a tool that is being used to increase the affordable housing stock in certain areas, but it is also being used as a way to help reduce gentrification. Gentrification is when more affluent people move into a neighbourhood and eventually displace lesser affluent residents byway of the increasing cost of living in that particular area, and making it less affordable overall with the increased demand in housing (Thompson, 2018). In Andrea Mösgen et al.'s study regarding the gentrification of metropolises, Mösgen concludes that: "(…) gentrification of working-class neighbourhoods (…) basically means bringing in and benefiting wealthy people at the expense of the poor. It does not seem to be a political goal anymore to

build an inclusive city for all. Instead, poor people are relegated to places less central, less desirable and less accessible" (2019). With this becoming a trend in many urban areas, there is a call by advocates for the government to intervene and ensure that neighbourhoods remain inclusive of people of varying income levels (Mösgen et al., 2019). Inclusionary zoning is proposed as one tool to help make this happen, however, the difficulty is not only in the implementation of such a policy but also in the maintaining of it in the face of legal challenges.

The Legislative History of Inclusionary Zoning: An Overview

Inclusionary zoning has an interesting judicial and legislative history both in Canada and the United States. In Ontario, in 1989, the city of Burlington introduced mandatory inclusionary zoning, however, at that time, the provincial government had not authorized such practices through explicit legislation (Reemark Holdings No. 12 Inc. v. Burlington (City), 1991). The practice was challenged and brought to the Ontario Municipal Board in 1991, and the result was that the municipality had no authority to implement such a policy and as such, it was voided (Reemark Holdings No. 12 Inc. v. Burlington (City), 1991). After this, no similar policies were reintroduced in Ontario until 2018 (Ontario Superior Court of Justice, 2011). Between the years of 2009 and 2013, Cheri DiNovo, a member of provincial parliament, introduced Bill 198, called: *Planning Amendment Act (Enabling Municipalities to Require Inclusionary Housing)*; she introduced this bill five times in the legislature but it never made it past second reading (Inclusionary Housing Canada, 2019). As already mentioned, legislation was passed in 2016 and 2019 that authorizes municipalities to implement inclusionary zoning at their discretion, however, to date, the only municipality in the province known to be considering this is the City of Toronto and they have had to go back to the drafting stage of the process because of the most recent change in 2019 (Build-ing, 2020).

The landscape in the rest of Canada, in terms of inclusionary zoning, is quite diverse. In Nova Scotia, Lisa Roberts, a member of provincial parliament, introduced the *Affordable Housing through Inclusionary Zoning Act* in September of 2018, however, it has not made it past first reading (Nova Scotia Legislature, 2019). Consequently, no municipalities in Nova Scotia have enacted such policies. In comparison, Prince Edward Island has introduced the 'Affordable Housing Development Program' which is voluntary and run by the province (Prince Edward Island, 2019). The program offers forgivable loans to developers who agree to build a certain percentage of affordable units (Prince Edward Island, 2019). P.E.I. has not implemented inclusionary zoning but the program they have implemented has the same purpose: increase the affordable and available housing stock in the province. This program has just begun, as of 2019 and as such, there is no data available yet in regards to the success of this program.

In Manitoba, legislation enabling municipalities to pass inclusionary zoning by-laws was enacted in 2013, however, no municipality has implemented it as of 2019 (Inclusionary Housing Canada, 2019). More to the west, municipalities in British Columbia have begun to develop voluntary density bonusing programs that negotiate an exchange of affordable housing for density, however, this is done on a case-by-case basis, which is different from how an inclusionary zoning policy would be applied (Bradley & Adam, 2018, p. 2). The exception to this is with Victoria, B.C. Even though municipalities in British Columbia do not have the explicit authority from the province to enact inclusionary zoning legislation, as of June of 2019, Victoria, B.C. enacted a by-law that mandates that for new developments of 60 units or more, 20% of them will have to be affordable (Bradley & Adam, 2018, p. 2; Victoria News, 2019). The development and approval of this legislation took years (Victoria News, 2019). Likely as a result of a majority of policies being voluntary in nature, there have been no legal challenges to date.

The United States has a much longer history with inclusionary zoning practices. Various states and municipalities have implemented it in various forms and only some of these have withstood the legal challenges that they have encountered. To date, however, no inclusionary zoning appeals have made it to the Supreme Court of the United States. Applications were made in both 2015, 2017, and 2019 to be heard at that level but the Supreme Court declined (The Intercept, 2019; Rose Law Group Reporter, 2019). Without a Supreme Court ruling as of yet, the landscape of inclusionary zoning in the United States is quite varied. Some states, such as Florida, have passed specific legislation that prevents any Floridian municipalities from enacting such policies (Pacific Standard, 2019). In December of 2018, Miami had passed an inclusionary zoning ordinance, however, in June of 2019, when the Floridian legislature passed a bill mandating that all costs of inclusionary zoning must be offset for developers, it consequently voided Miami's by-law (Pacific Standard, 2019). Other states that specifically ban inclusionary zoning include: Arizona, Texas, Kansas, Tennessee, Wisconsin, Indiana, and West Virginia (NMHC, 2019). In other states, even though there may not be an explicit ban on inclusionary zoning by-laws, there is a ban on rent control ordinances; in fact, 32 states have rent control bans (NHMC, 2019). Whether inclusionary zoning is classified as a form of rent control is dependent on the case law in that particular state.

