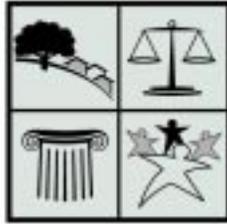


# CALIFORNIA INCLUSIONARY HOUSING READER



INSTITUTE *for* LOCAL  
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SELF GOVERNMENT

*T*he **Institute for Local Self Government** is the nonprofit research arm of the League of California Cities. The Institute was founded in 1955 as an educational organization to promote and strengthen the processes of local self-government. The Institute's mission is to serve as a source of independent research and information that supports and improves the development of public policy on behalf of California's communities and cities. The Institute's work is concentrated in three areas: *land use*, *fiscal issues* and *public confidence in local government*.

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# THE CALIFORNIA INCLUSIONARY HOUSING READER

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## THE CALIFORNIA INCLUSIONARY HOUSING READER

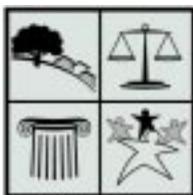
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### THIS PUBLICATION IS NO SUBSTITUTE FOR LEGAL ADVICE

This publication provides an overview of inclusionary housing issues and at times provides summaries of the law. Readers should note that attorneys can, and do, disagree about many of the issues addressed in this CALIFORNIA INCLUSIONARY HOUSING READER. Moreover, proposals to change the land use regulatory process are frequently introduced in the state Legislature and new court decisions can alter the practices a public agency should follow. Accordingly:

- **Public officials** should always consult with agency counsel when confronted with specific situations related to land use laws;
- **Agency counsel** using this publication as a resource should always read and update the authorities cited to ensure that their advice reflects a full examination of the current and relevant authorities; and
- **Members of the public and project proponents** reading this publication should consult with an attorney knowledgeable in the fields of land use and real property development law.



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Winter 2003

Dear Reader,

Was there something we missed? Or was a piece of information provided in this publication the “difference maker” on a project?

Either way, we want to know. The Institute strives to produce meaningful and helpful publications that can assist local officials in carrying out their duties. Your input and feedback, therefore, is vital! Comments from readers help us understand what you need and expect from Institute publications.

We have provided a feedback form on the following page and would greatly appreciate it if you could take a moment to provide some constructive comments.

Sincerely,

**JoAnne Speers**  
*Executive Director*

**Jerry Patterson**  
*President, Board of Directors*

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# FEEDBACK FORM

We are interested in hearing your comments. We would like to know how you used this reader, what you liked about it, and how you believe it could be improved. This is your chance to shape future Institute publications. **You may copy this page and either mail or fax it to:**

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Or comment by e-mail to [ilsg@cacities.org](mailto:ilsg@cacities.org). Please put "Inclusionary Housing Reader" in the subject line.

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WAS THIS *READER* USEFUL TO YOU?     YES     NO

WHAT ASPECTS WERE MOST USEFUL? LEAST USEFUL?

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DID INFORMATION WITHIN THIS *READER* INFLUENCE A POLICY DECISION?

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DID YOU FIND ANY ERRORS? IF SO, WHAT WERE THEY?

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HOW WOULD YOU IMPROVE THIS *READER*? OTHER COMMENTS?

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# FORWARD

## HOUSING: A CRITICAL CHALLENGE FOR CALIFORNIA

In 2002, the Board of Directors of the League of California Cities identified housing as a priority issue for the League and the cities it serves. This action recognized that affordable housing is an immensely difficult and complex problem in California—not only for the individuals and families who are unable to find decent affordable housing, but also for the state’s economic recovery. Economists are identifying challenges with the cost and supply of housing as a limitation on economic growth.

The problem is real and there is no “silver bullet” solution. While the passage of Proposition 46, the Housing and Emergency Shelter Trust Fund Act of 2002, is a helpful step (and one that the League actively supported), experts agree that the measure will only meet a very small portion of the unmet need for affordable housing in California.

## INCLUSIONARY HOUSING ORDINANCES AS AN OPTION

As the nonprofit research arm of the League of California Cities, it seems appropriate for the Institute for Local Self Government to offer assistance to local agencies in the area of housing policy options. Accordingly, this publication starts this process by examining one policy tool that some local jurisdictions have used to require the production of additional affordable housing: inclusionary housing ordinances. The Governor’s Office of Planning and Research reports that, as of 1996, some 120 local agencies had adopted inclusionary ordinances.

Inclusionary housing ordinances take many forms, but the basic concept is to require that a certain percentage of new development be set aside for occupancy by families of very low-, low- and moderate-income. Nearly all inclusionary housing programs apply to residential development and involve developers including a percentage of affordable housing units in their overall proposal. Some inclusionary housing ordinances also apply to non-residential development on the theory that non-residential development generates additional demand for affordable housing stock.

## ANALYZING WHETHER INCLUSIONARY ORDINANCES ARE A GOOD FIT FOR A COMMUNITY

As is typically the case with land use policies, inclusionary housing ordinances may not be for every community. As the “pros and cons” section of the reader illustrates, there are widely diverse perspectives on the pluses and minuses of inclusionary housing ordinances. In fact, in some communities, such requirements can be quite controversial.

Thus, the goal of this reader is to help community leaders evaluate whether inclusionary housing ordinances are for their community. Moreover, since many communities already have inclusionary requirements, the reader also helps communities evaluate and possibly update their existing ordinances to meet current community needs.

The reader pursues these goals by offering local officials analyses of the following:

- Policy considerations
- Case studies
- Implementation and monitoring
- Legal issues
- Links to online resources

For those local agencies interested in adopting or revising inclusionary housing ordinances, the reader offers a sample ordinance annotated with drafting notes. Also included is a sample, one-page description of inclusionary housing ordinances for local agencies to include in any public hearing notices relating to the adoption of inclusionary housing ordinances.

## **APPRECIATION AND GRATITUDE**

The Institute is deeply indebted to those organizations and individuals who gave permission to include their perspectives and analyses in this publication. The final collection comes from a variety of sources, including informal background papers, formal staff reports, articles, book excerpts, legal memoranda and even a calendar for a local housing authority. These resources, taken together, provide a wide variety of perspectives and ideas on the use of inclusionary housing ordinances as a planning tool.

The Institute is also indebted to the law firm of McDonough, Holland and Allen for sharing its expertise in this area and providing funding for this publication. The Institute's parent organization, the League of California Cities, also provided valued financial assistance for this effort.

# Part I

## INTRODUCTION



### THE FACES OF AFFORDABLE HOUSING

#### Hector and Irma Gonzalez

*“Because we had help from the Housing Authority, we had a good home and lived there for seven wonderful years. That gave us the opportunity to save up to buy a house.”*

Spending seven years in the Bath and Ortega Street Apartments enabled Hector and Irma Gonzales to save for a home of their own. The apartments were developed by Housing Authority of the City of Santa Barbara in 1973 and were remodeled in 1995 to achieve a softer, more compatible look with the neighborhood. Hector and Irma came to California from war torn El Salvador in 1988. They now have a family of five children and operate their own painting business called Gonzalez Painting and Cleaning. Hector’s most memorable experience is coming to the United States to find a better life and opportunity for his family. His goals are for their children to graduate from college and to expand his business.

*– Housing Authority of the City of Santa Barbara - 2002 Calendar*



## LOCKED OUT: CALIFORNIA'S AFFORDABLE HOUSING CRISIS

### *California Budget Project\**

Awareness of California's affordable housing crisis has increased exponentially in recent years as home prices and rents have skyrocketed, in many cases locking even middle-income families out of the housing market. For low-income families, the implications are even more severe, as families may be forced to forgo basic necessities or live in substandard or overcrowded conditions in order to afford shelter. From a broader perspective, the shortage of affordable housing – or, in some areas, any type of housing – has serious implications for the health of the state economy. Businesses struggle to recruit and retain employees, workers are forced to choose between overcrowded or substandard housing and long commutes, and families have less income to spend on other necessities.

Two previous reports by the *California Budget Project* (CBP) have documented California's housing crisis. These reports found that while renters faced the greatest affordability challenges, high housing costs had pushed homeownership out of reach for many families. As housing costs rose, overcrowding worsened, families struggled to leave welfare for work, and households across a broad array of age groups and ethnic and racial backgrounds faced significant cost burdens. The reports called for an increased federal commitment to affordable housing in California, more effective use of existing resources for affordable housing, and increased state support for housing.

Despite substantial interest among policymakers and voters and a significant infusion of state funds in 2000, little progress has been made in alleviating the state's housing crisis. More recently, the state's fiscal crisis resulted in a reduction in state funds available to expand the supply of affordable housing. [Although] Proposition 46, the Housing and Emergency Shelter Trust Fund Act of 2002, will provide \$2.1 billion for housing programs, housing experts and advocates understand that even a large one-time infusion is not enough to solve a crisis that has been over a decade in the making.

*\*The California Budget Project (CBP) serves as a resource to the media, policymakers, and state and local constituency groups seeking accurate information and analysis of a range of state policy issues. Through independent fiscal and policy analysis, public education, and collaboration with other organizations, CBP works to improve public policies affecting the economic and social well being of low- and middle-income Californians.*

### EDITOR'S NOTE

*The California Budget Project (CBP) is at the forefront of identifying the scope of the housing crisis in California. Over the past three years, CBP has issued three reports on the housing issue in California. This selection summarizes CBP's most recent report published in October 2002, except that the section entitled "impacts of the lack of housing" was included in the May 2000 report. The actual reports include a variety of graphs, tables and detailed statistical information that have been omitted here. All three reports are posted in their entirety on CBP's Web site: [www.cbp.org](http://www.cbp.org).*

## **RENTERS FACE THE GREATEST AFFORDABILITY CHALLENGES**

Stagnating household incomes have exacerbated the state's affordable housing crisis. While household incomes for owners have increased, the household incomes of renters have failed to keep pace with inflation. The household income of poor renters, those at the 20th percentile, fell 6.6 percent, from \$15,844 to \$14,800, between 1989 and 2000, after adjusting for inflation. The median household income for renters with children fell 7.8 percent during the same period, from \$32,529 to \$30,000, after adjusting for inflation.

Among renter households, a little over half (51 percent) pay more than the recommended 30 percent of their income for shelter. Low-income renter households, those with annual household incomes under \$18,000, fare even worse – nearly nine out of ten (88 percent) spend more than 30 percent of their income on rent. Low-income homeowners are also hit hard by housing costs, with 61 percent spending more than half their income for shelter. Low-income renter households suffer from an acute shortage of affordable housing, outnumbering low-cost rental units by a ratio of more than 2-to-1, both statewide and in Los Angeles County, translating into a statewide shortfall of 651,000 affordable units.

More than two-thirds (68 percent) of senior renter households, those headed by individuals age 65 or older, pay more than 30 percent of their income toward shelter. The majority (81 percent) of low-income senior renter households pay more than 30 percent of their income toward rent. A significant share (40 percent) of senior homeowner households pay more than 30 percent of their income toward housing costs. In contrast, more than three-quarters (77 percent) of low-income senior owner households pay more than 30 percent of their income for shelter.

## **MANY LOW-WAGE WORKERS CANNOT AFFORD RENTS**

Due to rising rents, many Californians can no longer afford to live where they work. In San Francisco, where housing costs have skyrocketed in recent years, the 2003 Fair Market Rent (FMR) for a two-bedroom apartment is \$1,940, a level that is only affordable to families earning at least \$77,600 per year – more than the earnings from five full-time minimum wage jobs. Even in areas with lower housing costs, lower incomes often make rents unaffordable.

In the rural counties that constitute the state's most affordable markets, where the FMR for a two bedroom apartment is \$522, a full-time worker would need to earn at least \$10.87 per hour to afford the rent – 161 percent of California's minimum wage.

An individual earning the minimum wage would be forced to work very long hours in order to afford the one-bedroom FMR in many of California's counties. Even in the more affordable metropolitan areas of the state, such as Fresno and Chico, a worker would have to work substantially more than the standard 40 hours per week.

In many counties, FMRs exceed the monthly payments families receive from welfare. The two-bedroom FMR exceeds the three-person family CalWORKs grant in 31 counties, and equals at least 80 percent of the grant level in every county. The FMR for a studio apartment exceeds the total Supplementary Security Income/State Supplementary Payment (SSI/SSP) grant for an elderly or disabled individual in 12 counties, and equals more than 50 percent of the grant in 39 counties.

### **CALIFORNIA RANKS FOURTH LOWEST IN NATION IN HOME OWNERSHIP**

California's 2001 homeownership rate of 58.2 percent was the fourth lowest in the nation, behind the District of Columbia, New York, and Hawaii. California's 2001 homeownership rate was about ten percentage points below that of the nation. The state's homeownership rates are lower than national ownership rates largely due to the state's high cost of housing. Nationally, 57 percent of households could afford to purchase the median-priced home in 2001, as compared to just 34 percent of households in California.

Homeownership rates vary significantly across different parts of the state. In the Sacramento metropolitan area, two-thirds (66.4 percent) of households are homeowners, while only 48.6 percent of those in the San Francisco metropolitan area own their homes.

Households headed by white Californians are significantly more likely to own their own homes than are households headed by Latinos, African-Americans, or Asian and other ethnic groups. While 65.4 percent of the state's white-headed households were homeowners in 2001, fewer than half (43.8 percent) of the state's Latino-headed households owned their own homes. Over half (56.1 percent) of Asian and other households, and 39.8 percent of African-American-headed households, owned their own homes. In Los Angeles County, all ethnic groups except African-American-headed households have lower homeownership rates than statewide rates.

## HOW REALISTIC IS THE DREAM OF OWNERSHIP IN DIFFERENT AREAS OF CALIFORNIA?

Although home prices have continued to rise, households have not necessarily enjoyed a corresponding increase in income. The income needed to purchase a median-priced home in the second quarter of 2002 exceeded the area median income by 15 percent in the Central Valley, 27 percent in Los Angeles, 37 percent in Orange County, 52 percent in San Diego and Northern California, 83 percent in the San Francisco Bay Area, and 113 percent in the Central Coast. Only in Sacramento and the Inland Empire did the median income exceed that needed to buy a median-priced home.

- ***San Francisco Bay Area.*** The median annual wage for a firefighter was approximately \$65,000 in 2001; he or she would need an income of more than \$136,000 in order to buy a median-priced home – a \$71,000 gap. A child care worker, whose median annual wage in 2001 was less than \$19,000, the dream of ownership appears next to impossible.
- ***Central Coast.*** The income needed to purchase a median-priced home exceeds the area median income by nearly \$61,000. A registered nurse earning \$52,000 per year earns less than half of what is needed to purchase a median-priced home.
- ***San Diego.*** The area median income is more than \$31,000 below what is needed to purchase a median-priced home, and is not even sufficient to purchase a median-priced home with a 20 percent down payment. An elementary school teacher making \$51,000 per year earns nearly \$41,000 less than the income needed to purchase a median-priced home.
- ***Orange County.*** The income needed to purchase a median-priced home in Orange County exceeds the area median income by more than \$28,000. A firefighter making \$59,000 per year falls more than \$45,000 short of the income needed to buy a median-priced home.
- ***Northern California.*** The income needed to buy a median-priced home exceeds the area median income by more than \$20,000. A computer support specialist earning \$34,000 per year is more than \$25,000 short of the income needed to achieve homeownership.
- ***Los Angeles.*** The income needed to buy a median-priced home exceeds the area median income by nearly \$15,000. A loan officer making \$49,000 per year earns \$21,000 less than the income needed to achieve homeownership.

- ***Central Valley.*** The income needed to buy a median-priced home exceeds the area median income by a comparatively narrow margin of \$6,000. While areas such as Bakersfield have not seen the substantial increases in home prices occurring elsewhere, incomes are generally lower in the Central Valley than in most other areas of the state.
- ***Inland Empire.*** The median income in Riverside and San Bernardino Counties actually exceeds the income necessary to buy a median-priced home by approximately \$7,000. A contributing factor to the regions relative affordability is the fact that housing construction has increased at a significant rate in the Inland Empire, as it has become the bedroom community for Orange County and Los Angeles. In Riverside County alone, more than 11,000 new housing units were built between 2000 and 2001, the largest increase of any county in the state.
- ***Sacramento.*** Families in Sacramento also enjoy an affordable housing price-to-income ratio, with the median income exceeding the income needed to buy a median-priced home by approximately \$6,000. However, home prices in Sacramento have increased significantly in recent years as families who have been priced out of the Bay Area Market relocate to the Sacramento area, driving up housing demand. Many continue to commute long distances to jobs in the Bay Area in order to afford a home of their own.

## REVISITING THE ROOTS OF CALIFORNIA'S AFFORDABLE HOUSING CRISIS

Housing production declined significantly in the 1990s, due in part to changes in several state and federal laws that made investing in rental housing less profitable on an after-tax basis. In addition, California's system of financing local government tends to discourage residential construction in favor of sales tax-generating retail development. Finally, neighborhood opposition, commonly known as NIMBYism (Not In My Back Yard), has blocked or delayed construction of many affordable housing projects in California.

- ***Inadequate Housing Production.*** Lack of supply contributes to California's steadily increasing home prices and rents. According to the state Department of Housing and Community Development, California must build more than 200,000 housing units per year through 2020 simply to keep up with population growth and remain "reasonably affordable." During the 1990s, multifamily housing

production in the state fell even lower than in the early 1980s, and single-family construction has not returned to 1980s peak levels. In 2001, multifamily housing was less than one-third of total new construction (41,433 units) – down from a nearly two-thirds share in 1970 (124,348 units). Multifamily housing construction has remained below 30 percent of total units since 1992.