It should be noted that while some states have outrightly banned inclusionary zoning, while others have banned rent control, there are a number of states that have neither banned nor endorsed such policies (NHMC, 2019). These consist of: Wyoming, Montana, Nebraska, Maine, Ohio, Hawaii, and Delaware (NHMC, 2019). The states that have specific legislation permitting rent control include: New York, New Jersey, District of Columbia, Maryland, California, and Oregon (NHMC, 2019). It will be seen, while exploring the legal challenges in the 16 cases

included in the following section, that each state has their own unique history with inclusionary zoning, in which legislation and case law both play an influential role.

American Legal Challenges to Inclusionary Zoning

In this section, 16 court challenges to inclusionary zoning will be reviewed and from this review, the factors relating to the upholding, or striking down, of the ordinances will be explored. The cases are from a diverse number of states and decades, ranging from 1973 to 2020. Eight of the cases resulted in the inclusionary zoning policy being upheld, and eight resulted in the policy being struck down. The cases are as follows:

Upheld	**Struck Down**
Holmdel Builders Association v. Holmdel, New Jersey (1990)	San Telmo Associates v. City of Seattle, Washington (1987)
Home Builders Association v. City of Napa, California (2001)	Town of Telluride, Colorado v. Thirty-Four Venture (2000)
Gagne v. City of Hartford, Connecticut (1994)	Apartment Association of South Central Wisconsin, Inc. v. City of Madison, Wisconsin (2006)
Home Builders Association of Chicago v. City of Chicago, Illinois (2016)	North End Realty, LLC v. Mattos et al., Rhode Island (2011)
2910 Georgia Avenue LLC v. District of Columbia (2017)	Palmer/Sixth Street Properties LP v. City of Los Angeles, California (2009)
Matter of Northern Manhattan Is Not for Sale v. City of New York (2020)	Board of Supervisors v. DeGroff Enterprises, Inc., Virginia (1973)
Cherk v. County of Marin, California (2018)	Home Builders Association of Middle Tennessee v. Metropolitan Government of Nashville and Davidson County, Tennessee (2019)
California Building Industry Association v. City of San Jose, California (2015)	Dacey v. Town of Barnstable, Massachusetts (2000)

Legal Rationale for Inclusionary Zoning Ordinances Being Upheld

Upon review of the eight American cases listed above, in which inclusionary zoning ordinances were upheld, there are some similarities amongst the cases in regards to the rationale

used to justify the final decisions. There are three primary issues that heavily influenced the final judgments in these eight cases and they are: the determination of whether the fees associated with the respective inclusionary zoning policies are a tax, whether it is within the municipalities' purview to implement inclusionary zoning regulations, and whether the regulation in question is advancing a state interest. These will now be explored in further detail.

In *California Building Industry Ass'n v. City of San Jose,* and *Cherk v. County of Marin*, it was determined that the respective inclusionary zoning fees were not a tax, or an unconstitutional taking, because there were alternative options offered to the property owners, such as developing affordable units onsite or offsite (2015, 2018): "[…] the unconstitutional conditions doctrine is not implicated where the permitting authority offers the applicant at least one constitutionally permissible alternative to paying the in-lieu fee" (Cherk v. County of Marin, 2018). In addition to this, it was argued successfully in *2910 Georgia Avenue LLC v. District of Columbia, Home Builders Ass'n v. City of Napa,* and *Home Builders Ass'n of Chicago v. City of Chicago*, that since the properties remained economically viable, it was not classified as a taking: "Plaintiff must demonstrate that the relevant parcel of property 'no longer provide[s] a reasonable rate of return' in light of the challenged regulation, [however] evidence shows that the regulations at issue […] did not prevent Plaintiff from earning a considerable profit from its property" (2910 Georgia Avenue LLC v. District of Columbia, 2017).

Another portion of the rationale that was used to shield inclusionary zoning from the claim that it was an 'unconstitutional taking' is that under such a policy, no property is being transferred from private to public ownership: "The [Inclusionary Zoning] Program is a generally applicable regulation that required Plaintiff […] to use a certain portion of the units in its new development in a certain manner by regulating the price at which it could sell those units. It did

not require that Plaintiff dedicate any portion of its property to the public" (2910 Georgia Avenue LLC v. District of Columbia, 2017). These are the primary arguments that were used to defend inclusionary zoning ordinances from being classified as a tax, or unconstitutional taking.

The second issue that heavily influenced the final decisions of the cases in which inclusionary zoning was upheld, pertains to whether municipalities have the authority to implement such regulations. In *Matter of Northern Manhattan Is Not for Sale v City of New York*, it was argued that a mandatory inclusionary housing program was implemented without proper due process, making it invalid (2020). More specifically, it was contended that to implement such a policy, the *State Environmental Quality Review Act* (SEQRA), and City Environmental Quality Review (CEQR), have to be adhered to and that the City failed to do this (Matter of Northern Manhattan Is Not for Sale v City of New York, 2020). However, the court ruled in favour of the city, explaining that the necessary reviews were completed and that "[…] the Council was authorized to engage in its own weighing and balancing of relevant considerations and issue its own statement of findings independent of the lead agency" (Matter of Northern Manhattan Is Not for Sale v City of New York, 2020). This resulted in the upholding of the city's authoritative power to implement such a policy.

Another defense that was successfully used to justify municipalities' authority to enact inclusionary zoning policies relates to the state statutes. In *Gagne v. City of Hartford, Connecticut*, it was noted by the court that even though state legislation does not explicitly authorize municipalities to introduce inclusionary zoning ordinances, it does imply the authority: "[The state statute] contains a broad grant of powers, including the power to provide for financing and construction of low income housing […]. In the absence of an express provision, the authority necessary for effective exercise of a granted municipal power will be conferred by

implication" (1994). Such arguments pertaining to the purview of municipal authority contributed to the upholding of inclusionary zoning ordinances in these cases.

The third issue that influenced the cases in which inclusionary zoning was upheld is whether the specific ordinance was advancing state interests. In five of the eight cases, it is explicitly noted that the regulation is justified if it is advancing a state interest and is reasonably related to that interest (Holmdel Builders Ass'n v. Holmdel, New Jersey, 1990; Home Builders Ass'n v. City of Napa, California, 2001; California Building Industry Ass'n v. City of San Jose, 2015; Gagne v. City of Hartford, Connecticut, 1994; 2910 Georgia Avenue LLC v. District of Columbia, 2017). For example, in 1975 and 1983, the New Jersey Supreme Court ruled on cases that are now referred to as Mount Laurel I and Mount Laurel II, and these decisions affirmed that it is the responsibility of government to provide sufficient affordable housing for people of low and middle incomes: "New Jersey municipalities [shall] plan, zone for, and take affirmative actions to provide realistic opportunities for their 'fair share' of the region's need for affordable housing for low and moderate-income people" (Fair Share Housing Center, 2020). In 1985, in response to these decisions, the New Jersey legislature passed the *Fair Housing Act* which resulted in the creation of the Council on Affordable Housing (COAH); the COAH's purpose is to "[…] assess the statewide need for affordable housing, allocate that need on a municipal fair share basis, and review and approve municipal housing plans aimed at implementing the local fair share obligation" (Fair Share Housing Center, 2020). The Mount Laurel doctrine is referenced in many of the New Jersey cases in which inclusionary zoning is challenged. In *Holmdel Builders Association v. Holmdel, New Jersey*, the court reasoned that the municipality was attempting to satisfy the state requirement for providing their fair share of affordable housing and since the *Fair Housing Act* permits zoning measures to accomplish the goal of

creating affordable housing, then the ordinance was justified (1990). Similarly, in *Gagne v. City of Hartford, Connecticut*, the court concluded that: "A land use regulation does not constitute a taking if it substantially advances legitimate state interests and does not prevent the owner from making economically viable use of his property" (1994). The court further clarified that: "The Ordinance does substantially advance the legitimate state interest of providing for affordable housing" (Gagne v. City of Hartford, Connecticut, 1994). As already noted, three other cases, in addition to the ones from Connecticut and New Jersey, make note of the same reasoning: that the ordinance is justified when it is advancing a state interest and is not making the property economically unviable. This argument also includes some explanation of how the measure (i.e. inclusionary zoning) is related to the state interest; it is argued that the policy is regulating the private housing market to provide for community housing needs (Holmdel Builders Association v. Holmdel, New Jersey, 1990). In these five cases, this argument sufficed.

Now that the three primary issues that heavily influenced the decision of the courts to uphold inclusionary zoning ordinances have been detailed, it is important to note that of the eight cases, there is an outlier among them. In only *Home Builders Ass'n of Chicago v. City of Chicago, Illinois*, inclusionary zoning was upheld despite a state statute prohibiting rent control of any kind: "A unit of local government […] shall not enact, maintain, or enforce an ordinance or resolution that would have the effect of controlling the amount of rent charged for leasing private residential or commercial property" (Illinois General Assembly, 2020). This statute applies to 'home rule units' as well (Illinois General Assembly, 2020). Instead of introducing this statute in *Home Builders Ass'n of Chicago v. City of Chicago, Illinois*, the plaintiff's relied on the argument that the ordinance resulted in an unconstitutional taking and the court ruled against the plaintiff (2016). In other cases, which will be discussed in the following section, the plaintiffs

rely on similar statutes from their respective states that pre-empt rent control or inclusionary zoning measures, and this is often times successful. However, as already noted, this argument was not introduced in *Home Builders Ass'n of Chicago v. City of Chicago, Illinois*; if it had been used, would the outcome have been different? Nevertheless, the result, and the case precedent set in Illinois, was an upholding of inclusionary zoning.

Legal Rationale for Inclusionary Zoning Ordinances Being Struck Down

Upon reviewing the eight cases that resulted in the striking down of inclusionary zoning ordinances, there are three primary issues that heavily influenced the decisions. Two of the three issues are the same ones that influenced why the ordinances were upheld; these include: whether the ordinance is classified as a tax or an unconstitutional taking, and whether municipalities have the authority to enact such measures. The third issue pertains to state statutes that pre-empt rent control or inclusionary zoning policies.

In *San Telmo Assocs. v. Seattle*, the Supreme Court of Washington, relying on case precedent, affirmed that: "If the primary purpose of the [ordinance] is to accomplish desired public benefits which cost money [then] the ordinance is a tax" (1987). It was noted that "[…] the city was shifting its burden of providing low income housing to the property owners […] but [the burden] was to have been shared by the whole city" (San Telmo Assocs. v. Seattle, 1987). The court also stated that even with the option of building units onsite or offsite, or paying a fee-in-lieu, it is all a matter of "[…] paying a tax in kind or in money" (San Telmo Assocs v. Seattle, 1987). Similarly, in *Dacey v. Town of Barnstable, Mass.*, the court ruled that the inclusionary zoning ordinance was equal to the town levying a tax because if it was a fee, as the town claimed, then there would be a specific benefit allotted to the person paying the fee: "The court found that the charge conferred no particular benefit on the payers, but served instead to fulfill

the town's statutory obligation to set aside ten percent of available housing stock as affordable housing" (Friedman, 2002). As such, the courts in both of these cases determined that the fees associated with the inclusionary zoning ordinances were not fees but rather a tax; an invalid tax.