- ***Job Growth is Outpacing Housing Construction.*** Although housing construction has declined in recent years, the state has continued to generate new jobs. A “jobs-housing imbalance” occurs when a region’s job growth increases at a faster pace than housing construction. The resulting geographic mismatch often forces families to move outside the community in which they work in order to find affordable housing, leading to increased traffic and commute times. The state as a whole has added 4.0 jobs for each new unit of housing since 1994, more than twice the recommended 1.5-to-1 ratio. Although the state’s economy has slowed recently, the jobs-housing imbalance persists. Job growth exceeded new housing units by 2.2-to-1 between 2000 and 2001, still well above the recommended 1.5-to-1 ratio. Although the imbalance is notably smaller compared to the 1994-2001 period, it is due to waning job growth, rather than a construction boom. Jobs grew in the state by only 1.4 percent from 2000 to 2001, compared to a 3.0 percent average annual increase from 1994 to 2001.
- ***Workers Cannot Afford to Live Near Their Jobs.*** As high metropolitan home prices are pushing more families to outlying areas, increasing numbers of workers endure long commute times. Although the majority of California workers commute less than 40 minutes one way to work, longer commutes are becoming more common. Statewide, workers who travel less than ten minutes fell by 14.4 percent between 1990 and 2000, from 12.7 percent to 11.1 percent. Conversely, the share of workers who commute more than 90 minutes, although small, increased by 57.1 percent during the same period, from 2.1 up to 3.3 percent.
- ***Housing Assistance Fails to Meet California’s Needs.*** Historically, the federal government has provided the majority of public support for low-income housing programs. However, federal aid has not kept pace with the need for assistance, and state and local governments have not stepped in to fill the gap. Moreover, both federal and state assistance primarily benefits higher income families through tax preferences for homeownership. These preferences provide little or no assistance to low- and middle income Californians, who face the most acute housing problems. Although total federal budget authority increased by two-thirds between 1976 and 2001, from \$1.2 trillion to

\$2.0 trillion, budget authority for the federal Department of Housing and Urban Development (HUD) declined by 60 percent during the same period. From 1976 through 1981, HUD budget authority ranged between 5 and 8 percent of total budget authority; since 1981, it has only risen above 2 percent twice.

- ***Loss of Existing Federally Subsidized Housing Stocks.*** Over the past three decades, the federal government guaranteed rental payments and low-cost financing to developers of affordable housing in exchange for a commitment that rents would remain affordable. Many of the projects built with federal assistance have reached the expiration dates of their contracts, putting a significant fraction of California's affordable housing stock at risk of conversion to market rate housing. Moreover, in 1996 Congress allowed owners to prepay their HUD-assisted mortgages, giving property owners in areas with rising rents the ability to refinance and convert to market rents. In the past seven years, California has lost more than 24,000 affordable housing units to opt-outs and prepayments, a total of 16 percent of the federally-assisted inventory, with most of the losses occurring in Los Angeles, Orange, Sacramento, San Diego, and Santa Clara Counties.
- ***State Spending Declining From Earlier Levels.*** During the early 1990s, bond proceeds supported a substantial investment in affordable housing. However, as these funds were spent, only minimal state support was allocated to continue the investment. State spending on housing dropped substantially in the 1990s, from 0.5 percent of General Fund spending in 1989-90 to approximately 0.2 percent each fiscal year in the second half of the decade. In 2000-01, public and policymaker interest in housing issues, along with a large state budget surplus, resulted in the largest ever non-bond allocation of state support for housing. Since then, however, the housing budget has been significantly reduced as the state has moved to address a large budget deficit.

## IMPACTS OF THE LACK OF HOUSING

California's housing crisis has serious implications for the families affected, for the communities in which they live and for the overall well being of the state's economy. Many of the connections between housing and other issues are frequently overlooked, but they include:

- ***Economic Growth.*** The housing crisis in Silicon Valley, the engine of much of the state's economic growth, has reached epic proportions. Many businesses report problems attracting employees from other parts of the state or the country because of the high cost of housing in

that community. In many metropolitan areas, workers who provide basic services - teachers, firefighters, secretaries - cannot afford to live in the communities where they work.

- ***Community Cohesiveness.*** Rising costs are forcing many low income families from communities where they have lived for decades. In the San Francisco Bay Area, gentrification of traditionally low and working class neighborhoods is running rampant. Housing pressures are so intense that long-time residents of neighborhoods, such as San Francisco's Mission District and East Palo Alto, are being forced to move out of the neighborhoods that they have called home for generations, reducing both social and economic diversity in these areas. In addition, the ability to obtain higher rents on the open market is leading many landlords to opt out of federal housing programs. Landlords are pre-paying mortgages and refusing to renew contracts to maintain affordability, eliminating what is frequently the only affordable rental stock, making those communities the exclusive enclaves of higher income households.
- ***Environmental Impacts.*** The problems of unchecked urban sprawl are by now familiar to most policymakers: gridlocked freeways, longer commute times for workers, greater air pollution, and loss of open space. But one major contributing factor to urban sprawl is the search for affordable housing. Families seeking affordable housing are being forced farther from the metropolitan core to find it. In the Bay Area, for example, the number of vehicle miles driven increased 18.6 percent between 1990 and 2000.<sup>4</sup> During the same period, population increased at two-thirds the pace (13.3 percent). Distant suburbs are often the only option for young families seeking to buy their first home. Yet, affordability comes at a cost: reduced time to devote to family and community as a result of lengthy commutes and the loss of prime agricultural land to development.
- ***Human Health and Welfare.*** Studies indicate that children who live in unaffordable or substandard housing are more likely than adequately housed children to suffer a variety of health problems.<sup>5</sup> Without affordable housing, children often lack adequate nutrition and do not arrive at school ready to learn. Also, families with high rent burdens move more frequently than those families with more affordable rents – resulting in frequent school changes for their children. Taken together, it is not surprising to learn that children with poor housing conditions perform less well in school than those with more affordable and stable housing.
- ***Cyclical Poverty.*** Housing plays a critical role in helping welfare recipients make the transition to work. The high cost of housing in the

parts of the state where jobs are most plentiful may discourage welfare recipients from relocating from areas where job opportunities are more limited, but housing less costly. Surveys of welfare recipients indicate that housing problems pose substantial barriers to finding and retaining employment. One reason for this may be that after paying for housing, welfare recipients have little extra money left over to pay for child care and other expenses associated with work.

- ***Homelessness.*** The lack of affordable housing contributes to the ongoing tragedy of homelessness throughout the state. While many factors, including substance abuse, mental illness, poor health status, and disabilities, can result in poverty and cause homelessness, affordable housing is at the heart of what is needed to both prevent individuals and families from becoming homeless and address the problems of those who are already living in shelters or on the streets.

## CONCLUSION

California faces a housing crisis of dramatic proportions. Record numbers of renters are paying far too large a portion of their incomes for rent, and Californians face some of the nation's least affordable homeownership markets. While the poorest households face the most severe housing problems, millions of California's middle-income households also face substantial difficulties in finding shelter they can afford.

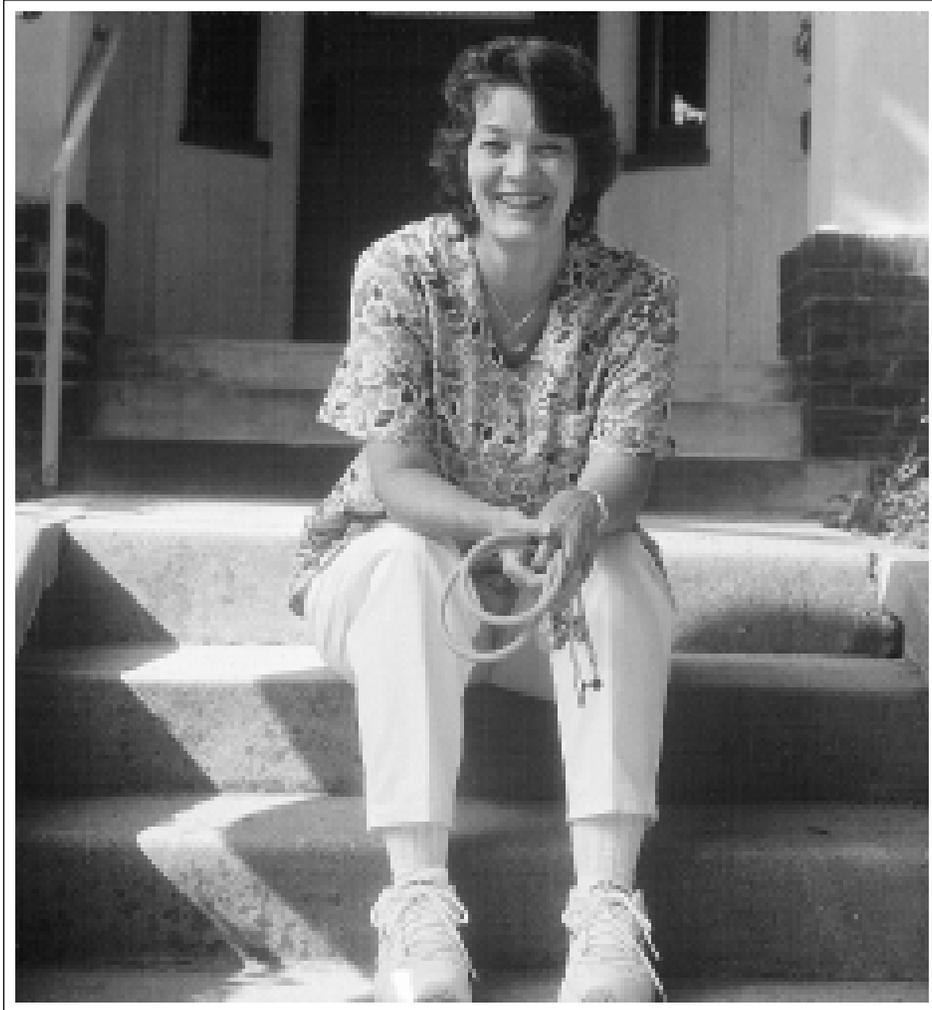
The lack of affordable housing has widespread implications for families, communities, and the vitality of the California economy. High housing costs make it difficult for businesses to attract and retain workers. The search for affordable housing is driving many metropolitan area workers farther and farther from their jobs, creating ever greater suburban sprawl and leading to growing traffic congestion and greater air pollution. Rising rents often make it impossible for low-wage workers to live in the communities where they work, forcing many to choose between a long commute and overcrowded and/or substandard housing. When families are forced to spend more of their earnings on shelter, they have less to spend on food, clothing, childcare, and other necessities. In addition, the lack of affordable housing contributes to the stubborn challenge of preventing homelessness and helping those who are already homeless to move off the streets.

Greater efforts at the federal, state, and local levels will be necessary to meet the housing challenges identified in this report. Although the current economic climate increases the difficulty of this challenge, failure to address California's affordable housing crisis could further damage the vitality of the state's economy.



# Part II

## INCLUSIONARY HOUSING EXPLAINED



### THE FACES OF AFFORDABLE HOUSING

#### Nancy Mendonca

*“As a single parent I don’t know how I could have survived in Santa Barbara without affordable housing.”*

Nancy is a native of California who came to Santa Barbara in 1972 as part of a dance troupe. She stayed to raise her daughter. Her goal is to always engage in work that she enjoys, finds satisfying and enriches the life of others. Nancy has worked as a licensed home health aide for the past seven years, taking care of elderly people in their homes. Nancy lives in De La Vina, a circa 1924 Craftsman style four-unit apartment building purchased by the Housing Authority for the City of Santa Barbara in 1982. Major rehabilitation of the building was undertaken and completed in 1993.

*– Housing Authority of the City of Santa Barbara - 2002 Calendar*



# INCLUSIONARY HOUSING POLICY BACKGROUND PAPER

*Gary Binger\**

Inclusionary zoning is a citywide or countywide mandatory requirement or voluntary objective that calls for a minimum percentage of lower and moderate income housing to be provided in new residential developments. In California, mandatory inclusionary requirements are usually incorporated in the zoning code or the housing element of the general plan, and obtaining building permits is made contingent on the developer's agreement to provide affordable housing. Jurisdictions often allow developers to pay fees in-lieu of providing the units on-site.

## HISTORY

The first inclusionary zoning ordinance was enacted in Fairfax County, Virginia in 1971. Although the Fairfax ordinance was designed in a manner that was eventually ruled unconstitutional (as a taking of property), courts have since allowed other forms of mandatory inclusionary zoning. Perhaps the most successful inclusionary housing program to date is the Moderately Priced Dwelling Unit (MPDU) program in Montgomery County, Maryland, which has accounted for more than 10,000 affordable units since 1973. The Montgomery County ordinance requires that 12 to 15 percent of the units in projects that have more than fifty residential units must be designated as affordable. The inclusionary zoning program has been a significant factor in Montgomery County becoming one of the more racially and economically integrated communities in the nation over the past thirty years.

## CALIFORNIA

The affordable housing requirement of the California Coastal Commission, dating back to the 1970s, was one of the first inclusionary policies employed by a state. As housing prices rose dramatically during that period, inclusionary zoning was applied within a growing number of

### EDITOR'S NOTE

*This selection was prepared by the author as a background piece for a program co-sponsored by the Los Angeles District Council of the Urban Land Institute. We have included it here at the beginning because it provides a fair and straightforward description of inclusionary housing ordinances as a planning tool.*

*\*Gary Binger is a land use planning consultant based in the San Francisco Bay Area. Mr. Binger is the Director of the Urban Land Institute's (ULI) California Smart Growth Initiative, which examines growth and development trends in California, identifies smart growth barriers, and focuses on specific state incentives and regulatory reforms to promote smart growth.*

jurisdictions. The state legislature enacted an inclusionary housing requirement for redevelopment areas and promoted the adoption of a model inclusionary zoning ordinance.

In the early 1990s, a California survey identified more than 50 inclusionary programs in that state which had collectively resulted in the production of 20,000 affordable units. This figure has grown by more than 4,000 new units as of the year 2000. The 1995 *Planner's Book of Lists*, published by the California State Office of Planning and Research, includes 14 counties and 107 cities in the state that have adopted inclusionary zoning.

Inclusionary housing policies also fit into California's broader, statewide housing context. State law requires local governments to have a current housing element in the general plan. One aspect of the housing element involves an explanation of how the "fair share" number of housing units required by the applicable council of governments and/or the State Department of Housing and Community Development will be provided. Inclusionary housing requirements assist local governments in fulfilling the housing provision requirements by reducing the ability of affordable housing opponents to challenge their construction.

## COMMON ELEMENTS

Most inclusionary programs contain the following elements:

- Income eligibility criteria for defining affordability
- Pricing criteria for affordable units
- Restrictions on resale and subsequent rental of affordable units
- Provisions for in-lieu fees

In addition, the following lists detail the range of inclusionary incentives and in-lieu options that localities can pursue to mitigate the impact of inclusionary zoning requirements on the private development community.

## LOCALLY-BASED INCENTIVES

- waivers of zoning requirements, including density, area, height, open space, use or other provisions;
- local tax abatements;
- waiver of permit fees or land dedication;

- fewer required developer-provided amenities and acquisitions of property, including reduced parking provision requirements;
- “fast track” permitting;
- feasibility findings that lessen the percentage of affordable units required;
- subsidization or provision of infrastructure for the developer by the jurisdiction.

### NON-LOCALLY-BASED INCENTIVES

- tax credits;
- HOME grants to build and rehabilitate affordable housing;
- Section 8 vouchers to assist low income household pay rent;
- mortgage revenue bonds;
- Section 202 grants to support housing for the elderly; and/or
- location efficiency mortgages.

### IN-LIEU OPTIONS

- payment of a per-unit fee which is pooled in a local affordable housing fund;
- construction of set aside units off-site by the same developer;
- recognition of set aside units as transferable credits that can be exchanged between developers of local residential projects.

## APPROACHES TO CONSIDER

In adopting or amending inclusionary zoning strategies, city and county officials should consider the following:

- ***Involve Developers.*** Include both for-profit and non-profit developers in discussions about program design.
- ***Examine the use of In-Lieu Fees.*** In-lieu fees offer an alternative when the actual construction of affordable units may not be feasible. In-lieu fees should not be completely optional for the developer if the desire is to scatter low- and moderate-income units throughout the community. The fee should be sufficient to facilitate the development of the required affordable units at another nearby location.

- ***Consider Land Donation.*** Land donation may be considered as a preferred alternative to in-lieu fees. The developer donates (or sells at a considerably reduced price) a portion of the development site to the locality or a non-profit housing developer. A non-profit developer then develops the donated land, using their expertise and resources for constructing and managing affordable housing.
- ***Consider Increasing Densities.*** Increased densities and other land use changes to enhance residential development capacity may accompany inclusionary zoning. This will help offset the financial impact of inclusionary requirements to the developer.
- ***Set Reasonable Requirements.*** Affordable housing requirements should be relatively modest (10-15 percent of the total number of units), if there are no development incentives such as density bonuses and fee waivers.
- ***Establish Appropriate Fee Level.*** In-lieu fees, if too low, may not generate enough funding to construct housing units. Also, low in-lieu fees are a major disincentive to construct the affordable housing on-site.
- ***Vary Requirements by Area.*** Inclusionary requirements may vary by district. For example, infill housing in downtown areas may have a lower inclusionary requirement because infill housing is desired and/or significant affordable housing may already exist downtown.
- ***Establish Design Guidelines.*** Ensure that inclusionary units are integrated within the development so as not to be distinguishable from the market-rate units.
- ***Establish Criteria for Future Residents.*** Criteria need to be established to screen the applicants for the low-cost units because the demand from eligible buyers and renters is sure to exceed the supply.
- ***Establish Resale Controls.*** Resale controls assure that the units remain affordable after the unit is sold or rented to new occupants. This requires on-going management and administration. Some cities and counties have contracted with local housing authorities to run this staff-intensive activity.