Aside from the claim that the inclusionary zoning fees are a tax, some plaintiff's have argued that such fees, or the other options of providing onsite or offsite affordable housing, is an unconstitutional taking without just compensation. In *Board of Supervisors v. DeGroff Enterprises, Inc.* (Virginia), the court ruled that the ordinance was an "[…] attempt to control the compensation for the use of land and the improvements thereon. The […] requirement for the sale of low and moderate income housing at prices not fixed by a free market violated [Virginia's Constitution] that no property be taken without just compensation" (1973). This portion of Virginia's Constitution reflects the 5th amendment of the *United States Constitution*; namely that private property will not be taken for public use without just compensation and due process (Cornell Law School, 2020). When inclusionary zoning has been introduced, sometimes there have been incentives extended to the property developers subjected to the ordinance, and in other cases, there have been no such incentives. The purpose of the incentives is to offset either the partial cost, or full cost, of the affordable housing that the developer is required to provide. In Florida, in 2019, the legislature passed House Bill 7103 that explicitly permitted municipalities the use of inclusionary zoning but with the condition that all costs would be offset for the developer (Florida Housing Coalition, 2020). This legislation is used to clarify the expectations of the state when municipal governments are using inclusionary zoning, and it is presumably an attempt to pre-empt any future legal challenges based on a claim of unconstitutional takings.

As seen from the three cases discussed, if a court finds that an inclusionary zoning ordinance is equal to a tax or an unconstitutional taking, then the ordinance is struck down.

Another reason for the ordinance to be struck down relates to the authority that municipalities have and whether enacting such legislation is an act of overstepping that authority. In three of the eight cases, it was determined that the municipalities in question need, but did not have, the explicit authority of the General Assembly to implement inclusionary zoning ordinances (North End Realty, LLC v. Mattos et al., 2011; Board of Supervisors v. DeGroff Enterprises, Inc., 1973; Dacey v. Town of Barnstable, Mass., 2000). For example, in *North End Realty, LLC v. Mattos et al.* (Rhode Island), it was observed that even though there was a state interest being advanced, namely the provision of affordable housing, the municipality did not have the authority to enact an inclusionary zoning ordinance (2011). East Greenwich, which is the town that was sued, had incorporated inclusionary zoning into their housing plan and the plan was subsequently approved by the State Director of Administration, who was responsible for approving all municipal housing plans in the state; however, the court determined that this approval was not sufficient and that the municipality would need explicit authority from the General Assembly and without that, the ordinance was void (North End Realty, LLC v. Mattos et al., 2011). The rationale for determining the cases in Virginia and Massachusetts was much the same.

In cases where municipalities need explicit authority from a state legislature to take specific actions, this is often referred to as Dillon's rule. Dillon's rule comes from case precedent dating back to 1868 in which Judge John F. Dillon of Iowa reasoned that municipal governments "[…] may engage in an activity only if it is specifically sanctioned by the state government" (New Hampshire Municipal Association, 2020). In contrast to Dillon's rule, home rule is "[…] a delegation of power from the state to its sub-units of governments […]. That power is limited to specific fields, and subject to constant judicial interpretation, but home rule creates local autonomy and limits the degree of state interference in local affairs" (New Hampshire Municipal

Association, 2020). In the cases from Rhode Island, Virginia, and Massachusetts, it can be seen from the judgments that the respective local governments were subject to Dillon's rule and as such, the courts determined that they did not have the legislative authority to enact inclusionary zoning ordinances; to do so would require explicit state legislation.

The third issue that influenced the outcome of four of the eight cases that resulted in inclusionary zoning policies being struck down, pertains to state statutes that pre-empt rent control or inclusionary zoning specifically. As previously noted, Illinois had such a statute in place but notwithstanding said statute, the City of Chicago was able to win their case and maintain their inclusionary zoning ordinance (City of Chicago, 2020). However, in cases set in Tennessee, Colorado, Wisconsin, and California, the outcome was different (Home Builders Ass'n of Middle Tenn. v. Metro. Gov't of Nashville and Davidson County, 2019; Town of Telluride, Colorado v. Thirty-Four Venture, 2000; Apt. Ass'n of South Central Wisconsin, Inc. v. City of Madison, Wisconsin, 2006; Palmer/Sixth Street Properties LP v. City of Los Angeles, California, 2009). For example, in Nashville, Tennessee, in 2016, the city passed an inclusionary zoning ordinance and when it was subsequently challenged in court, the challenge was dismissed; however, the developers pursuing the challenge applied to the Court of Appeals and were granted a hearing (Home Builders Ass'n of Middle Tenn. v. Metro. Gov't of Nashville and Davidson County, 2019). While awaiting the hearing that was scheduled for 2019, the state legislature passed a bill in 2018 effectively nullifying the ordinance and any such future ordinances of like-nature (Reicher, 2018). This led to the Court of Appeals acknowledging, along with both plaintiff and defendant, that the ordinance was void, and as such, the case was dismissed (Home Builders Ass'n of Middle Tenn. v. Metro. Gov't of Nashville and Davidson County, 2019). In the other three cases, both parties actually argued their cases and the

judgments were made in favour of the plaintiffs challenging the ordinances, primarily because of the pre-emptive state statutes. Even though the scenario in all four cases are similar, there is an outlier among them. In *Palmer/Sixth Street Properties LP v. City of Los Angeles, California*, the court ruled to strike down the inclusionary zoning ordinance based on the *Costa-Hawkins Rental Housing Act* of 1995; this act is a state statute and it stipulates that landlords have the right to establish the initial rent rate when the unit is new to the market, and the subsequent rent rates when there is a change of tenants; this is known as 'vacancy decontrol' (Costa-Hawkins.com, 2020). Despite attempts to repeal *Costa-Hawkins,* it remains in effect today; what has changed is the definition of the units subjected to *Costa-Hawkins*. Originally, it was meant to exempt single-family dwellings and condominiums from rent control, however, due to a flexible definition of 'condominium', sometimes apartments were being labeled as 'condominiums' so that they would not be subjected to rent control (Costa-Hawkins.com, 2020). What is most interesting about this state statute is that it was successfully used as an argument against inclusionary zoning in *Palmer/Sixth Street Properties LP v. City of Los Angeles, California,* however, it was not used successfully in the three Californian decisions previously discussed in which inclusionary zoning ordinances were upheld, namely, *Home Builders Association v. City of Napa* (2001), *California Building Industry Association v. City of San Jose* (2015), and *Cherk v. County of Marin* (2018). However, after the *Palmer* decision, municipalities recognized that their inclusionary zoning ordinances were vulnerable to legal challenges and as such, "[…] almost all of the 170 localities with inclusionary laws had suspended the application of [said laws]" (Public Interest Law Project, 2018, p.1). Finally, in 2017, the state passed legislation that explicitly granted municipalities the authority to enact inclusionary zoning ordinances to advance the state interest in providing affordable housing (California Legislative Information, 2017). This legislation will

presumably assist in protecting inclusionary zoning ordinances from claims that the *Costa-Hawkins Rental Housing Act* pre-empts such ordinances. As can be seen from these cases, court decisions can be influenced through existing state statutes that pre-empt rent control and inclusionary zoning, or court decisions can be rendered moot with the passing of new legislation. This played a role in the striking down of inclusionary zoning ordinances in four of the eight cases identified.

Inclusionary Zoning within the Canadian Context

Would legal arguments used in American cases have any success within the Canadian judicial system? The four primary arguments explored in the American cases include: whether the costs associated with inclusionary zoning is considered an unconstitutional taking/tax, whether it is within municipalities' purview to enact such ordinances, whether there are state statutes that pre-empt inclusionary zoning practices, and finally, whether such policies advance state interests. Each of these arguments will be considered within the Canadian context to explore whether inclusionary zoning ordinances would be vulnerable to the same legal challenges found amongst the American cases, or whether there are mechanisms in place to shield the policies from being declared void by the judicial system.

Legal Challenge One: Unconstitutional Takings

The first argument that will be explored is whether inclusionary zoning fees could be declared an unconstitutional taking, or tax, within Canada. In the United States, this argument is premised on the 5th amendment of the constitution, which states that: "No person shall […] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation" (Cornell Law School, 2020). In Canada,

property rights have been legislated through the *Canadian Bill of Rights*, a federal statute; it reads: "It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination […] the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law" (Government of Canada, 2020). In 1982, when the *Canadian Charter of Rights and Freedoms* was passed, it enshrined a majority of the rights identified in the *Bill of Rights*, however, property rights were specifically excluded. Under the 'Legal Rights' section of the *Charter*, it reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (Government of Canada, 2020). Alexander Alvaro explains in his article: 'Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms' that had property rights been included in the *Charter*, it would have been left to the courts to interpret and determine what exceptions fell under the "[…] principles of fundamental justice" (1991, p. 317). This is something that the provinces were not in favour of: "A majority of provinces […] argued that a property rights clause threatened to limit the scope of economic legislation enacted by elected governments" (Alvaro, 1991, p. 319). As such, property rights in Canada exist through legislation and common law, rather than being enshrined in the *Charter*. As a result, federal and provincial governments have more latitude with legislation pertaining to private property because they are not vulnerable to *Charter* challenges (Alvaro, 1991, p. 319-320). In the United States, the opposite is the case and this is the basis for the claim of unconstitutional takings. In respect to inclusionary zoning fees being declared an unjust 'taking', or tax, within Canada, the argument would be substantially weaker because of the difference in the Constitutions regarding property rights. This is not to say that municipalities can implement inclusionary zoning by-laws

because there can be no *Charter* challenges but rather that such by-laws would not be made vulnerable to such arguments; however, they may be vulnerable to arguments relating to municipal authority being subject to provincial rule.

Legal Challenge Two: Municipal Authority

The second argument that will be explored in the Canadian context is whether it is within municipalities' purview to enact inclusionary zoning legislation. The first component of this argument that needs to be considered is case law in Canada. There are a very limited number of Canadian cases that pertain to inclusionary zoning, however, one of them is from Burlington, Ontario, and it relates to the purview of municipal authority. In 1989, the Ontario provincial government released the *Land Use Planning for Housing* policy statement, which stated that, "All municipalities […] establish appropriate planning policies and standards which will enable at least 25% of New Residential Units resulting from New Residential Development and Residential Intensification […] to be affordable Housing" (Reemark Holdings No. 12 Inc. v. Burlington (City), 1991). In some of the discourse that happened within the Legislative Assembly of Ontario in 1990, this was understood as a requirement for municipalities to mandate that 25% of all future developments be affordable housing: "We have a provincial land use policy for housing whereby all new developments must contain 25% affordable housing. It is all built by the private sector" (Legislative Assembly of Ontario, 2020). However, when the city of Burlington made this a condition on a building permit approval, the developer challenged it and the case went to the Ontario Municipal Board to be adjudicated. It was determined that the provincial policy statement encouraged municipalities to facilitate that 25% of new housing is affordable housing, but the policy did not provide any new tools for doing this, such as the authorization to enact inclusionary zoning (Reemark Holdings No. 12 Inc. v. Burlington (City),