## A DEVELOPER’S GUIDE TO THE CARLSBAD INCLUSIONARY HOUSING ORDINANCE

*City of Carlsbad\**

### I. INTRODUCTION

This document is intended to provide an overview of the City of Carlsbad’s Inclusionary Housing Ordinance.

#### WHAT IS THE INCLUSIONARY HOUSING ORDINANCE?

The City of Carlsbad adopted the Inclusionary Housing Program to assist the City in reaching its lower-income housing goals. The ordinance requires that 15 percent of all residential units in any master plan, specific plan, or residential subdivision be set aside for occupancy by, and be affordable to, lower-income households. Additionally, for those developments that are required to provide ten or more units affordable to lower-income households, at least ten percent of the lower-income units must have three or more bedrooms.

#### WHAT IS THE PURPOSE OF THE INCLUSIONARY HOUSING ORDINANCE?

The Housing Element of the City of Carlsbad’s General Plan concludes that there exists a considerable demand for, yet an inadequate supply of, housing within the City which is affordable to lower-income households. The City Council adopted the Inclusionary Housing Ordinance in an effort to meet the housing needs of lower-income households. In effect, the Inclusionary Housing Ordinance brings the private sector of the economy into the business of providing affordable housing, making it a fact of the marketplace within Carlsbad.

#### EDITOR’S NOTE

*Staff at the City of Carlsbad developed this simple overview of the city’s inclusionary housing ordinance to assist developers. The Guide does an excellent job of explaining its requirements in a plain, easy-to-understand style. We include it here as an example of a typical inclusionary program. This selection also works as a useful template for other local agencies to explain to various groups – such as developers, landlords, homebuyers and tenants – how their inclusionary housing programs work.*

\*Planning Department, City of Carlsbad

## WHAT IS A LOWER-INCOME HOUSEHOLD?

“Lower-income Household” refers to low-, very low- and extremely low-income households. The City’s Inclusionary Housing Ordinance defines lower-income households as follows:

- ***Extremely Low:*** A household whose gross annual income is equal to or less than 30 percent of the median income for San Diego County as determined annually by the U.S. Department of Housing and Urban Development (HUD).
- ***Very Low:*** A household whose gross annual income is more than 30 percent but does not exceed 50 percent of the median income for San Diego County as determined annually by HUD.
- ***Low (rental):*** A household whose gross annual income is more than 50 percent but does not exceed 70 percent of the median income for San Diego County as determined annually by HUD.
- ***Low (for-sale units):*** A household whose gross income is more than 50 percent but does not exceed 80 percent of the median income for San Diego County as determined annually by HUD.

## WHAT IS AN AFFORDABLE HOUSING COST?

In order for housing costs to be considered affordable, these costs may not exceed 30 percent of the gross annual household income of any given income group. For example, under current standards (year 2000), a low-income family of four with a gross annual income of \$40,600 should pay no more than \$1,015 per month for housing. For a rental unit, total housing costs include the monthly rent payment as well as a utility allowance. With for-sale units, total housing costs include the mortgage payment (principal and interest), homeowners association dues, taxes, mortgage insurance and any other related assessments.

The U.S. Department of Housing and Urban Development provides income charts that identify the annual and monthly maximum incomes for lower-income households as well as the monthly housing expenditure that lower-income households within San Diego County can afford to pay. These income and related rent charts are available at the Carlsbad Housing and Redevelopment Department.

## II. REQUIREMENTS

### RESIDENTIAL UNITS SUBJECT TO THE INCLUSIONARY HOUSING REQUIREMENTS

All residential market rate dwelling units resulting from new construction or conversion are subject to one of the City's Inclusionary Housing Requirements as follows:

#### *Six or Fewer Units*

An Inclusionary Housing In-Lieu Fee applies to residential projects of six or fewer dwelling units. The In-Lieu Fee amount is currently \$4,515 (year 2000) per market-rate dwelling unit. The fee is subject to change by resolution of the City Council. The fee is paid at the time of building permit issuance, or for conversion of existing apartments to condominiums, prior to the recordation of a final map and/or issuance of a certificate of compliance.

An Inclusionary Housing Impact Fee applies to any residential project for which the application for discretionary approval was deemed complete prior to May 21, 1993 (the effective date of the ordinance). The Housing Impact Fee amount is currently \$2,925 (year 2000) per market-rate dwelling unit. The fee is subject to change by resolution of the City Council. The fee is paid at the time of building permit issuance, or for conversion of existing apartments to condominiums prior to the recordation of a final map and/or issuance of a certificate of compliance.

#### *Seven Units or Larger*

The construction of new inclusionary housing units applies to all residential projects of seven or more units. Subject to adjustments for incentives, the required number of lower-income inclusionary units shall be 15 percent of the total residential units, approved by the final decision-making authority of the City. If the inclusionary units are to be provided within an offsite, combined or other project, the required number of lower-income inclusionary units is 15 percent of the total residential units to be provided both onsite and/or offsite.

Subject to the maximum density allowed per the growth management control point or per specific authorization granted by the Planning Commission or City Council, fractional units for both market rate and inclusionary units of .5 will be rounded up to a whole unit. If the rounding

calculation results in a total residential unit count which exceeds the maximum allowed, neither the market rate nor the inclusionary unit count will be increased to the next whole number.

- **Example 1:** If the final decision making authority approves 100 total residential units, then the inclusionary requirement equals 15 percent of the “Total” or 15 units ( $100 \times .15 = 15$ ). The allowable market rate units would be 85 percent of the “Total” or 85 units.
- **Example 2:** If the inclusionary units are to be provided offsite, the total number of inclusionary units is calculated according to the total number of market rate units approved by the final decision-making authority. If 100 market rate units are approved, then this total is divided by .85, which provides a total residential unit count ( $100 \div .85 = 117$ ). The 15 percent requirement is applied to this “Total” (117 units), which equals the inclusionary unit requirement ( $117 \times .15 = 17.6$  units).

An Affordable Housing Agreement (see below) must be executed, and a Site Development Plan (SDP) must be approved to outline the manner in which a developer will meet an obligation to construct new inclusionary housing units. A developer will not be allowed to proceed with development of market-rate units within any given housing project until the City approves the Affordable Housing Agreement and related SDP.

### III. STANDARDS

#### LOCATION, DESIGN & DURATION

Whenever reasonably possible, inclusionary units shall be built within the residential development project (on site) and be constructed concurrently with market-rate units. The actual construction phasing of the inclusionary (affordable) units shall be set forth in the approved affordable housing agreement. Every effort should be made to locate the inclusionary units on sites that are in close proximity to, or will provide access to, employment opportunities, urban services, or major roads or other transportation and commuter rail facilities and are compatible with adjacent land uses.

The design of the inclusionary units must be reasonably consistent or compatible with the design of the total project development in terms of appearance, materials and finished quality. Inclusionary projects must provide a mix of number of bedrooms in the affordable dwelling units in response to affordable housing demand priorities of the City.

Inclusionary rental units must remain restricted and affordable to the designated income group for not less than 55 years. With regards to mixed income rental projects, inclusionary units may not be rented for an amount that exceeds 90 percent of the actual rent charged for a comparable market-rate unit in the same development.

After their initial sale inclusionary for-sale units shall remain affordable to subsequent income eligible buyers pursuant to a resale restriction with a term of 30 years. As an alternative, for-sale units may be sold at a market price to other than targeted households provided that the sale results in the recapture by the City or its designee of a financial interest in the units equal to the amount of subsidy necessary to make the unit affordable to the designated income group and a proportionate share of any appreciation. Funds recaptured by the City must be used to assist other eligible households with home purchases at affordable prices at other locations within the City. To the extent possible, projects using for-sale units to satisfy inclusionary requirements must be designed to be compatible with conventional mortgage financing programs, including secondary market requirements.

#### **IV. INCENTIVES/ALTERNATIVES**

Certain types of affordable housing are more likely to satisfy the City's Housing Element goals, objectives and policies. As an incentive to assist the City in providing this housing, developers may receive credit for providing more desirable units, thereby reducing the total inclusionary housing requirement to less than 15 percent of all residential units approved. A schedule of inclusionary housing incentive credits specifying how credit may be earned has been adopted by the City Council, but is subject to periodic change.

The City Council also has the discretion to determine that an alternative to the construction of new inclusionary units is acceptable. The City Council may approve alternatives to the construction of new inclusionary units where the proposed alternative supports specific Housing Element policies and goals and assists the City in meeting its state housing requirements. Such determination is based on findings that new construction would be infeasible or present unreasonable hardship in light of such factors as project size, site constraints, market competition, price and product type disparity, developer capability, and financial subsidies available. Alternatives may include, but are not limited to, acquisition and rehabilitation of affordable units, conversion of existing market units to affordable units, construction of special needs housing projects or programs

(for example, shelters or transitional housing), and the construction of second dwelling units (with the income and rent limitations).

## **V. HOUSING AGREEMENTS**

An Affordable Housing Agreement is a legally binding agreement between a developer and the City to ensure that the inclusionary requirements of a particular residential development are satisfied. The agreement establishes, among other things, the number of required inclusionary units, the unit sizes, location, affordability tenure, terms and conditions of affordability and unit production schedule.

Agreements that do not involve requests for offsets and/or incentives shall be reviewed by the Affordable Housing Policy Team and approved by the Community Development Director. Agreements that involve requests for offsets and/or incentives shall require the recommendation of the Housing Commission and action by the City Council as the final decision-maker. Following the approval and execution by all parties, the affordable housing agreement is recorded against the entire development, including market-rate lots/units and the relevant terms and conditions filed and subsequently recorded as a separate deed restriction or regulatory agreement on the affordable project individual lots or units of property which are designated for the location of affordable units.

## **VI. PRELIMINARY REVIEW**

Prior to the formal submission of an application for an affordable housing project, it is strongly recommended that the project proponent use the preliminary project review process. Preliminary review is an early, informal review of a project by the Housing and Redevelopment, Planning and Engineering Departments. Preliminary review allows a project developer to obtain early project direction, reduce development costs, shorten processing time and alleviate costly redesigns. Preliminary review applications may be submitted to the Housing and Redevelopment or Planning Departments.

Within 30 days of receipt of the preliminary application, City staff will provide a letter that identifies project issues of concern, the offsets and incentive adjustments that the Community Development Director can support when making a recommendation to the final decision-making authority, and the procedures for compliance.

# Part III

## PROS & CONS



### THE FACES OF AFFORDABLE HOUSING

#### Margaret Vasquez

*“I am fortunate – the area I live in is quiet, peaceful and safe. My son and I can enjoy the weather, the beaches and the many sports activities for kids.”*

Margaret works as a medical billing clerk at a busy local clinic. She was born and grew up in Santa Barbara and is now raising her 12-year-old son there. Her goals are for her son to become a productive and respectful young man and to one day own her own home. She lives at Via Diego, a 24 unit family complex that was developed by the Housing Authority in 1989. It is part of a larger master planned and mixed income housing development known as La Colina Village. There are 22 townhomes and 2 single story, fully accessible units for the disabled. All are two-bedroom units.

*– Housing Authority of the City of Santa Barbara - 2002 Calendar*



## INCLUSIONARY ZONING: PROS AND CONS

*Dr. Robert W Burchell and Catherine C. Galley\**

The fundamental purpose of inclusionary zoning programs are to allow affordable housing to become an integral part of other development taking place in a community. At the local level, this is usually accomplished by a zoning ordinance, mandatory conditions or voluntary objectives for the inclusion of below-market housing in market-level developments. Incentives designed to facilitate the achievement of these conditions or objectives are often included.

A typical ordinance sets forth that a minimum percentage of units within a residential development be affordable to households at a particular income level, generally defined as a percentage of the median income of the area. The share of units allocated to such households is termed a “mandatory set-aside.” The goal is to establish a relatively permanent stock of affordable housing units provided by the private market. This stock of affordable housing units is often maintained for 10 to 20 years or longer through a variety of “affordability controls.” Often these are ownership units that do not require a great deal of community administration, except for the qualification of successive occupants.

In many ordinances, some form of incentive is provided to the developer in return for the provision of affordable housing. These incentives can take the form of waivers of zoning requirements, including density, area, height, open space, use or other provisions; local tax abatements; waiver of permit fees or land dedication; fewer required developer-provided amenities and acquisitions of property; “fast track” permitting; and/or the subsidization or provision of infrastructure for the developer by the jurisdiction.

### EDITOR’S NOTE

*This selection provides a good starting point to examine the pros and cons of inclusionary housing. No planning device is perfect; and a good understanding of the strengths and weaknesses of any planning tool is helpful. This particular selection is the first of two excerpts selected from INCLUSIONARY ZONING: A VIABLE SOLUTION TO THE AFFORDABLE HOUSING CRISIS? (October 2000), published by the Center for Housing Policy as part of its New Century Housing series. The Center for Housing Policy is the research affiliate of the National Housing Conference ([www.nhc.org](http://www.nhc.org)) and brings together practitioners, policy analysts and research professionals to examine core problems of the housing issue.*

*\*Dr. Robert W Burchell is a professor at the Center for Urban Policy Research, Rutgers University and an expert on land-use regulation, development impact analysis and housing policy. Dr. Burchell’s recent research includes lead authorship of “The Costs of Sprawl – Revisited” published by National Academy Press for the Transportation Research Board. Ms. Catherine Galley is a Research Associate at the Center for Urban Policy Research, Rutgers University where she is a doctoral candidate in the Department of Urban Planning and Policy Development. Ms. Galley specializes in the analysis of cultural resources and their economic contributions, both nationally and internationally.*

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## **POSITIVE FEATURES AND OUTCOMES**

### **AFFORDABLE UNITS AT LITTLE OR NO COST TO LOCAL GOVERNMENTS**

Advocates of inclusionary zoning argue that this regulatory tool creates economically diverse communities and allows local governments to create more heterogeneous communities at little or no direct financial cost. Generally, the provision of affordable housing units as part of an inclusionary program does not require significant expenditure of public funds. Inclusionary units are delivered in step with market units through incentives such as density bonuses, fee waivers and/or local tax abatements offered by the local jurisdiction.

Inclusionary zoning relies on a strong residential market to create below-market units. This type of program reached its zenith in the 10-year period from 1975 to 1985. During this time (except for the 1980-82 recession), market housing was built in record numbers, and a share of this housing was allocated to lower-income households.

### **CREATING INCOME-INTEGRATED COMMUNITIES**

The affordable housing enabled by inclusionary programs is not produced as an “island” of the poor but rather is integrated into the development of the overall community in lockstep with market-rate units. The integration of a percentage of low- and moderate-income housing units into market-rate housing developments avoids the problems of over-concentration, ghettoization and stigmatization generally associated with solely provided and isolated affordable housing efforts. Inclusionary programs make possible the integration of populations that traditional zoning segregates – young families, retired and elderly households, single adults, female/male heads of households, minority persons and households of all types.

Suburban and exurban employers further benefit from the presence of this proximate low- and moderate-income work force. Inclusionary zoning significantly reduces the oft-cited spatial mismatch between available suburban jobs and employment-seeking urban households.

### **LESS SPRAWL**

Findings from the County Council of Montgomery County, Maryland, indicate that the inadequate supply of housing for persons of low- and moderate-income results in large-scale commuting from outside the

County to places of employment within the County, thereby overtaxing existing roads and transportation facilities, significantly contributing to air and noise pollution, and engendering greater than normal personnel turnover in the businesses, industry and public agencies of the County, all adversely affecting the health, safety and welfare of and resulting in an added financial burden on the citizens of the County. Yet another argument advanced by the proponents of inclusionary zoning is that it provides the critical mass necessary to create a town center and reduce the proliferation of sprawled bedroom subdivisions.

From a regional perspective, density bonuses often make possible residential environments of a variety of housing types. They enable developments to be built more densely than those of primarily single-family zones, which helps to reduce the sprawl that would otherwise be created by single-purpose residential zones. A large development containing inclusionary zoning often allows for mixed-use and transit-oriented development, while protecting surrounding open spaces.

## **NEGATIVE FEATURES AND OUTCOMES**

### **THE SHIFT OF THE COST OF PROVIDING AFFORDABLE HOUSING TO OTHER GROUPS IN SOCIETY**

Critics claim that inclusionary zoning changes the financial characteristics of real estate developments and reduces the saleable value of the development upon completion. They equate inclusionary zoning mandates with a tax on new development – especially when there are no compensating benefits provided to developers to cover the full cost of providing affordable housing. Opponents of inclusionary programs assert that developers cannot make money on affordable housing and thus are saddled with the burden of economically integrating neighborhoods that have been demographically homogeneous for decades. Developers become scapegoats for problems beyond their control but quickly pass this burden onto the new occupants of the housing that they develop.