1991). In fact, the arbitrator went so far as to say that, "With normal rules of statutory interpretation, Burlington has no explicit authority to require sales prices and affidavits with respect to principal residence as part of the plans and drawings" (Reemark Holdings No. 12 Inc. v. Burlington (City), 1991). (The affidavits were meant to confirm the income of prospective renters, and then use the income statements to determine the rental cost for the affordable units). In an affidavit submitted to the Ontario Superior Court of Justice, by Michael Shapcott, in 2011, he states that:

> "Municipalities in Canada are considered creatures of the provinces under the Constitution, and cannot adopt mandatory inclusionary housing programs without explicit provincial authority. An inclusionary housing scheme adopted by the City of Burlington was struck down by the Ontario Municipal Board (OMB) in 1991 for lack of provincial authority, and municipalities have been reluctant to take further action in this area" (p. 42).

In John Gladki and Steve Pomeroy's article entitled: 'Implementing Inclusionary Policy to Facilitate Affordable Housing Development in Ontario', they also note that:

> "In 1991, the City of Toronto and the Ontario Ministry of Housing initiated a study on the feasibility of introducing mandated inclusionary zoning for the City of Toronto and by extension the province of Ontario. [The study concluded] that mandatory inclusionary zoning could only be introduced through increased powers from the Province" (2007, p. 6).

Eventually, the Planning Act was amended to include section 37, which allowed for municipalities to provide incentives, such as density bonusing, in exchange for community benefits, however, this was negotiated on a case-by-case basis, and was not a general policy like inclusionary zoning would be (Gladki & Pomeroy, 2007, p. 6). In 2019, this section was replaced with the 'Community Benefits Charge System' which "[…] allows municipalities to charge for community benefits to fund community services, such as parks, affordable housing and childcare facilities" (Keating & Leisk, 2020). However, this is still not equal to the explicit authority needed by municipalities to introduce an inclusionary zoning policy.

In 2016, the Liberal government of Ontario passed the *Promoting Affordable Housing Act*, which amended the *Planning Act* and for the first time, gave municipalities the explicit authority to enact inclusionary zoning policies (Ontario, 2020). In 2018, the City of St. Catharines attempted to utilize this tool but did not follow due process: "City Council [introduced] a Motion that the Staff Recommendation be amended to include the following: 'That 10% to 30% of the development be defined as affordable housing as defined under provincial regulations'" (Go-To Glendale Avenue Inc. v. St. Catharines (City), 2019). This motion was then passed by council. The developer appealed to the Ontario Local Planning Appeal Tribunal and it was determined that under the *Promoting Affordable Housing Act*, a municipality must first include an inclusionary zoning policy in their Official Plan, and then enact the necessary by-laws so that the policy can be appropriately applied; the City of St. Catharines did not do either of these things, and as such, the arbitrator voided the affordable housing requirements that had been placed on the developer (Go-To Glendale Avenue Inc. v. St. Catharines (City), 2019). In 2020, the *More Homes, More Choice Act* repealed the *Promoting Affordable Housing Act*, and even though inclusionary zoning is still included in the *Planning Act* as a tool that municipalities can use, further stipulations were put in place, such as where such zoning can be applied (Ontario, 2019). As seen from the two cases from St. Catharines and Burlington, Ontario, the political and legislative landscape is ever-changing in regards to inclusionary zoning. From these cases, and the current legislation, it is clear that if Canadian municipalities desire to implement such policies, they not only need the explicit authorization from their respective provincial governments, but they need to adhere to the strict prescriptive process of implementation. No other case law in Canada was found regarding inclusionary zoning practices, however, legislation from other provinces, authorizing the enactment of such

policies, was found. For example, Manitoba has given municipalities explicit authority to implement inclusionary zoning policies, and the required regulations have also been enacted, whereas in Alberta, even though the legislation was passed in 2016, the regulations have not been written (Manitoba, 2015, p. 63-64; Thomas, 2017). To date, no municipalities, in either province, are known to have enacted inclusionary zoning policies. In British Columbia and Quebec, various municipalities in each province have 'incentive-based programs' that are similar to the programs that existed in Ontario under section 37 of the *Planning Act*, but these are not considered inclusionary zoning policies (Gladki & Pomeroy, 2007, p. 6). The one exception to this is the city of Victoria, B.C., where council passed an inclusionary zoning policy in 2019 (Victoria News, 2019). Whether this policy will withstand a legal challenge based on municipal overreach, remains to be seen. The eastern provinces, as mentioned earlier in the literature review, do not have explicit authority under their respective provincial legislation to enact inclusionary zoning policies, and there are no municipalities within those provinces that are known to have tried.

How does the landscape in Canada contrast with the landscape in the United States in regards to the authoritative power of municipalities? As seen from the cases reviewed in the previous section, different states have given a different range of authority to their respective municipalities. In *North End Realty, LLC v. Mattos et al.* (Rhode Island), it was determined that home rule does not extend to state concerns, such as affordable housing, and as such, Dillon's rule must apply; consequently, since there was no explicit state statute authorizing inclusionary zoning, the ordinance was struck down. Similar decisions were made in *Board of Supervisors v. DeGroff Enterprises, Inc.* (Virginia), and *Dacey v. Town of Barnstable, Mass*. (2011, 1973, 2000). In other cases, courts ruled that even though there was no state statute that explicitly gave