Who pays for inclusionary zoning? The requirement of subsidized housing has the same effect as a development tax. The developer makes zero economic profit with or without inclusionary zoning, so the implicit tax is passed on to consumers (housing price increases) and landowners (the price of vacant land decreases). In other words, housing consumers and landowners pay for inclusionary zoning.

Another deficiency of the inclusionary zoning strategy is that it is based on a market-supply equation that relies primarily upon a developer's ability to sell market-level units – as an example, eight market units for every two affordable units produced. This reliance on the private sector to finance affordable housing based on the sale of market units is not necessarily a major issue when the economy flourishes, but it is a very serious one when the economy falters.

Finally, “shift” criticisms of inclusionary zoning have become focused on the very structure of the inclusionary zoning technique. Inclusionary programs that are mandated without compensation were challenged constitutionally in the 1990s as a taking.

### **BREAKING UP POCKETS OF THE POOR**

A lingering criticism of inclusionary zoning is that it “distills” the most upwardly mobile poor from central neighborhoods and artificially transports the citizens who could do the most for reviving central city neighborhoods to the suburbs. The “best” of the poor are enticed outward by a write-down on the cost of housing there. While this is certainly a valid concern, and the more economically mobile residents may move out, leaving the less mobile behind, such is the nature of residential choice; it has existed in housing markets since time immemorial.

Similarly, in-kind housing subsidies are nontransportable devices that may not significantly improve the welfare of recipient families. These programs may provide individual economic benefits that are difficult to “cash out.” For example, affordable housing units usually carry with them affordability controls that typically limit the sales price increase on such housing to a small multiple of the rate of inflation.

### **MORE DEVELOPMENT/INDUCED GROWTH**

In instances where density bonuses are provided as part of the inclusionary solution, criticisms about “massing” have emerged. Some argue that increased density represents an unwanted and unplanned-for glut of development that burdens both the overall environment and the public service capacity of local governments.

## CONCLUSIONS AND FUTURE DIRECTIONS

Inclusionary zoning is simple to understand and apply, and coupled with density bonuses and other incentives, allows higher-income communities to achieve a balanced economic composition. Inclusionary zoning also helps limit sprawl by concentrating more development in a single location.

Inclusionary zoning works best when combined with developer incentives. It has delivered the greatest numbers of units when the populations “included” are closest to median income. Inclusionary zoning is the by-product of expensive housing markets that have been spawned by either raw demand or exclusionary zoning controls. Typically, these have been in northeastern and western United States housing markets and today are likely to extend to specific locations in southeastern and southwestern U.S. housing markets.

Inclusionary zoning has been criticized for shifting the burden of affordable housing provision to other groups, for distilling the upwardly mobile poor from the remainder of central city residents and for causing undue growth in locations that would not otherwise experience it. These criticisms, while warranted and substantive, pale by comparison to the roster of benefits attributable to inclusionary housing programs.

Inclusionary zoning will continue to be sought in tight and expensive housing markets where there is socially responsible interest in providing both housing opportunity and economic balance. The technique must be implemented cautiously, however, with sensitivity to the locality paying for it and the population benefiting from it.



## INCLUSIONARY ZONING: A VIABLE SOLUTION TO THE AFFORDABLE HOUSING CRISIS? A HOME BUILDER'S POLICY VIEW ON INCLUSIONARY ZONING

*Kent Conine\**

Home builders are justifiably proud of the part they have played in our nation's strong economy and the recent achievement of the highest homeownership rate in modern American history. But we recognize that not all households have benefited from the current wave of prosperity; in fact, many families may be experiencing a housing affordability gap as the housing industry needs to maintain a sharp focus on providing housing that is affordable for those at the lower end of the income distribution.

Homeownership has proven to be an important step for building equity and creating family wealth that can be passed to the next generation and lift a family to the middle class. While not everyone may be in an economic position to become a homeowner, it is in the public interest to expand homeownership opportunities to moderate- and low-income families.

Since the 1970s, a few local governments have fostered affordable homeownership through the imposition of inclusionary zoning, which mandates that builders construct a certain percent of affordable homes in a new development. Some of these programs provide density bonuses as a way to compensate builders for complying with inclusionary requirements.

These programs have two laudable goals: to create more affordable homeownership opportunities and to integrate affordable units throughout a jurisdiction. Where inclusionary zoning requirements have been

### EDITOR'S NOTE

*In this selection, author Kent Conine begins to lay out some of the concerns that developers and others have with inclusionary housing programs. Mr. Conine concludes that although there may be a role for inclusionary housing as a planning tool, it should not be relied upon to the exclusion of other programs that may be more effective at increasing levels of homeownership. This is the second selection from INCLUSIONARY ZONING: A VIABLE SOLUTION TO THE AFFORDABLE HOUSING CRISIS? (see Selection 4).*

*\*Kent Conine is the Vice President and Secretary of the National Association of Home Builders. He is also President of Conine Residential Group, Inc., which specializes in multifamily development, single family homebuilding and single family subdivision development. Since 1981, he has been responsible for the building, management and development of over 3,000 apartment units as well as the development of several residential communities consisting of over 1,000 single family lots. Prior to the establishment of the Conine Residential Group, Mr. Conine was involved in the development and management of multifamily projects in the Dallas area as Vice President of Metroplex Associates.*

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imposed, they have resulted in the construction of significant amounts of affordable housing without any government subsidy. In a 1992 report, the San Diego Housing Commission found more than 20,000 affordable dwellings had been built in California in the previous ten years without government subsidy.

Home builders have reacted in a variety of ways to the inclusionary mandates. Some view the mandates as the cost of doing business in a profitable, high-cost area. Some believe that if density bonuses are provided, the builder can break even on the affordable units or even realize a profit. Other builders maintain that the requirements impose significant costs and regulatory burdens on the building industry and further increase the cost of market-rate housing in already costly areas, thereby making housing even less affordable for many families who are not eligible for the units built under the requirements.

Whatever builders may think, inclusionary housing requirements raise some important public policy questions. Do programs impose a cost, and if so, who bears that cost – the builder or the purchaser of the market-rate homes? If there is a cost to the builder (even if only in more work or regulatory complications), is it fair for the builder to shoulder the cost of providing a needed social good? If there is a cost to the purchaser of the market-rate units, is it sensible housing policy to use a technique that further raises home prices in already high-cost areas? Are housing prices for the majority of homebuyers made higher in return for lower prices for a few?

Some of these questions may be difficult to answer without significant research. The more important and more immediate policy question is whether inclusionary zoning is the best method of government intervention to achieve the goals of affordability and inclusion for the largest number of people. A legitimate criticism of inclusionary zoning programs is that, in spite of the amount of affordable homes built over two decades, the number of households that benefit from the programs is relatively small compared to the need. In most instances, applicants so outnumber available units that lotteries are used to select homebuyers. And several observers have noted that the programs have been of greatest benefit to the children of the middle class rather than helping families from low-income backgrounds attain middle-class status. Perhaps a different approach - one that addresses the larger issue of how growth occurs and is regulated - could bring benefits to a greater number of families.

Of course, most states can already point to proven models of the government-sponsored low-rate mortgages for low- and moderate-income purchasers (funded by mortgage revenue bonds). Other programs provide down payment assistance to buyers. These approaches benefit those at the margins of achieving homeownership, but the impact of such assistance is limited and does not address the issue of the high cost of homes.

To increase homeownership significantly among lower-income households, a more comprehensive approach is called for. The Smart Growth policy adopted by the National Association of Home Builders supports such a comprehensive approach. Elements include planning adequately for growth; providing the infrastructure needed to accommodate growth; and providing revitalization of central cities and older suburbs with a strong housing component.

1. ***Planning for growth.*** Each jurisdiction should plan for growth by making available an ample supply of land for all types of residential uses, in addition to planning for commercial and industrial development and open space. Land costs are an especially large part of the cost of housing in high-income areas, and any regulations that restrict the developable land supply contribute greatly to the housing affordability problem. Zoning should permit reasonably high densities in appropriate places, and zoning districts should be flexible enough so that they do not restrict development to one particular type of housing. If zoning allows different housing types and lot sizes in each neighborhood, builders will more likely respond with a wider range of housing products and prices.
2. ***Planning and constructing infrastructure.*** Communities need to find fair and broad-based sources of funding to pay for needed roads, schools, and utilities. When new infrastructure is not available for an adequate amount of new development, land already served by infrastructure escalates in price, making housing less affordable.
3. ***Urban revitalization.*** Builders and local governments should work together to revitalize inner-city and older suburban areas. Incentives provided by cities can be tailored to support the building of affordable infill housing. For example, several cities make vacant city-owned land available to builders at low or no cost in return for building affordable homes.

It cannot be denied that in the few places where it has been adopted, inclusionary zoning has succeeded in producing affordable housing and provided homeownership for those who otherwise may not have achieved it. However, the small number of places that have adopted these

requirements suggests that much of the public is concerned with the troublesome policy questions these requirements raise. Rather than rely on the particular tool of inclusionary zoning to bring affordable homeownership to more Americans, we should be rethinking the planning, zoning and housing policies that have the greatest impact on the price of housing. As communities throughout the country focus on Smart Growth, they should develop policies and tools that comprehensively foster greater homeownership opportunities for all Americans.

## BENEFITS OF INCLUSIONARY HOUSING

### *PolicyLink\**

Inclusionary housing requires or encourages that a percentage of housing units in new residential developments be made available for low and moderate income households. The fundamental purpose of inclusionary housing is to tie the creation of affordable housing to the larger residential development process, and foster mixed-income communities – diverse, stable, and supportive.

Inclusionary housing can take many forms. Some inclusionary housing programs are mandatory, while others are voluntary or incentive-driven. Some jurisdictions require developers to construct affordable units within the development, while others allow affordable units to be constructed in another location. Some require developers to build the units, while other communities allow developers to contribute to an affordable housing fund.

While approaches differ, inclusionary housing policies share a common thread. Inclusionary housing requires and/or encourages developers to contribute to affordable housing stock in exchange for benefits, such as zoning variances, development rights and other permits. Inclusionary housing is a flexible strategy with a proven track record of meeting a community's affordable housing needs while allowing builders to profit from housing developments. To date, inclusionary housing policies have been most effective in areas that are experiencing growth, since the creation of affordable units is a function of residential development that is occurring in the community.

This tool provides an overview of inclusionary housing and considers the key issues related to implementing inclusionary housing. While the focus of this tool is inclusionary housing, inclusionary housing programs will also be referenced and discussed.

*\*PolicyLink is a nonprofit research and advocacy organization based in Oakland that works to achieve social equity by connecting diverse methods and constituencies to create lasting results and system change. Policylink's Web site ([www.policylink.org](http://www.policylink.org)) offers an equitable development tool kit from which selection is taken. In addition to addressing the affordable housing issue, the Web site also offers useful resources on a number of related subjects, including code enforcement, rent control and retaining subsidized housing.*

### EDITOR'S NOTE

*This selection answers the question of "why inclusionary housing?" by describing the policy goals and benefits provided by such programs. Perhaps most convincingly, PolicyLink identifies that inclusionary housing programs are "doable" for most local agencies because they can easily be blended with existing programs. This selection also helps to make the point that many nonprofit organizations are creating resources that can be helpful in designing inclusionary housing programs and drafting findings in support of such programs.*

### THE MARYLAND EXPERIENCE

Passed in 1974, Montgomery County's (Maryland) inclusionary housing program requires 12.5 to 15 percent of new housing developments of 50 or more units be households in the lowest one-third of the county's income bracket. Between 1976 and 2001, 13,000 affordable housing units have been developed throughout the county.

## WHY USE INCLUSIONARY HOUSING?

For decades, various land use policies have contributed to urban sprawl, concentrated poverty, lack of affordable housing, and gentrification with its attendant displacement. Inclusionary housing is a regulatory strategy that strives to insert equity into land use policies by integrating the creation of affordable housing with the larger development process.

As such, inclusionary housing policies are an effective tool for maintaining affordability in housing markets. In communities facing displacement or experiencing significant new investment, the housing market is often the most acutely impacted. As higher income individuals move into a neighborhood, housing prices rise, displacing low- to moderate-income residents. Furthermore, in areas where new housing development consists of "market-rate" or "higher end" units, affordability is further compromised. In communities planning for new investment or already experiencing this pattern of displacement, inclusionary housing policies promote balanced housing development by ensuring that some portion of new housing development is affordable. When coupled with other mechanisms to preserve and increase the stock of affordable housing, inclusionary housing policies are an effective component of an equitable development strategy. In redevelopment efforts, inclusionary housing is an effective mechanism to promote a balanced housing supply, one in which affordable units are created in concert with higher end residential units.

Inclusionary housing has most often been used in communities with high-cost or escalating housing markets, in areas where communities want to preserve open space, or where exclusionary zoning is visibly evident (for example, Washington, D.C., New York metropolitan areas, and California). Inclusionary housing draws upon municipal authority over land use to require developers to dedicate a percentage of units for moderate-, low-, very low-, or extremely low-income families. Innovative communities use inclusionary housing to ensure mixed-income housing and housing near jobs, and to counter declining public-sector investment in affordable housing.

## BENEFITS OF INCLUSIONARY HOUSING

- *Creation of Mixed Income, Diverse, Integrated Communities.* Inclusionary housing policies contribute to the development of economically and racially integrated communities. In order to achieve this goal, inclusionary housing policies must require developers to build

the affordable housing units within the larger development, as opposed to developing the units elsewhere. The benefits of mixed income communities are manifold. For example, studies have shown that low-income children who live in mixed-income communities have higher test scores and improved educational achievement over students of similar economic status in schools with concentrated poverty.

- ***Deconcentration of Poverty.*** Communities of color are the most likely to live in concentrated poverty. In his book, *The Inside/Outside Game*, (Brookings Institution Press, 1999) David Rusk notes that only one of four poor whites live in neighborhoods characterized by concentrated poverty, compared to three of four poor blacks. Inclusionary housing can lessen the concentration of poverty in communities of color and create greater access to education and job opportunities in the larger region. In order to achieve the goal of poverty deconcentration, inclusionary housing policies must focus on reaching very low-income families and require affordable units be built into the larger development. This goal of deconcentration of poverty is best achieved if all jurisdictions in a region adopt commensurate policies.
- ***Smart Growth, Less Sprawl, Preservation of Open Space.*** Many inclusionary housing policies offer developers density bonuses in exchange for the creation of affordable housing units. Optimal density can be an important element of a region's smart growth strategy. Inclusionary housing is a strategy that simultaneously meets the goals of housing advocates, environmentalists and smart growth proponents.
- ***Housing for a Diverse Labor Force.*** A healthy community requires a diverse labor pool, including professionals, service sector employees, public servants, and others. In escalating housing markets, lower-paid employees are the first to be driven out. Inclusionary housing helps build a diverse housing market, ensuring that lower income individuals, whose housing needs are not met through the market, can live in the community where they work.
- ***Satisfaction of Fair Share Requirements.*** Fair share requirements hold jurisdictions accountable for producing their "fair share" of affordable housing. Inclusionary housing is one strategy to satisfy these requirements. In 1979, Orange County, California implemented a mandatory inclusionary housing requirement after a lawsuit challenged the county's housing element for lack of compliance with state fair share requirements. Through their inclusionary housing policy, Orange County today has produced the required number of affordable units, bringing them into compliance.

### INCLUSIONARY HOUSING HELPS PREVENT GENTRIFICATION

When coupled with other mechanisms to preserve and increase the stock of affordable housing, inclusionary policies are an effective component of an anti-displacement strategy.

In Montgomery County, Maryland, inclusionary housing has been an important mechanism for distributing below market-rate housing throughout the county. Since the adoption of their Moderately Priced Dwelling Units (MPDU) program, the distribution of affordable housing units reflects the county's growth patterns. For example, Germantown has experienced a lot of residential development in the last 20 years and also has the highest percentage of MPDU units.

- ***Doable Strategy.*** Creating inclusionary housing does not require a massive overhaul of existing land use law. Since it was first adopted in 1974 by Montgomery County, many jurisdictions nationally have successfully implemented inclusionary housing to increase the stock of affordable housing. Feasibility, however, should not be equated with ease – getting an inclusionary housing ordinance adopted may require a vigorous campaign to demonstrate community support to elected officials.

# INCLUSIONARY ZONING ISSUES

## BRIEFING PAPER

*California Association of REALTORS® (Unofficial)\**

With more pressure from the state to provide affordable housing, and fewer government dollars to subsidize such housing, more local governments have turned to inclusionary zoning programs that place the primary burden for affordable housing on the private development community. In its most recent list, compiled in 1996, the Governor's Office of Planning and Research identified over 120 cities and counties with some form of inclusionary housing policy. This number represents a steady increase over the previous decade. Although C.A.R. has been historically opposed to inclusionary zoning, some local Associations have made a departure from this position and supported inclusionary policies in their area.

## FORMS OF INCLUSIONARY ZONING

Inclusionary ordinances can vary in a number of ways. However, they typically contain some or all of the following features:

- an inclusionary set-aside, usually ranging from 10 to 25 percent of the project's units;
- an exemption from inclusionary zoning requirements for small projects, most often for projects of less than five or ten units;
- affordability criteria based on a percentage of median income and/or median home prices;
- provisions for in-lieu fees which allow the developer to pay a fee to the locality instead of building the units;
- restrictions on the resale of affordable units
- ordinances may be either voluntary or mandatory.

*This selection was posted on the Web site of the California Association of REALTORS®. It does NOT represent an official policy position (See Editor's Note). For additional information, please contact C.A.R.'s Public Policy Division at (213) 739-8375, or send an e-mail to Rick Laezman at richard\_laezman@car.org.*

### EDITOR'S NOTE

*The following selection is from a background discussion paper that was written for the California Association of REALTORS® (CAR) and posted on the CAR Web site. It does NOT represent CAR's official policy. Indeed, this paper has NOT been considered by any of the committees that would need to approve it before it became policy, including CAR's Local Governmental Relations Committee, the Housing Affordability Committee, the Land Use and Environmental Committee, the Executive Committee or the Board of Directors. Despite this selection's unofficial status, we include it in this collection because it describes many of the drawbacks associated with inclusionary housing policies and outlines issues that should be reviewed when considering whether or not to adopt an inclusionary housing program. Indeed, there is value in fully understanding all the drawbacks associated with an option before adopting it.*

## **MANDATORY INCLUSIONARY PROGRAMS**

Ordinances that require a specified percentage of affordable units in all new construction projects constitute the majority of inclusionary programs. Almost all mandatory ordinances contain a threshold at which the inclusionary requirement kicks in. A few cities have a very low or no threshold, in order to discourage developers from downsizing their projects to avoid the inclusionary requirements. Some cities also have a low threshold because a lack of developable land has resulted in a majority of construction permits being issued to small projects.

Most inclusionary zoning ordinances apply to projects of five or more units, and may have a threshold of ten. Cities usually target the larger projects because they are seen as being strong enough financially to be able to sustain the lower profit margin that results from including the below market-rate units.

Mandatory inclusionary ordinances also require a specified number of affordable units to be built in the project. This requirement is a percentage of the total number of units being built. The percentage can be as low as 10 percent, or as high as 30 percent in new multi-family projects. The percentage sometimes reflects an overall goal for affordable housing which the local government wants to reach.

## **VOLUNTARY PROGRAMS**

Some local governments do not require developers to build affordable units, but they offer builders the option of receiving one or more concessions in exchange for setting aside affordable units on their own volition. These concessions may be given in the form of an increase in the number of units provided or lower parking lot requirements, for example, which can lower the developer's costs and may make the project more profitable. In many cases, units provided under voluntary inclusionary programs must also be placed under resale restrictions.

## **INCLUSIONARY EXACTIONS ON COMMERCIAL DEVELOPMENTS - LINKAGE PROGRAMS**

Most inclusionary programs apply strictly to residential projects. However, some cities also require exactions from commercial and/or industrial developers. These exactions are usually for an in-lieu fee that is placed in an affordable housing fund to help finance future projects. These requirements are often referred to as linkage programs because they

assume that a link exists between the construction of a new commercial or industrial project and an increase in affordable housing needs in the community, presumably from the new workers that the project brings.

## INCLUSIONARY ZONING AND GROWTH CONTROL

In order to counter allegations that growth controls exclude low- and moderate-income buyers from a community's housing market, many cities that have such ordinances have incorporated an inclusionary component.

### OPPOSITION TO INCLUSIONARY ZONING ORDINANCES

- ***Unfair Burden on Developers.*** It is unfair to place the burden of providing affordable housing solely on developers. The lack of affordable housing is a societal problem, and as such, all of society should share the responsibility for addressing it.
- ***Does Not Address Factors That Cause High Housing Costs.*** Inclusionary zoning does not address the factors – such as high land costs, lack of available sites, developer fees and exactions and cumbersome permitting processes - that contribute to the high cost of market-rate housing. Moreover, inclusionary zoning adds new costs to the development of market-rate housing.
- ***Inclusionary Zoning Places Financial Hardships on Developers.*** Ultimately, developers will no longer be able to provide housing in the community because the costs are too high, or they will pass the costs on to market-rate buyers, thus making homes more expensive.
- ***Resale Controls are Economically Inefficient.*** Resale price controls eliminate homeowners' ability to realize a reasonable profit on the resale of their homes. It also acts as a disincentive to maintain the home and property. This makes it harder to resell inclusionary units, which hurts the real estate market.
- ***High Implementation Cost.*** The cost of implementing an inclusionary zoning ordinance for a local government entity is significantly high. Most local governments cannot afford the staff resources and experience necessary to implement and administer an effective program.
- ***More Effective Alternatives Available.*** Local government can best provide housing that is affordable for its constituents at all income levels by making it easier for developers to build such housing. Incentives such as reduced land costs and land restrictions, increased availability of housing sites, and reduced fees make the development process less costly and time consuming.
- ***Tax on Homeowners.*** Because market-rate homeowners and renters ultimately bear the cost of in-lieu fees, implementing such fees constitutes a tax on homeowners and renters.
- ***In Lieu Fee Programs Not Effective.*** Many jurisdictions collect in-lieu fees, but do not leverage the revenues to build more affordable housing. Instead, in some cases, the money is not spent to produce new affordable housing.

## **A CRITICAL LOOK AT THE BASICS OF INCLUSIONARY ZONING**

This section examines these features and reveals some fundamental weaknesses in the concept of inclusionary zoning based on common problems that have occurred in the cases that were chosen for this study.

### **RESALE CONTROLS**

In order to ensure that inclusionary units remain affordable, most inclusionary ordinances contain resale restrictions for ownership units. These provisions, which typically come in the form of a deed restriction, require ownership units to be sold to another qualified low- or moderate-income buyer at a restricted price. The restriction applies to units that are sold within a certain time frame, usually 30 years.

Resale restrictions include various enforcement mechanisms. Several cities and counties, for example, have the right of first refusal when an inclusionary unit is resold. In this case, a city may have 60 days to buy the unit after an owner decides to put the unit up for sale. The city will purchase the unit at its appraised value or a value based on the original purchase price plus an amount tied to the increase in the Consumer Price Index (CPI) during the time the seller owned the unit, whichever is less.

In other localities, affordable units can only be resold to someone who falls into the same low- or moderate-income category as the original buyer. If after one year the owner cannot find a buyer in his/her income category, the local government may allow the home to be sold to someone at a higher income level.

A city may also buy back units when owners cannot find buyers who qualify under low- and moderate-income guidelines. Since sellers do not want to go through the trouble to find buyers who qualify under the city's guidelines, the city may use money from in-lieu fees to purchase the units. Other cities require an equity recapture as opposed to resale controls.

### **IN-LIEU FEES**

As stated earlier, most mandatory programs also have an option to pay in-lieu fees instead of building the required number of affordable units. While average housing prices in California certainly vary from region to region, the amount charged for in-lieu fees varies more dramatically.

Fees may be based on a percentage of the cost of land in the city, or they may be calculated from a formula that is based on the difference between the cost of producing the units and the price at which median-income families can afford to buy them. Other formulas include: a percent of the gross sales value of the total number of units, or simply a flat rate per unit.

Many jurisdictions prefer that developers build the required number of units under the inclusionary ordinance as opposed to paying the fee. However, because paying the fees is less expensive for developers than building, if given the choice, developers will often opt to pay the fee. To prevent this, many jurisdictions have adopted strict guidelines as to when the in-lieu fee option can be used. Several cities do not allow in-lieu fees. Others only allow certain projects to pay fees.

## **DENSITY BONUSES AND OTHER INCENTIVES**

Because developers sustain a loss of profit when building below market-rate units, cities and counties that have inclusionary zoning ordinances provide incentives to encourage developers to participate. A common incentive is the density bonus. The density bonus allows the developer who builds a certain percentage of affordable units to include a certain percentage of market-rate units in addition to what would otherwise be permitted under the zoning restrictions for that particular planning area. This provides the builder with an opportunity to recoup the loss he takes by participating in the inclusionary program. One problem that local governments experience with the density bonus is neighborhood opposition.

The state requires all local governments to provide a density bonus to developers who provide a certain percentage of affordable units. The state requires all cities and counties to provide a 25 percent density bonus to any developer whose project includes 20 percent low-income units, 10 percent very low-income units, or 50 percent senior units.

## **ADMINISTRATIVE COSTS**

Perhaps the most significant drawback to inclusionary zoning programs is the administrative liability. Inclusionary zoning ordinances require a great deal of staff supervision in order to make them effective. As one county official explained, “inclusionary zoning programs are not self-administering.”

The greatest demand for program supervision probably comes from resale controls and other mechanisms for ensuring long-term affordability. Resale controls involve many complicated legal and title issues, and they require enforcement.

## CONCLUSION

After examining all of the above examples, several observations can be made about inclusionary zoning programs. While these programs are designed to address communities' affordable housing needs, they present many problems as well. Localities frequently cite problems with such provisions as threshold requirements, fees, qualifying buyers, meeting all of the affordable housing needs of the community, legal and technical issues with resale controls, enforcement, and administrative time.

Cities and counties that are considering adopting an inclusionary zoning ordinance must ask themselves if the proposed ordinance will produce enough affordable housing units and meet enough of the affordable housing needs of the community to justify their existence. REALTORS® who are involved in discussions of this issue must consider all of the above when determining their own position and when confronting local officials on the matter.

Should REALTORS® choose to oppose an inclusionary zoning proposal in their community, they must be prepared to offer alternatives for meeting the local population's affordable housing needs. Their suggestions should reflect the specific circumstances of the local community.

## INCLUSIONARY HOUSING: SOME DOUBTS

*Michael Pyatok\**

As an architect I have worked with many nonprofit corporations, some community-based, some working citywide, some regional in scale. As I assembled the book *Good Neighbors*, I had a chance to touch base with hundreds of other affordable housing projects nationwide that had been executed by nonprofits, for-profits, and public housing authorities. Obviously, there are many strategies for achieving results and each has its place. But I want to make it clear why “inclusionary housing,” while it has a place in some circumstances, is harmful in others.

It arose as a strategy in suburban communities and small towns where there has been a long history of de facto segregation by class and race, and where there was no network of nonprofit affordable housing producers, except for maybe a local housing authority. Forcing private developers to do it seemed like a good way to get communities to “bear their fair share.” But when applied to communities where there is a long tradition of racially and culturally cohesive lower income neighborhoods with their own community-based development corporation, it can be very inappropriate. Let me explain through a series of actual case studies.

### FIRST EXAMPLE

In a predominantly white upper-middle-class town in southern California, a Latino neighborhood, with help of an attorney, sued the city for not producing its fair share of affordable housing. The city offered inclusionary housing as one idea. But the Latino community said absolutely not for the following reasons:

- a) they wanted their people to live together in a cohesive community in which they can maintain their cultural tradition;

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### EDITOR'S NOTE

*This selection provides a unique critique of the use of inclusionary housing as a planning tool. Mr. Pyatok makes the point that while the goal of creating economically integrated communities may be laudable, in some instances it may have the effect of breaking up traditional ethnic communities. The article was published in August 2000 issue of Designer-Builder magazine, a bi-monthly publication that is dedicated to social justice as an underlying principle of architecture and the built environment ([www.designerbuilder.com](http://www.designerbuilder.com)).*

- b) they wanted the political clout in town that they could have by remaining geographically cohesive; and
- c) they wanted to form their own development corporation and develop their own housing themselves so they could build their own economic capacity and development savvy.

In short, they wanted to determine their own destinies. None of this was possible if private developers did it all for them. In the end, they would merely be a 20 percent minority presence in someone else's culture and economy.

Within less than three years after getting the money from the city and hiring a consultant and myself, they had a mixed-use housing development with almost 100 units. Since then they have gone on to produce hundreds more affordable units, a teen recreation center and child care. All of this never would have been possible under the inclusionary model.

## **SECOND EXAMPLE**

In a town in western Washington, four different language groups of southeast Asian immigrants were organized by a nonprofit corporation to get affordable housing to meet their needs. They were offered an inclusionary opportunity within a suburban subdivision and they agreed on one condition: they would co-exist within the predominantly white suburb only if their housing were developed exclusively by a nonprofit organization that serves Asian immigrant needs and not by the developer of the rest of the subdivision. They wanted this for several reasons:

- a) the codes, covenants and restrictions that accompanied the larger white middle-class subdivision disallowed many behaviors that typify the cultures of the four language groups – no exposed laundry drying in the sun, no hanging food stuffs from porches to dry in the sun, no large unkempt community vegetable gardens in public view, no religious rituals in open public spaces, no combining of houses for large family clans;
- b) they wanted the architectural character to reflect their cultural tradition, not at all like the typical suburban subdivision that surrounded them;
- c) they wanted their nonprofit to gain the expertise in developing this type of housing.

They now have a fifty-three-unit development with a 6,000-square-foot vegetable garden, front and back porches designed to allow for hanging clothes and food, and a pig-roasting area. The housing is designed so that these activities do not face the surrounding white suburb, and the surrounding community exerted control only over the colors of the buildings.

### **THIRD EXAMPLE**

In a city in Washington, a group of African-Americans, either recent or descendant from West African immigrants of several nationalities, wants affordable housing for families like themselves in the Pacific Northwest. These are very large families of eight to twelve people, with proud cultural and religious traditions, and no developers are providing them with what they need, either in price, size, or freedom from regulation controlling their behavior.

They have said that inclusionary housing is simply out of the question for them: they want to maintain their traditions and build their economic strength as a minority within the larger community, but not as unequal minorities living in someone else's housing, passive residents under house rules made by others. They want to run their own home-based industries, which are messy, and no condo or homeowners' association or developer-owned rental development will ever allow such enterprises to flower on site. So they are now well on their way as a nonprofit, with the use of various local and federal subsidies, to developing their own community within a suburb of Seattle (where the land is cheaper).

### **CONCLUSIONS**

I have many more such stories about how the absence or avoidance of inclusionary housing helped to spawn local self-determination. I am particularly sensitive to this argument about the value of "mixed-income" housing because I see how it is being used to actually reduce the amount of housing affordable to very-low-income households.

Personally, I was born into a single-parent family that started on welfare, and I attended public school in Brooklyn. I had a scholarship opportunity to attend a private junior high in a middle-income neighborhood about a mile away. There, I encountered shocking displays by my peers of arrogance, disrespect for authority, spoiled and self-centered attitudes and a flaunting of their economic rank. I considered myself lucky when I could walk back into the tenements among the factories where I was living with "real people" - so much for mixing the children of welfare with the children of doctors, dentists, and lawyers. Maybe this is why to this day I still feel more

comfortable living in a lower-income neighborhood of East Oakland rather than the wealthier North Oakland or Berkeley.

Oakland is a city of very proud and capable minority and lower-income communities. Up to now, the available subsidies have spawned a network of neighborhood and citywide nonprofit organizations. They are not perfect, but they have been responsible for nearly all of the affordable housing and other neighborhood-related projects produced in Oakland in the last twenty years, many receiving national attention for the quality of their programs and designs. It is this local self-determination that gets undermined when the limited supply of subsidies gets funneled into the hands of for-profit developers. Except for a very few, for profit developers working in Oakland merely produce units as a measure of success, while the nonprofits work to rebuild communities and revitalize neighborhoods. The for-profit development community in Oakland consistently fought to undermine these local grassroots efforts. They fought against producing housing in the downtown when office buildings were all the craze. They fought against the introduction of rent control, even though new construction was exempt.

This fuel for self-determination in the neighborhood and capacity-building in the nonprofit sector should not be siphoned off to assist the for-profit sector. If there is to be inclusionary housing, it should be funded from developer profits. The for-profit developers are not silver bullets who will slay the dragon of unaffordable housing. They take as much time, if not longer, to produce their housing because they and their investors fear even the slightest of risks.

We have to be very honest about whom we are going to bed with here: to get inclusionary housing it must be buried within risk-free market-rate housing, and to get the risk-free market-rate housing, we will watch these same developers conspire to shut down single resident occupancy buildings and remove the homeless shelters. The limited subsidies needed for such populations should be reserved primarily for nonprofit developers; let the private developers bear their fair share from their profits.

I think that affordable housing advocates should be using their energy and political capital to work with others to raise those subsidies that will be needed by nonprofit developers. Without their ample availability, neither the private nor the nonprofit sector will be productive, because without them, affordable housing advocates will continue to beat up the private developers, slowing them down or chasing them away. To waste time and energy on inclusionary zoning ordinances only hurts the overall effort to get more affordable housing. Instead, efforts should be focused on working in concert to increase the overall subsidy pool that will be needed by all developers to meet the need.

# Part IV

## IMPLEMENTATION ISSUES



### THE FACES OF AFFORDABLE HOUSING

#### Luis Quezada

*“My family and I have been enjoying every aspect of our new home. Affordable housing and self sufficiency motivation helped me get ahead with my education, my career and most importantly, my family.”*

Luis lives in the Meigs Road Apartments, an 18 unit family complex with a mixture of two, three and four bedroom units. This complex was developed by the Housing Authority in 1974 and is well located in the beautiful Mesa area of Santa Barbara. Luis is married and has five sons ages 9 to 16. Luis worked hard to become a licensed electrical contractor. He studied math and electrical classes and Santa Barbara Community College, served a five-year apprenticeship and graduated as an industrial electrician in 1995. His goals are to see his sons attain a higher education than his own and to stay close to family and loved ones. The Quezadas have just bought their own home in the Ventura area and are pleased that another family can now benefit from the affordable housing they recently vacated.

*- Housing Authority of the City of Santa Barbara - 2002 Calendar*



## THREE BAY AREA CASE STUDIES

### *Bay Area Economics\**

As of 1998, 30 municipalities and one county employed inclusionary housing programs in the nine-county Bay Area. The rapidly expanding cities of Livermore and Pleasanton, for example, successfully leverage their growth control ordinances and the demand for development to create affordable units. Livermore developers willingly provide inclusionary units – and occasionally go beyond required levels – to receive project approval from city council. As a result, Livermore has produced approximately 1,140 units since 1978.