municipalities the authority to enact inclusionary zoning ordinances, there was an implied authority given to municipalities, byway of the state encouraging municipalities to use their discretion to advance specific state interests, such as affordable housing. Such decisions were found in five of the eight decisions that upheld inclusionary zoning ordinances (Holmdel Builders Ass'n v. Holmdel, New Jersey, 1990; Home Builders Ass'n v. City of Napa, California, 2001; Gagne v. City of Hartford, Connecticut, 1994; 2910 Georgia Avenue LLC v. District of Columbia, 2017; California Building Industry Ass'n v. City of San Jose, California, 2015). In Canada, the analysis provided in this section strongly indicates that explicit authority must be given by a province to enable a municipality within that province to enact inclusionary zoning ordinances. In this way, Canadian municipalities are comparable to the municipalities in the American cases that were subject to Dillon's rule and had their inclusionary zoning ordinances struck down. Without the explicit provincial legislation and the complementary regulations, inclusionary zoning ordinances enacted by Canadian municipalities would be extremely vulnerable to legal challenges. To protect against these types of legal challenges, it is imperative that explicit provincial legislation pre-empts such municipal policies.

Legal Challenge Three: Pre-emptive Legislation

The third argument that will be explored in this section is whether there is Canadian legislation that is similar to the state statutes that pre-empt inclusionary zoning policies. Currently, there is no known Canadian legislation that specifically pre-empts inclusionary zoning, but as discussed earlier, without explicit provincial authority being given to municipalities to enact such legislation, the chances of it surviving legal challenges are slim. To pass pre-emptive legislation prohibiting inclusionary zoning practices is unnecessary given the well-established relationship between the provinces and their respective municipalities.

Legal Challenge Four: State Interests

The fourth and final argument to be taken from the American cases and applied to the Canadian context is whether inclusionary zoning policies advance state interests. Is there an affirmative obligation on the Canadian government to provide adequate, affordable housing? Is this a formally acknowledged federal, provincial, or municipal interest? In the American cases that were explored, five of the eight in which inclusionary zoning was upheld, the courts stated that the ordinance in question was advancing the state interest in affordable housing; this helped to justify the existence of the ordinance and the decision to uphold it (Holmdel Builders Ass'n v. Holmdel, New Jersey, 1990; Home Builders Ass'n v. City of Napa, California, 2001; Gagne v. City of Hartford, Connecticut, 1994; 2910 Georgia Avenue LLC v. District of Columbia, 2017; California Building Industry Ass'n v. City of San Jose, California, 2015). This was partially attempted in 1989 through the *Land Use Planning for Housing* policy statement, in which the Ontario government acknowledged that municipalities should have the goal of facilitating the creation of 25% affordable housing out of all new developments, however, without the explicit authorization from the province to enact inclusionary zoning policies, it was not enough to shield the policy from a successful appeal through the Ontario Municipal Board (Reemark Holdings No. 12 Inc. v. Burlington (City), 1991).

More recently, there has been a renewed acknowledgement of the right to affordable housing in Canada. In 2017, the United Nations criticized Canada for not having a national housing plan, despite ratifying the *International Covenant on Economic, Social and Cultural Rights* in 1976 (United Nations, 2020). The *International Covenant* states that: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing" (United Nations,

2020). In 2017, in a report completed by the United Nations, it was noted that: "After more than two decades of Canada ignoring recommendations for a national strategy to address the crisis of homelessness and inadequate housing, people with disabilities, homeless people and advocates initiated a legal challenge under the Canadian Charter of Rights and Freedoms" (United Nations, 2017, p. 3); however, this legal challenge was dismissed by the courts at the request of the Government of Canada and the Government of Ontario (United Nations, 2017, p. 3). Possibly in response to this criticism, the federal government introduced and passed *the National Housing Strategy Act* in 2019. The preamble of this act acknowledges that: "[…] housing is essential to the inherent dignity and well-being of the person [and] affordable housing contributes to achieving beneficial social, economic, health and environmental outcomes" (Government of Canada, 2020). Then in section 4 of the act, it states that:

> "[…] the Government of Canada […] (a) recognizes that the right to adequate housing is a fundamental human right affirmed in international law; (b) recognizes that housing is essential to the inherent dignity and well-being of the person […]; (c) supports improved housing outcomes for the people of Canada; and (d) furthers the progressive realization of the right to adequate housing as recognized in the International Covenant on Economic, Social and Cultural Rights". (Government of Canada, 2020).

These same sentiments have been reiterated by the Ontario Human Rights Commission (2020), however, there has been no provincial legislation found in any of the provinces that reflect the same ideas found in the *National Housing Strategy Act*. Nevertheless, perhaps this is an introduction of legislation that could be influential in the judicial system when courts are deciding cases that pertain to housing. In 2017, the United Nations noted that: "Canadian courts have explicitly rejected the notion that the Canadian Charter of Rights and Freedoms confers a right to housing" (2017); however, even though such a right is not enshrined in the *Charter*, now that the *National Housing Strategy Act* has legislated "[…] the right to adequate housing […]"

(Government of Canada, 2020), perhaps this can play a role in future legal arguments and decisions.

How does this relate to inclusionary zoning policies? As mentioned earlier, there are a number of cases from the United States in which inclusionary zoning ordinances were upheld because such policies advanced a state interest, namely, affordable housing. What has been explored in this section is whether *Canada* has a state interest in affordable housing. From the analysis completed, it can be reasonably concluded that Canada *does* have an interest in adequate, affordable housing, however, the question is whether this would be sufficient to justify inclusionary zoning on a municipal level. Considering that municipalities receive their authority from the provinces, and explicit authority is required to enact such policies, then regardless of Canada's interest in affordable housing, it likely would not be enough to justify municipal ordinances if the explicit authority from the province is lacking; this is substantiated through the Ontario case law already explored.