The City of Pleasanton maintains a voluntary program that has produced more than 930 units since the mid-1980s. The program has undergone changes over the years, and currently allows an additional 100 units above the annual growth cap to be constructed in projects with 25 percent of units set aside for low and very low-income households. In addition to the voluntary program, the city added a requirement for all residential projects with 15 or more units to reserve at least 20 percent of units for very low, low, and/or moderate income households.

Cities experiencing slower growth have also developed successful programs. The City of Petaluma had produced over 520 affordable units since 1984, with no affordability term limits on multifamily projects. San Leandro has produced over 375 units since 1983. Approximately 53 percent of these units serve very low-income households.

The following case studies provide a more detailed description of the inclusionary programs in three Bay Area cities: Sunnyvale, Palo Alto and San Francisco.

### SUNNYVALE

Sunnyvale adopted its inclusionary housing program in 1980 and updated it in 1991. The program has led to the development of approximately 818 affordable units as of January 2001 (622 rental and 196 ownership units), an average of 39.0 units per year. These figures exclude any units developed with in-lieu fees.

*\*Bay Area Economics (BAE) provides comprehensive real estate economic analysis and urban development services to public, private, non-profit, and institutional clients throughout the U.S. BAE is headquartered in Berkeley, California, with additional offices in San Francisco, Washington D.C., and the Sacramento region. For more information, see [www.bayareaeconomics.com](http://www.bayareaeconomics.com).*

### EDITOR'S NOTE

*These three case studies come from an inclusionary housing study prepared by the real estate consulting firm Bay Area Economics for the City of San José Housing Department in February 2002. It has a useful analysis and comparison of three different applications of the inclusionary requirement. The complete report can be found at the Web site of the San Jose Housing Authority ([www.sjhousing.org](http://www.sjhousing.org)) under the "Reports" heading.*

## **PROGRAM STRUCTURE**

The ordinance requires residential developments of 10 or more units to maintain at least 10 percent of the units as affordable to moderate income households. The inclusionary housing ordinance applies only to developments outside of low-density single-family residential zones, and excludes assisted living and special needs housing projects. Inclusionary units must have similar exteriors to market rate units.

Developers may request payment of an in-lieu fee for projects fewer than 20 units. In-lieu fees associated with for-sale projects are calculated as the difference between the fair market value of a unit and the below-market rate price as established in the program's price guidelines. In-lieu fees for rental projects are the difference between the market rent for the units and the established below-market rent capitalized over 20 years.

For-sale inclusionary units carry a 20-year affordable term. The term "resets" if the unit is resold prior to the completion of 20 years, with the City or its designee maintaining first right of refusal. Sale price is limited to the original purchase price plus the percentage increase of the housing component of the San Francisco Bay Area Consumer Price Index and any major capital improvements. No sales restrictions apply after completion of the 20 year term, or if the City or its designee do not accept the offer of sale at any point.

Rental units must be rented to very low and low income households, and remain affordable for a flat twenty years, regardless of a change in tenants. The City indexes inclusionary rents to the annual percentage increase in the Santa Clara County median income.

## **INCENTIVES**

To help offset any additional costs the inclusionary units may present to developers, the City offers developers a density bonus of 15 percent of the maximum units allowed in any given area. Projects with 10 to 19 units may add an additional unit. Developers also receive fast track permit processing, technical assistance from City staff, and occasionally, Community Development Block Grants to support off-site improvements. In addition, projects with 20 percent low income or 10 percent very low-income units receive a 20 percent density bonus. However, according to City staff, few market rate developers have taken advantage of this option for a number of reasons, including small sites that limit the attractiveness of a density bonus.

## **ADMINISTRATION**

The Housing Division of Sunnyvale's Community Development Department administers the program. It maintains a list of all inclusionary units in the City, conducts annual audits of the inclusionary rental units, establishes current inclusionary rent levels, certifies occupancy and eligibility of ownership units, and conducts title searches to supervise the sale of inclusionary units. In addition, the City contracts with the Santa Clara County Housing Authority to qualify households for ownership units. The Housing Authority reports a four-year waiting list for these units. According to City staff, administration and monitoring of the program requires at least one full-time staff person, plus the Housing Authority contract and additional hours spent by supervisory City staff. Estimated annual cost of administering the Sunnyvale inclusionary program is approximately \$90,000 to \$110,000.

## **COMMUNITY REACTION**

Sunnyvale Planning staff indicates that developers have grown familiar with the program and generally accept its requirements. Since the ordinance is clearly defined in the municipal code, developers have little room to negotiate or request exemptions.

## **FUTURE**

Planning Commission and staff are considering making a number of changes to the inclusionary housing ordinance. For example, in cases where 10 percent of a project leads to a fraction of an inclusionary unit (e.g., 3.2 units for a 32 unit complex), in-lieu fees may be required for that fraction. The City is also considering extension of the affordability term beyond 20 years, as they have determined that 20 years is an insufficient term to assure a steady stock of below-market rate units. As a result, the City has had to purchase a number of units approaching the end of their affordability terms. The City also intends to conduct regular workshops for potential owners and renters under the program, as it handles approximately 30 phone calls a week requesting program details. The City has also considered amending the ordinance to include single-family zones, and require developers to make the interiors of inclusionary units identical to market rate units.

## PALO ALTO

The City of Palo Alto's inclusionary housing program is one of the oldest in the state. The program has produced 152 for-sale units and 101 rental units since 1974, at an average of 9.4 units per year. These figures exclude units developed through in-lieu fees.

### PROGRAM STRUCTURE

Palo Alto does not have an inclusionary housing ordinance per se, but rather incorporates the "Below-Market Rate Program" into the City's Comprehensive Plan. As such, Palo Alto's program is less prescribed, and while certain baseline requirements generally apply to residential developments, City staff can negotiate with developers on a case-by-case basis.

The program requires that, in for-sale projects of three or more units and rental projects of five or more units, at least 10 percent of the units be provided at housing costs that are affordable to low and moderate income households. Developments on sites greater than five acres must include a 15 percent affordable component. For ownership projects, the City sets unit prices at levels affordable to households at 80 to 100 percent of the Santa Clara County Area Median Income. Inclusionary rents are affordable to households at 50 to 80 percent of median income.

The program also requires inclusionary units to have identical exteriors to the market rate units, though for interiors of ownership projects, developers may request City approval to substitute more standard finishings, appliances, or fixtures for luxury items. Inclusionary units should be located throughout the development, and should be provided proportionately in the same unit type mix as the market rate units. Since the greatest demand exists for two- and three-bedroom units, however, the City may negotiate a waiver of the in-lieu fee on any fractional unit in return for the provision of these larger units.

While it is City policy to encourage developers to include the inclusionary units within the project, the City does occasionally allow them to be built off-site. As a third option, the program allows the payment of an in-lieu fee. In-lieu fees also apply to developments that have fewer than 10 units. In addition, developers must pay in-lieu fees for fractions of required inclusionary units. For ownership projects, the in-lieu payment equals five percent of the actual sales price or the fair market value of each unit sold, whichever is greater. For rental projects, developers may opt between an annual payment based on the difference between the initial Section 8 Fair Market Rent and the market rate rents of the units, or a one-time fee based on five percent of the appraised value of the rental portion of the project.

The City directs in-lieu fees to Palo Alto's Housing Development Fund, which supports the activities of non-profit affordable housing developers and covers a portion of the Below-Market Rate Program's administrative costs. Palo Alto's program requires an affordability term of 59 years for both ownership and rental housing, a much longer period than most California programs. For ownership units, the term resets and the City retains first right of refusal on the unit if sale occurs prior to the end of the 59-year term. Resale price is based on the percentage increase in the San Francisco Bay Area Consumer Price Index housing component during the period of ownership. Currently, one-third of the percentage increase in the Consumer Price Index is applied to the original purchase price to determine the resale price. Rental properties have a flat 59-year affordability term, with rents increasing according to one-third of the percent change in the local Consumer Price Index as well.

## **INCENTIVES**

Palo Alto's Below-Market Rate Program includes a density bonus that allows construction of up to three additional market rate units for each inclusionary unit above that normally required, up to a maximum zoning increase of 25 percent in density. The program also allows an equivalent increase in Floor Area Ratio for projects that meet this requirement. However, City staff report that developers seldom use the density bonus, since they would prefer to build fewer larger units.

## **ADMINISTRATION**

The City of Palo Alto contracts with the Palo Alto Housing Corporation, a nonprofit affordable housing developer, to monitor and provide day-to-day administration of the Below-Market Rate Program. PAHC maintains the list of inclusionary units, screens and records eligible households, works with lenders, and monitors the affordability of the inclusionary rents and sale prices. The contract ranges from \$40,000 to \$60,000 annually, and pays for a near full-time employee to administer the program. The high cost reflects the fact that Palo Alto's program dates back to 1974, and therefore has numerous resales of inclusionary units. The resale process requires significant supervision, and staff feel that a newer program, with fewer units and resales, may entail less oversight at first.

The Below-Market Rate Program also addresses vacant land. Under the program, sellers of vacant land subdivided into three or more lots and sold without construction of housing must provide a buildable parcel(s) equivalent to at least 10 percent of the vacant acreage to the City or the City's designee. The City may then use the land for the development of

affordable housing, or sell the property and place the funds in the City Housing Development Fund. The City and developer may also agree to a comparable in-lieu fee based on a least five percent of the greater of the actual sales price or fair market value of the improved lots.

## **SAN FRANCISCO**

San Francisco's inclusionary housing program exists as a policy in the City's General Plan Residence Element. Since the policy began in 1991, it has led to the development of 182 inclusionary ownership units and 68 rental units, or 24.9 units a year.

### **PROGRAM STRUCTURE**

The policy states that residential projects containing 10 or more units which seek Planning Commission approval as a conditional use or a planned unit development should provide a 10 percent affordable component. Staff estimates that half of the residential projects in San Francisco meet these criteria (however, actual production of inclusionary units appears to be substantially below this level). Inclusionary ownership units target first-time homebuyer households with incomes from 60 percent to 100 percent of median income. Affordable rental units should target households earning up to 60 percent of median income.

Units must remain affordable for a 50-year term. To allow monitoring of inclusionary rental units, the policy requires developers to maintain records certifying the tenants' income levels. The Mayor's Office of Housing may request this data on an annual basis, along with an administrative fee. The Office of Housing also monitors resale of ownership units, and may take the necessary steps to verify that an inclusionary unit is owner-occupied or being rented by an income-eligible household.

San Francisco's inclusionary policy provides developers with a great deal of flexibility, and as in Palo Alto, developers may negotiate with staff and the Planning Commission on the exact number of units as well as the affordability levels. The policy guidelines specifically state that the affordable housing requirement may be modified as necessary, taking into account increased project costs due to adaptive reuse of an historically significant building, increased carrying costs due to excessive delay in permit processing, and the provision of other elements in the project which serve a demonstrable community need.

While the policy encourages developers to provide the affordable units on-site, the Planning Commission may approve off-site alternatives if the developer provides more affordable and/or a greater number of affordable units. Linked off-site housing should be ready for occupancy within the same general time frame as the market rate units, and should be in close proximity to the proposed project, in a high need area as identified by the Office of Housing, or in a project type identified as a high priority in the Residence Element or the Affordable Housing Action Plan. Developers may also pay an in-lieu fee to the City’s Affordable Housing Fund, based on the amount of subsidy determined by the Office of Housing that is required to produce a unit meeting the affordability levels.

**FUTURE**

The San Francisco Board of Supervisors is currently considering adoption of an inclusionary housing ordinance to formalize and standardize the process. Although an ordinance may limit the program’s flexibility, staff feels that it would allow a more aggressive approach to inclusionary unit production. Administrative costs of this inclusionary program were unavailable.

<b>THREE BAY AREA CITIES: HOUSING MARKET SNAPSHOT, 2001</b>			
	<b>Sunnyvale</b>	<b>Palo Alto</b>	<b>San Francisco</b>
Median Sales Price: Single Home	\$605,000	\$800,250	\$516,000
Median Sales Price: Condominium	\$394,000	\$450,000	\$499,000
Average Rent	\$1,773	\$2,211	\$2,157
Vacancy Rate	5.9%	3.8%	5.2%
New Single Family Units Permitted	9	70	–
New Multifamily Units Permitted	168	3	861

## **LESSONS LEARNED**

The success of an inclusionary housing program lies in a number of factors, and does not depend solely on market rate housing production. The case studies suggest that the manner in which the inclusionary requirement is applied has a greater impact on the production of inclusionary units. For example, while Sunnyvale sees far less residential development than San Francisco, it has managed to produce over 14 more inclusionary units a year. Palo Alto has a comparable rate of residential development as Sunnyvale, but produces far fewer inclusionary units annually. Therefore, a well-applied inclusionary program is more likely produce a significant number of affordable units.

## **RELATIONSHIP TO GENERAL HOUSING COST**

While a high-priced housing market may allow developers to recoup some of the costs of inclusionary units, it does not necessarily lead to greater inclusionary unit production. Sunnyvale's program has produced more affordable units than either Palo Alto or San Francisco, despite the city's lower housing values.

## **FLEXIBILITY MAY HAVE DISADVANTAGES**

The fact that Sunnyvale's program is enacted through a city ordinance may contribute to its strong rate of inclusionary production. An ordinance allows less leeway for developers to negotiate requirements, and creates more certainty for developers by setting a clear and universally applied standard. This clarity may prove particularly useful at the program's inception, when developers are unfamiliar with the requirements. On the other hand, an ordinance does not offer the flexibility of a General Plan policy, and prevents staff from reviewing the inclusionary requirement on a project-by-project basis. A city can also adapt a General Plan-based program more easily to reflect changing market conditions and policy shifts over time.

## **ADMINISTRATIVE ISSUES A CHALLENGE**

Estimates of the administrative cost of an inclusionary program vary from \$40,000 to \$110,000 among the case study cities. In both Sunnyvale and Palo Alto, at least one full time employee is required to manage the program, in addition to time spent by supervisory staff to adjust and refine the program requirements. Palo Alto's contract with a non-profit housing organization to monitor units and qualify households centralizes these two

tasks, and may offer greater marketing and outreach opportunities since the organization already has contacts with low income households. The cities of Livermore and Pleasanton have considered jointly forming a non-profit to administer both cities' inclusionary programs and save costs.

In general, program managers characterized monitoring of inclusionary requirements as a challenging process. One Sunnyvale Housing Division staff person described the monitoring requirements as "time consuming" and "cumbersome." Complications regularly arise from unit resales, owners renting out their units, and tenants and owners losing their qualification as their incomes grow, among other issues. Staff in all cities emphasized the need for highly detailed deed restrictions to mitigate some of these problems.



## HOW DID WE DO? 17 RECOMMENDATIONS FOR THE MONTEREY COUNTY INCLUSIONARY PROGRAM

*Monterey County Staff Report\**

### I. ISSUES FOR HOMEOWNERS

#### 1. CALCULATION OF SALES PRICE

The criteria used to determine original sales price of an inclusionary unit has varied with market conditions. The County used a housing cost ratio of 35 percent of median income for a four-person household (principal, interest, taxes, insurance and homeowner association fees make up 35 percent of household income). The County's 35 percent ratio is higher than that of most other communities. The ratio should be reduced to 30 percent if it is to include only housing-related costs. Also, the current formula assumes a 10 percent down payment with a 6 to 7 percent loan interest rate. It is recommended that the formula be changed to a 5 percent down payment with a standard 8 percent interest rate to provide more flexibility for buyers who might find it difficult to build up a 10 percent down payment.

The sales price calculation is also based on a four-person median income household. The sales price does not reflect the size of the unit. A question arose as to whether to "tie" the household size to the number of bedrooms. The recommended change is to calculate household income based on a formula of one person per bedroom plus one person. For example, a two-bedroom unit would require a three-person household income. Staff should prepare the calculation early in the development process. Sales prices should not be changed without prior written authorization from the County.

#### 2. VALUE OF HOME IMPROVEMENTS

Currently, up to 5 percent of the original sales price can be credited for home improvements. Several inclusionary homeowners commented on the

*\*Monterey County Staff (Housing and Redevelopment Department) Staff also credit housing consultant Melanie Shaffer Freitas (based in the City of Santa Cruz) for her significant contributions to this report.*

#### EDITOR'S NOTE

*This selection is an excerpt from HOW DID WE DO? EVALUATION OF THE INCLUSIONARY HOUSING PROGRAM. This report provides an excellent overview of many of the complex issues associated with inclusionary ordinances that are not always readily apparent when a program is first designed. The County deserves much credit for seeking broad citizen input and developing a meaningful audit of its program.*

*Part of the usefulness of this selection is that the issues and recommendations are explained briefly. However, this part of the report follows a summary of the Monterey program. Thus, it assumes the reader has full knowledge of the Monterey Program. The report, in its entirety, is posted online at [www.co.monterey.ca.us/housing](http://www.co.monterey.ca.us/housing). Then click "documents" and look for the title EVALUATION OF THE INCLUSIONARY HOUSING PROGRAM. Readers may also be interested in the recently completed (January 2003) INCLUSIONARY HOUSING ADMINISTRATIVE MANUAL that is also located on this web page.*

valuation of improvements. Failure to consider improvements in the calculation of resale value may discourage property owners from investing in improvements. However, including the value of all improvements in the resale value may make the home too expensive for low- to moderate-income households.

The type of improvement is also a consideration. For example, bedroom additions are often necessary as a family expands. Thus, a bedroom addition could be considered a valuable improvement. The new resale value could then be based on number of bedrooms and, consequently, a larger household income. By contrast, landscaping, hot tubs and other types of improvements are not of the same significance as bedroom additions.

The County should increase the percentage weight of improvement to 10 percent of the original purchase price. A 10 percent credit will reflect basic improvements required to maintain a property. The County will no longer require proof of improvements. Instead, a 10 percent credit will be provided at the time of refinancing or resale if the unit meets a basic maintenance level. Furthermore, the value of a bedroom addition will be based on the difference in household size allowed to occupy the unit with the bedroom addition.

Another question is the resale of housing units that are not maintained. Several communities report that they inspect units prior to resale and deduct the costs of repair from the resale value. Monterey County has implemented this strategy. It is recommended that the County continue to enforce this policy.

### **3. CALCULATION OF RESALE VALUE**

Many inclusionary homeowners want to be able to sell their homes during the affordability period without resale price restrictions. Monterey County calculates the resale value of an inclusionary housing unit based on original sales price plus the percentage change in median income since the original sales date. The current method of calculating resale price by “pegging it” to the change in median income reflects the intent of the program. As median income changes, the resale value changes in the same proportion. This ensures that the moderate-income household can still afford to purchase the unit.

Some communities tie the resale value increase to changes in the *Consumer Price Index*. However, there often are years when the *Consumer Price Index* increases but incomes do not. Therefore, the *Consumer Price Index* indicator might inflate the resale value beyond the reach of moderate-

income households. Other communities allow property owners to resell the unit at market value. This practice depletes the inventory of affordable units in the housing stock. Even if some of the “housing subsidy” is recaptured, it is usually not sufficient to replace the lost affordable unit.

The underlying assumption of the inclusionary ordinance is that the high cost of housing excludes low- and moderate-income households from the benefits of home ownership. These households include teachers, public safety employees, health care workers and others. The goal of the inclusionary ordinance is to ensure that these households can stay in Monterey County. Achieving this goal requires that increases in the market value of an affordable unit do not make it too expensive for resale to another moderate-income household. In fact, the inclusionary ordinance specifically states that “resale control through deed restrictions” is a necessary consideration in order to prevent undermining of the credibility of the whole program, not so much because of the windfall to those who sell an inclusionary unit, but because of the loss of the unit itself as an affordable unit.

The question of resale value highlights the conflict between preserving the stock of affordable units and allowing the build up of equity for the owners’ use. It is recommended that Monterey County continue to recognize the importance of preserving the stock of affordable units and ensuring that they remain affordable.

#### **4. REFINANCING AND SECOND DEED OF TRUSTS**

After purchasing an inclusionary unit, homeowners may want to either refinance their existing first mortgage or encumber a second mortgage on the property. The current ordinance is interpreted to allow refinancing if:

- The loan-to-resale value does not exceed 95 percent;
- Improvements calculated in the resale value do not exceed five percent of the original purchase price;
- Homeowners receive no cash out; and
- The County’s lien remains in second position.

Some inclusionary owners indicate that they would like to be able to refinance or encumber a second deed of trust. It is recommended that the County allow inclusionary homeowners to take out cash and revise the loans-to-resale value to 100 percent.

## 5. TITLE CHANGES

The variety of household types listed on the title of an inclusionary unit give rise to a number of possible title changes. Married couples, unmarried couples or single individuals may hold title. Monterey County allows transfer of title to surviving joint tenants upon death of one of the owners. The County retains all deed restrictions on the property. A new spouse may be added on the title, or title may also be transferred to a spouse as a result of a divorce.

The one issue that remains, however, is the question of inheritance. If the sole or surviving owner of the property dies, the property must be resold to another income-eligible household. The heirs of the deceased must qualify as an income-eligible household if they want to continue to occupy the property.

Should the County allow an inclusionary unit to be inherited, especially by a child or children of the original owner? This issue has proven to be a very difficult and emotional issue for the public as well as the Housing Advisory Committee and Planning Commission. Staff's recommendation is that the program be revised to allow children or stepchildren to inherit the property, regardless of their income. However, they must occupy it as their principal residence and a new 30-year resale period begins.

The Planning Commission indicated that the primary purpose of the inclusionary ordinance is to provide affordable units to low- and moderate- income households. Allowing non-income eligible children or stepchildren to inherit affordable units would not advance achievement of this goal. However, the Commission did acknowledge that there might be some transition time needed after the death of a parent and the sale of a property. Therefore, the Commission recommended that the ordinance continue to require the sale of the property to an income-eligible household. However, a one-year "compassion" period will be allowed between the settlement of the estate and the eventual sale of the property if a non-income eligible child or stepchild inherits it.

## 6. FIRST TIME HOMEBUYER REQUIREMENT

The Inclusionary Program does not restrict eligibility to first-time homebuyers. There have been instances where Monterey County inclusionary applicants already owned a home, sold or rented it and moved to an inclusionary unit. Most inclusionary applicants will be first-time buyers due to income and asset limitations. Restricting inclusionary housing to first-time buyers would prevent inclusionary owners from buying a larger unit. Therefore, it is recommended that the County retain its currently policy and not require inclusionary applicants for homeowner units to be first-time buyers.

## **II. RENTAL UNITS:**

Current restrictions regarding inclusionary rental units include: (i) that units must be affordable to either very low-income or low-income households; (ii) affordability is defined as rents that are at 30 percent of 50 percent of median income for very low-income households or 30 percent of 70 percent of median income for low-income households; and (iii) rents are to be restricted to affordable rents and monitored as such “in perpetuity.”

### **7. RENTAL UNIT OCCUPANCY AND AFFORDABILITY REQUIREMENTS**

Monitoring of rental units identified units rented to households that are not income-eligible. In other cases rental units were occupied by households too large for the unit. Affordability restrictions have not been re-recorded upon the sale of rental property. To address these issues, regulatory agreements should contain detailed requirements for the occupancy of the rental units. These agreements should be recorded against the property.

The inclusionary ordinance should be revised in order to be more consistent. The ordinance restricts occupancy to very low- and low-income households. It defines low-income as households at or below 80 percent of median income. Yet, the ordinance also defines affordable rents as affordable to low-income households at 30 percent of 70 percent of median monthly income. The ordinance needs to consistently define low-income at 80 percent and to change the affordability definition to 30 percent of 80 percent, not 70 percent.

### **8. USE OF EXISTING UNITS TO SATISFY INCLUSIONARY REQUIREMENT**

The inclusionary ordinance has been interpreted to allow developers to substitute existing units for their off-site contribution. Off-site units can be used to meet the inclusionary requirement if “a greater contribution” can be demonstrated. Usually this means that the units, if rentals, will be affordable to households at or below 50-70 percent of median income. Further, the County requires that the rental units have affordability restrictions imposed “in perpetuity.”

Several members of the public and representatives of groups commented. Proponents argued that the existing procedure encouraged the rehabilitation of existing units in the housing stock and provided rental units at greater affordability levels. However, other comments included the statement that existing units do not really meet the intent of the ordinance, which was to provide affordable units in conjunction with new construction. Further, there is concern regarding the long-term property condition of existing units, as compared to the life cycle of a newly constructed unit.

It is recommended that the County no longer allow existing units to be substituted for off-site development of inclusionary housing requirements. There is no substantial community benefit to be derived from allowing existing units to be substituted.

### III. ADMINISTRATIVE POLICIES

#### 9. DEVELOP AN INCLUSIONARY HOUSING MANUAL\*

Evaluation of the Inclusionary Housing program revealed a need to consolidate procedures and develop a written manual. The County should develop and maintain an Inclusionary Housing Manual that describes day-to-day administrative procedures and policies, including:

- ***Program Guidelines.*** A description of all elements of the inclusionary program, including eligibility criteria; unit pricing criteria; homeowner requirements (including occupancy, subordination, default and foreclosure, title changes and refinancing); rental requirements (including occupancy, rent adjustments and habitability); restrictions on resale and re-rental; on site unit requirements; off site unit requirements; land donation option; applicant selection and marketing procedures, special handling procedures;
- ***Compliance Guidelines.*** A description of the monitoring processes for developers, developments, homeowner occupancy, tenant occupancy and rents and the penalties for noncompliance.
- ***Fact Sheets.*** Shorter fact sheets should be developed that outline the procedures for homeowners, tenants and developers.

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\***Editor's Note:** The County completed this manual in January 2003. It is posted online at [www.monterey.co.us/housing](http://www.monterey.co.us/housing). Click on "Documents" and look for title "*Inclusionary Housing Administrative Manual.*"

## **10. MONITORING AND COMPLIANCE PROCEDURES**

As part of the 2001 evaluation process, staff from the Housing and Redevelopment Office initiated a comprehensive monitoring process. The monitoring effort needs to be continued in the future. Inclusionary housing units are an extremely valuable component of Monterey County's affordable housing stock. These units must be consistently monitored in order to ensure that units are not "lost" and converted to market rate units inadvertently.

Further, there needs to be considerable involvement by County Counsel or other legal professionals to define legally acceptable compliance methods. These methods need to be defined in legal agreements with owners of inclusionary units and, when required, enforcement must occur.

## **11. IMPROVE IMPLEMENTATION TOOLS**

A review of current resale agreements and legal documents indicate that there needs to be some revision of the documents. The current resale agreement is very difficult to understand and needs to be re-written to make it more customer-friendly and readable. Further, it may be necessary to require additional legal documents to be recorded against a property to prevent properties from being re-sold without proper notice to the County.

Public comment on this issue included a recommendation that all documents be available in English and Spanish for potential applicants. Further, it was recommended that the County consider on-going education of inclusionary recipients in regard to their responsibilities and maintenance of property standards.

## **12. MARKETING AND SELECTION PROCEDURES**

Evaluation of the inclusionary housing program identified a need to define marketing and selection procedures. Improved marketing and selection procedures should include:

- Staff markets the program, including advertising for availability of units.
- Staff conducts lottery and establishes a priority list based on written criteria, for example, households who live or work in Monterey County.

- Staff maintains and updates list on a yearly basis. List is used for both new inclusionary units as well as turnover of existing homeowner and rental units.
- Housing Authority will continue to qualify potential applicants for income eligibility.
- Staff will refer eligible applicants to developers who will coordinate eventual transfer of ownership to qualified applicants.

Members of the Planning Commission supported the priority for households who live or work in Monterey County and suggested that there also be consideration given to households who have jobs in close proximity to the inclusionary unit. Since one of the planning objectives for the County is to balance jobs and housing, it may be appropriate to give additional priority to households with jobs near the proposed unit. Further, the marketing plan should allow some flexibility for developers to propose alternative marketing strategies, especially in regard to employee housing.

### **13. SPECIAL HANDLING PROCEDURES**

In 1992, the County initiated a “Special Handling” program for affordable units. Although not tied directly to the Inclusionary Housing Ordinance, this program compliments the Inclusionary Housing Ordinance by encouraging a higher percentage of affordable units. The program applies to developments of 7 or more units that provide 25 percent or more affordable units. Incentives included as part of the program include fee reductions and waivers, priority processing, financial assistance and density bonuses.

The requirements for the affordable units are more stringent than the inclusionary ordinance in that “for-sale” units must be affordable to low income households and “rental units” must be affordable to very low-income households. The procedures also state that all affordable units must be “...rendered permanently affordable by deed restriction in the manner prescribed to inclusionary units by the inclusionary Housing Ordinance.” In total, there have been eight developments processed under the Special Handling procedures.

One of the program goals should be assistance in expediting applications and permits. Therefore, it is recommended that the program be revised to “Entitlement and Permit Processing Coordination.” Development applications that qualify for this program would be assigned to a specific staff member from the Housing and Redevelopment Office who would be responsible for monitoring and coordinating the development process

as efficiently as possible. Further, there would be aggressive marketing of the program to the development community and County staff.

#### **14. EXEMPTIONS FOR OWNER-OCCUPIED UNITS/LOTS**

Currently, if a developer/owner indicates that they will be occupying one of the units in a proposed development as an owner-occupant, that unit is exempt from inclusionary housing requirements. There have been several instances of misuse of this policy. For example, owners have claimed owner-occupied exemptions on more than one development during the same period of time. It is recommended that the County limit the number of owner-occupied exemptions to one per development and, further, one exemption per developer for every 10-year period. The Planning Commission further recommended that an owner-occupied exemption only be allowed for developments of 4 or less units.

#### **15. TIMING AND DESIGN OF INCLUSIONARY UNITS**

The County currently has no definitive written policies regarding the design of inclusionary units. Specifically, there are no written policies regarding the exterior appearance of inclusionary units. Further, there should be more specific policies in terms of when inclusionary units are built in relation to the construction of the market rate unit. Examples of issues that should be addressed then are exterior appearance, size of units, clustering or scattering of units and timing of provision of inclusionary units.

The issue of clustering or scattering units is dependent on several variables. The first is the size of the project. A project requiring only two inclusionary units is different than a project generating 10 inclusionary units. The second variable is the type of project. Again, the type and actual costs of developing a large lot, single-family development are different that the costs and variables associated with a multi-family development of town homes or apartments. Therefore, it is recommended that the option of clustering or scattering be available and determined on a project-by-project basis.

It is recommended that the County include written guidelines in its administrative procedures that specify that the exterior appearance of the inclusionary units shall be similar to the market rate units. Further, the inclusionary units shall be similar in number of bedrooms to the market rate units although square footages can differ between the units.

Regarding timing, the issue involves the stage of the development

approval process at which time the developer commits to an inclusionary requirement and option selection. Currently, the inclusionary requirement does not need to be identified until the final map stage. In order to provide full public disclosure of the inclusionary requirement, it is recommended that a written agreement be developed at the (earlier) tentative map stage. The written agreement should include the number of inclusionary units to be provided and the anticipated household income levels of affordability. Further, the agreement should contain the requirement that the inclusionary units must be built before or concurrently with the market rate units. It was initially suggested during the public comments on this item that the agreement be a “condition of approval” at the tentative map stage. However, there was also some concern that, by requiring it as a condition of approval, there was little flexibility provided should there be major or unforeseen changes between the tentative map and final map stages. Therefore, it is recommended that the requirement be finalized as a written agreement at the tentative map stage, rather than as a “condition of approval.”

## **16. THREE OPTIONS TO FULFILL INCLUSIONARY REQUIREMENT**

The Inclusionary Housing Ordinance has allowed developers to fulfill their inclusionary housing requirements by choosing one or a combination of three options: they may provide inclusionary units on-site, provide inclusionary units off-site or pay an in-lieu fee. The availability of three options provides flexibility for both the County and the developer in delivering affordable units. Each development proposal is different and the opportunity to have a variety of different options available helps to ensure that the maximum benefit will be achieved.

However, there is also concern that payment of in-lieu fees does not necessarily generate a unit similar to an inclusionary housing unit. In-lieu fees have been used to help with development and financing costs of affordable units in the County but there is not necessarily a one-to-one correlation between the amount of in-lieu fees paid and the development of a similar number of affordable units. Therefore, it is recommended that the payment of in-lieu fees for developments of 7 or more units only be allowed as a “last-resort,” that is, if the developer demonstrates that provision of inclusionary units either on or off-site is infeasible. Payment of in-lieu fees would still be allowed for developments of six or less units.

There were several public comments in regard to the provision allowing off-site units. The real estate and development community generally favored allowing units off-site because it allowed more flexibility. However, others noted that off-site units were being developed in planning areas far from the market units. It could be construed, they argued, that the inclusionary units were being concentrated in areas that already had substantial numbers of low and moderate-income households.

In order to more accurately reflect the objective of the Inclusionary Housing Ordinance, it is recommended that off-site units be allowed only if

- 1) the off-site units are located within a 10-mile radius of the market rate units, and
- 2) there is demonstration that the off-site units are producing a “greater contribution”.

“Greater contribution” will include requirement that rental units must be affordable to very low-income households and ownership units affordable to low income households. Further, “greater contribution” shall also include that the number of units produced off-site will be greater than the number of units required on-site.

## **17. IN-LIEU FEE CALCULATION**

In-lieu fees have been allowed since the inception of the program. The methodology used to determine the fee for projects of seven or more units or lots is:

“Fifteen percent of the median sales price of a single family home in the unincorporated portion of the Planning Area in which the new residential development is located increased by the percentage difference between the lowest unincorporated planning area median single family home sales price and the median single family home sales price in the unincorporated portion of the Planning Area in which the new residential development is located.”

A proportional fraction of the in-lieu fee is charged for projects of up to six units or lots.

<b>Planning Area</b>	<b>Median Sales Price</b>	<b>In-lieu Fee (for 7 or more units/lots)</b>
Greater Salinas	\$219,000	\$47,021
Toro	\$404,750	\$160,610

The original concept was that the in-lieu fee would equal the cost of providing an affordable unit similar to the market rate units. However, as the examples above demonstrate, the fees do not reflect the actual subsidy cost of providing an affordable unit.

The fee is based on 15 percent of the sales price of a home, adjusted for the difference between lowest and median priced homes. However, because the fee is based on only 15 percent of the price, rather than a 100 percent factor, the fee only reflects a portion of the actual cost of providing a housing unit. Further, the fee as currently calculated does not take into account cost of new construction.