Overall, when exploring arguments taken from American cases and applying them to the Canadian context, one can see that certain arguments are more relevant than others. The sometimes-successful claim that inclusionary zoning fees are unconstitutional takings is a much weaker argument in Canada because property rights are not enshrined in the *Canadian Constitution*, as they are in the *American Constitution*. The same is the case for pre-emptive legislation prohibiting inclusionary zoning; even though such legislation has been used to sometimes strike down inclusionary zoning ordinances in the United States, no similar legislation is known to exist in Canada. In regards to the argument pertaining to the advancement of state interests, which is sometimes used to defend inclusionary zoning, it has been concluded that in Canada, this would not likely result in a successful defence of such policies, unless

explicit provincial authority had been granted to the municipality to enact such a policy. This is the crux of the Canadian context surrounding inclusionary zoning: Do municipalities have the explicit authority, from their respective provinces, to implement an inclusionary zoning policy? If the answer is no, then the policy would likely be struck down, as was the case in *Reemark Holdings No. 12 Inc. v. Burlington (City)*. If explicit authority is given, then assuming due process for implementation is followed (which was not the case in *Go-To Glendale Avenue Inc. v. St. Catharines (City)*), then it is likely that the policy would be upheld. In the cases from the United States, there were a number of legal issues that were weighed and balanced, however, in Canada, the overarching legal issue surrounding inclusionary zoning is whether a province gives to its respective municipalities, the explicit authority to enact such legislation.

Exploratory Research: Other Notable Findings

The cases from the United States in which inclusionary zoning was struck down were from the following states: Washington, Colorado, Wisconsin, Rhode Island, California, Virginia, Tennessee, and Massachusetts. Of these eight states, six currently have municipalities that have enacted mandatory inclusionary zoning ordinances, despite the case precedence in those particular states. In some cases, the state passed explicit legislation allowing for such policies, which was the situation in Washington, Virginia, California, and Rhode Island (Washington State Legislature, 2006; Housing Virginia, 2017; California Legislative Information, 2017; Justia, 2020). In Massachusetts, the state government now recommends that when municipalities enact mandatory inclusionary zoning ordinances, that some kind of benefit, such as increased density, is offered to developers to help offset the costs associated with the ordinance (Commonwealth of Massachusetts, 2020). In the case of *Dacey v. Town of Barnstable, Mass*. the lack of benefit provided to the ‘payer’ of the fee was a primary component of the court’s

rationale for determining that the fee was a tax (2000); to ensure that other inclusionary zoning ordinances within the state are not voided for the same reason, the state government has encouraged that developers receive some kind of benefit in exchange for the affordable housing or the fee-in-lieu (Commonwealth of Massachusetts, 2020). In Colorado, various municipalities have implemented inclusionary zoning ordinances, despite a state statute pre-empting rent control still being in effect, and existing case precedent supporting the notion that inclusionary zoning is a form of rent control (Town of Telluride, Colorado v. Thirty-Four Venture, 2000). In 2017, there was an attempt to pass legislation that would make inclusionary zoning ordinances exempt from the statute that prohibits rent control measures, however, this did not pass (LegiNation, Inc., 2020). Even if certain cities in Colorado are subject to home rule rather than Dillon's rule, the courts decided in *Town of Telluride, Colorado v. Thirty-Four Venture* that the state statute pre-empting rent control supersedes municipal ordinances in either case (2000). Nevertheless, places such as Denver, Boulder, and Longmont, Colorado, have enacted mandatory inclusionary zoning ordinances (Denver, Colorado - Code of Ordinances, 2020; City of Boulder, 2020; City of Longmont, Colorado, 2020). Whether these ordinances will be upheld or struck down in the face of legal challenges remains to be seen.

What is interesting about this is that at some point in time, there was evidently a shift in support towards inclusionary zoning. Did a change in the composition of the state legislature cause the shift? Did vacancy rates create public pressure for governments to implement additional mechanisms to increase the affordable housing in the area? Did the United States Department of Housing and Urban Development encourage states and municipalities to implement inclusionary zoning measures? The answers to these questions are outside of the

scope of this paper, however, analyzing the possible causes of the shift towards inclusionary zoning could be a topic for future research.

Conclusion

This research has been exploratory in nature and its purpose has been to answer this question: How can Canadian municipalities shield themselves from legal challenges that may put inclusionary zoning policies at risk of being nullified? Even though there is a body of research pertaining to the effectiveness of inclusionary zoning policies, usually completed through a case study framework, there has been very limited research completed regarding the legal challenges that surround the issue. This research is much more limited when looking solely at the Canadian context. As Canadian municipalities begin to contemplate the implementation of such practices, especially now that certain provinces have explicitly given municipalities the authority to do so, it is imperative that the legal challenges that the policies could be vulnerable to, are understood. By overlaying the primary arguments used in American case law, and applying it to the Canadian context, this research has explored the legislative and judicial landscape of inclusionary zoning in Canada. What was found is that some of the fundamental arguments made in the cases from the United States would not necessarily be used in Canada because there would be no basis for them, such as the unconstitutional takings argument. However, the argument pertaining to whether it is within a municipality's purview to enact inclusionary zoning policies is very relevant in the Canadian context and must be considered when a municipality is deciding to implement such measures.

In summation, even though the structure of government is different in Canada in comparison to the United States, the legal challenges used in American case law have

illuminated potential legal challenges in Canada, and this has helped to identify the best ways to shield inclusionary zoning policies from such legal challenges.

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