The fee should be based on the difference between the market cost of an average unit or lot in the development and the cost of providing a unit or lot affordable to a household earning 80 percent of median income. There would then be no need to calculate fees by planning areas because the market cost of the average unit will reflect the market costs in that area. For projects of six or less units or lots, the fee would be calculated on a proportionate share of the in-lieu fee.

*An example of the revised fee calculation:*

**Assumptions:**

\$400,000	Sales Price of Market-rate Unit
\$116,000	House Price Affordable to a 4-person household at 80 percent of median income; 30 year term at 8 percent interest; and limiting principal, interest, taxes and insurance limited to 30 percent of household income
\$284,000	In Lieu Fee for seven unit/lot project

The \$400,000 sales price is based on the average sales price of a unit or lot in the market rate development that is triggering the inclusionary housing requirement. The in-lieu fee therefore will vary depending on the sale prices of the proposed development.

There has been some concern noted that, since a written agreement is recommended to be developed by the tentative map stage (*see Issue 15*), the estimated sales price at the tentative map stage might change by the time the development is actually built. Therefore, it is recommended that a policy be included with the revised in-lieu fee calculation that the in-lieu fee calculation at the time of the tentative map is an estimate only and is subject to revision and verification at the time of construction.

One final issue regarding in-lieu fees is whether the fee should be assessed on existing or remainder lots. For example, a developer applies to subdivide an existing lot into three lots and the question has been asked whether the in-lieu fee applies to two or three lots. Staff has interpreted the ordinance in the past to require the fee to be assessed on all three lots. It is recommended that the County formalize this practice into a written policy that specifies that all lots in projects of up to six units shall be assessed an in-lieu fee.



# Part V

## LEGAL ISSUES



### THE FACES OF AFFORDABLE HOUSING

#### Joan Haughton

*“Having affordable rent takes all the worry away. Without having debt, I can just sit and enjoy being and feel at peace.”*

Joan is a retired great-grandmother and considers caring for her garden as her primary vocation. She finds that Santa Barbara is the perfect place to grow the flowers she has always loved. She is also an avid seamstress and reader. Joan continues to give back to the community by knitting baby wear for the St. Francis Hospital Guild. Joan lives at SHIFCO, which was named in honor of the developers of the property (Senior Housing Interfaith Corporation). This 107 unit senior complex with private gardens was built in 1976. In an effort to ensure stable management and guarantee affordability in perpetuity, SHIFCO was acquired by the Housing Authority in 1988 for \$2.2 million in outstanding debt.

*– Housing Authority of the City of Santa Barbara - 2002 Calendar*



## HOUSING ELEMENTS AND AFFORDABLE HOUSING LAWS

*Alexander Abbe, Roxanne M. Diaz and Robert H. Pittman\**

### I. HOUSING ELEMENTS

In 1980, the Legislature required local agencies to adopt housing elements as a part of their general plan.<sup>1</sup> The legislation recognized the serious shortage of housing in California, particularly affordable housing, and gave local agencies the responsibility to facilitate the improvement and development of housing for all economic segments.

Under these laws, a housing element must provide for the existing and projected housing needs of all economic segments of the community. Although the local agency need not construct the housing itself, it must identify potential sites for its development, and form goals, policies and programs that will promote its development. A local agency's particular housing "need" is determined by the state Department of Housing and Community Development ("HCD"), in cooperation with the local council of governments, if a particular area has a council of governments.<sup>2</sup>

This information, known as the Regional Housing Needs Assessment (or "RHNA"), establishes the minimum new construction required for each of four income categories:

- very low (below 50 percent of area median income);
- low (50 percent to 80 percent of median income);
- moderate (80 percent to 120 percent of median income); and
- above moderate (above 120 percent median income).

The housing element must be reviewed by a state agency prior to adoption.

<sup>1</sup> Cal. Gov't Code §§ 65580 and following.

<sup>2</sup> Cal. Gov't Code § 65584

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#### EDITOR'S NOTE

*The following selection provides an overview of legal issues related to local agency housing elements. The authors explain how local agencies can benefit from state certification of their housing elements, and show how planning for inclusionary housing helps local agencies improve their chances for obtaining certification. While most jurisdictions are familiar with the statutory requirement to adopt a housing element, local jurisdictions will need to become increasingly familiar with obligations under other provisions of state housing law. This selection comes from a paper presented at the County Counsels' Association of California, Land Use Section Spring 2002 Conference in Santa Barbara, California, May 24, 2002.*

Local agencies must submit draft housing elements to HCD at least 90 days prior to adoption, or 60 days prior to amendment.<sup>3</sup> HCD evaluates whether the draft element or draft amendment complies with state law. The local agency is given an opportunity to make corresponding changes.

If HCD certifies that the element conforms with state law, the statute creates a rebuttable presumption of the element’s validity in any subsequent litigation challenging the element.<sup>4</sup> This presumption is a powerful deterrent to litigation and is a primary reason local agencies strive to attain HCD certification of their housing elements. Existing law does *not* give the same legal force to a decision of HCD to decline to certify an element. Instead, the statute authorizes a locality to “self-certify”<sup>5</sup> the element by making findings as to why it rejects HCD’s conclusions.<sup>6</sup>

### CONSEQUENCES OF INVALID HOUSING ELEMENT

The consequences of failing to adopt a valid housing element can be severe. In addition to requiring a local agency to revise its housing element to conform to state law, a court may *suspend* the authority of the local agency to issue building permits, variances, and subdivision map approvals, or to grant zoning changes.<sup>7</sup> A court could also mandate the *approval* of all applications for building permits or other related construction permits for residential housing in certain circumstances.

- For example, one court prohibited a city from issuing any building permits, map approvals, or other discretionary land use approvals until the city revised its housing element.<sup>8</sup> The case concerned whether to grant relief to a developer who had a tentative map approval prior to the court’s order. Ultimately, the court reasoned that even though the developer intended to build a housing development, approval of the development could still impair the city’s ability to meet its RHNA for low-income housing, and disallowed the project until the housing

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<sup>3</sup> Cal. Gov’t Code § 65585.

<sup>4</sup> Cal. Gov’t Code § 65589.3.

<sup>5</sup> The “self-certification,” under which a local agency makes findings explaining why it complies with state law notwithstanding HCD’s comments, is to be distinguished from the special “self-certification” for local agencies within the regional jurisdiction of the San Diego Association of Governments (“SANDAG”). See Cal. Gov’t Code § 65585(f). Local agencies in the SANDAG region may adopt housing elements without undergoing HCD review, provided that a series of conditions are met. See Cal. Gov’t Code § 65585.1.

<sup>6</sup> Cal. Gov’t Code § 65585(f). Note, however, that if the local agency self-certifies its element, it will bear the burden of proof of establishing that the element complies with state law, in any legal action challenging the validity of the element.

<sup>7</sup> Cal. Gov’t Code § 65755.

<sup>8</sup> *Committee for Responsible Planning v. City of Indian Wells*, 209 Cal. App. 3d 1005 (1989).

element was in compliance with state law.

- In another case, a court concluded that a city had not provided “adequate sites...to facilitate and encourage development of...emergency shelters and transitional housing.”<sup>9</sup> As a result, the court required the city to approve all conditional use permit applications for emergency shelters and transitional housing until it brought the housing element into compliance with state law.

Without a valid housing element, local agencies cannot approve any development project requiring a finding of consistency with the general plan.<sup>10</sup> A finding of consistency with a general plan is not valid where a general plan is incomplete or inadequate.<sup>11</sup> Accordingly, a local agency without a valid housing element would not be able to approve most development projects.

## TIPS ON GAINING HCD CERTIFICATION

Local agencies can improve their chances of obtaining HCD certification by reviewing HCD comments on draft elements. The following nine-point summary of common criticisms is based on comment letters HCD has sent to various local agencies.

### 1. INVENTORY OF LAND

A housing element must contain an inventory of land suitable for residential development, including vacant sites and sites having potential for redevelopment, and an analysis of the relationship of zoning and public facilities and services to these sites. This is one of the most closely scrutinized areas of the housing element. Unless there is ample land in the jurisdiction to satisfy the RHNA requirement, HCD asks that local agencies provide information on *specific* sites, rather than general observations about large areas of land.

In particular, HCD looks for information on the general plan designation, zoning and density, the suitability and feasibility of development, and the

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<sup>9</sup> *Hoffmaster v. City of San Diego*, 55 Cal. App. 4th 1098 (1997). See Cal. Gov't Code § 65583(c)(1).

<sup>10</sup> Some of the approvals requiring a finding of consistency with the general plan include: subdivision map approvals (Cal. Gov't Code §§ 66473.5 and 66474); specific plan or other development plan and amendments thereto (Cal. Gov't Code §§ 65359 and 65454); development agreements (Cal. Gov't Code § 65867.5); public works projects and public acquisition or disposition of property (Cal. Gov't Code § 65402); capital improvement programs by joint powers agencies (Cal. Gov't Code § 65403); redevelopment projects (Cal. Health & Safety Code §§ 33331 and 33367); and housing authority projects (Cal. Health & Safety Code § 34326).

<sup>11</sup> See for example, *Resource Defense Fund v. County of Santa Cruz*, 133 Cal. App. 3d 800, 806-07 (1982).

Site	SITE CHARACTERISTICS		SITE EVALUATION					
	Parcel Size (acres)	Development Code Zoning Category	Infrastructure	Potential Units				
				Very Low	Low	Mod	Above Mod	TOTAL
123 Green St.	10.5	R-1 (1 DU/ac)	no sewer; narrow rd.				5	5
456 Blue Rd.	27.2	R-3 (3 DU/ac)	deficient fire protect.; no sewer			5	15	20
789 Red Lane	6.8	R-5 (5 DU/ac)	good	15	15			30
(insert additional rows for each potential development site)								
<b>TOTALS</b>				<b>100</b>	<b>130</b>	<b>80</b>	<b>93</b>	<b>403</b>
<b>RHNA</b>				<b>100</b>	<b>125</b>	<b>80</b>	<b>70</b>	<b>375</b>
<b>Surplus (Deficit)</b>				<b>0</b>	<b>5</b>	<b>0</b>	<b>23</b>	<b>28</b>

available infrastructure at each site.<sup>12</sup> In addition to a written discussion of these factors, a summary table satisfying the HCD requirements could take a form like the one above.

## 2. CONSTRAINTS

The element must analyze potential and actual governmental and nongovernmental constraints upon the maintenance, improvement, or development of housing for all income levels.<sup>13</sup> HCD typically looks for the following components in the constraints analysis:

- **Land Use Laws.** The element should identify development densities, parking requirements and restrictions on lot coverage, lot sizes, unit sizes, setbacks and building heights. In its comment letters, HCD invariably asks for more information about parking standards and building height limitations.
- **Design Review.** HCD will look at whether objective standards and

<sup>12</sup> Cal. Gov't Code § 65583(a)(3).

<sup>13</sup> Cal. Gov't Code § 65583(a)(4), (a)(5).

guidelines exist to allow developers to determine what is required prior to submitting an application and also what the cost impacts of design review are.

- ***Code Enforcement Program.*** HCD also asks for an analysis of whether a jurisdiction's code enforcement program poses a significant constraint to housing development or maintenance, and whether the jurisdiction has enacted any amendments to the Uniform Building Code that would affect development.
- ***Fees and Exactions.*** The element should identify permit, development and impact fees, in-lieu fees and land dedication requirements. Include any contributions or payments required as a precondition for receiving any kind of development permit.
- ***Processing and Permit Procedures.*** The element should describe the permit requirements and how these procedures affect the cost, timing and feasibility of housing. Include a description of typical permit processing times, standard approval procedures and the entire list of permits that would be necessary for a residential development. HCD also looks for a comparison of the permit and approval process for typical single-family subdivisions and typical multifamily projects. *HCD often asks for a thorough analysis of these constraints.*
- ***On- and Off-site Improvements.*** The element should describe the improvements that are required as conditions of development, such as improvements to street widths, curbs, gutters and sidewalks, as well as water and sewer connections.
- ***Thoroughness of Constraints Analysis.*** When a draft element does not contain a thorough constraints analysis, HCD will invariably defer consideration of the adequacy of the programs to remove constraints to housing, by simply stating that "absent a complete constraints analysis, it is not possible to determine if additional program actions are necessary to mitigate potential and actual governmental constraints." Given that this will lead to additional delays in adoption of the housing element, it is important to be as thorough as possible in the constraints analysis for the draft element.

### 3. SPECIAL HOUSING NEEDS

The element must contain an analysis of the special housing needs of certain groups, including the disabled, the elderly, large families, farmworkers, families with female heads of households and persons in need of emergency shelter.<sup>14</sup> For this part of the element, HCD requires that

each of these groups have its own separate analysis, rather than an analysis of “special needs groups” in the aggregate.

In particular, HCD asks for additional analysis of the availability of emergency shelters and transitional housing and the feasibility and constraints for developing additional facilities. The land inventory must identify sites where such facilities are permitted. The programs, in turn, should identify methods of removing constraints to the development of the facilities and discuss how the local agency will encourage and facilitate the development of shelters and transitional housing. Finally, the element should describe what areas are accessible to public services and transit.

HCD also requires a detailed analysis of the special needs of the disabled and the constraints on development, improvement and maintenance of housing for the disabled, in *virtually every comment letter*. The element should contain a program that removes constraints or provides reasonable accommodations for housing intended for persons with disabilities, such as facilitating approval of group homes, Americans With Disabilities Act (ADA) retrofit efforts, an evaluation of the zoning code for ADA compliance, or other measures that provide flexibility in the development of housing for persons with disabilities.

#### **4. GOALS FOR MAINTENANCE, IMPROVEMENT AND DEVELOPMENT**

The element must contain a statement of the local agency’s goals relative to the maintenance, improvement, and development of housing.<sup>15</sup> HCD often asks for *quantified* information with respect to these goals, and also looks for the goals for each income category, rather than an aggregate number. In its comment letters, HCD sometimes recommends that the element contain the following table:

<b>Income Category</b>	<b>New Construction</b>	<b>Rehabilitation</b>	<b>Conservation</b>
Very Low Income			
Low Income			
Moderate Income			
Above Moderate			

<sup>14</sup> Cal. Gov’t Code § 65583(a)(6).

<sup>15</sup> Cal. Gov’t Code § 65583(b)(1).

## 5. SITES TO BE MADE AVAILABLE

The element must identify adequate sites, which will be made available through appropriate zoning and development standards and with services and facilities for a variety of types of housing for all income levels.<sup>16</sup> If the draft element does not identify adequate sites to meet the RHNA requirements, HCD is unlikely to certify the element. In addition, if the element does not identify adequate sites to accommodate the prescribed development for all income groups under the RHNA, the local agency must identify sites with zoning that permits both owner-occupied and rental multifamily residential use by right (without a conditional use permit).<sup>17</sup> Given that local agencies might prefer to maintain their discretion to approve or disapprove housing projects, it is important that the housing element identify sufficient potential locations for housing for all income groups, even if some of these sites would ultimately be impractical to develop as a result of the various governmental, environmental and market constraints.

Accordingly, a local agency should consider identifying additional sites, perhaps by identifying land suitable for redevelopment or recycling, including underutilized residential land, publicly-owned and surplus land, aging non-residential uses that may be suitable for recycling to residential uses, areas suitable for mixed commercial and residential uses, and sites eligible for adaptive reuse programs. The element cannot rely on the absence of land for housing, it must rely on financing and other non-site related constraints that explain its inability to meet its “fair share” of the regional need for affordable housing. Note also that if the local agency cannot locate sufficient sites for low-income housing, it must provide a numerical projection of the number of lower-income dwellings it does expect to produce.<sup>18</sup>

## 6. HOUSING PROGRAMS

The element must contain programs that set forth a five-year schedule of actions the local agency is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element.<sup>19</sup> This is another closely scrutinized area of the housing element, especially with respect to the following issues:

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<sup>16</sup> Cal. Gov't Code § 65583(c)(1).

<sup>17</sup> Cal. Gov't Code § 65583(c)(1)(A).

<sup>18</sup> Cal. Gov't Code § 65583(b)(2).

<sup>19</sup> Cal. Gov't Code § 65583(c).

- ***Timelines for Program Actions.*** In the large majority of comment letters, HCD asks for specific time frames in which programs will be carried out, and even asks for separate dates for completion of intermediate steps in programs.
- ***Adequacy, Utilization and Promotion of Density Bonus Ordinance.*** As of 1979, all local agencies were required to adopt density bonus ordinances.<sup>20</sup> HCD examines whether the jurisdiction has such an ordinance, how it is implemented, and the extent to which developers are made aware of the availability of the density bonus. In addition, HCD interprets density bonus law to mean that density bonuses may not be offered for the development of *moderate-income* units unless a developer has already met the State standards for low- and very low-income or senior units.<sup>21</sup> Offering moderate-income units before lower-income units would “undermine the intent” of the density bonus law, according to HCD.
- ***Other Incentives.*** Similarly, the housing element should specify what other incentives and/or regulatory concessions will be used to implement program actions, such as reductions and waivers of fees and improvement requirements.
- ***Mandatory Actions.*** HCD prefers that local agencies commit themselves to taking specific actions to implement programs, rather than promise to consider adopting a program.
- ***Outreach Efforts.*** HCD sometimes suggests distributing an inventory of potential development sites to area developers and/or conducting a request for proposal process for affordable development on specific sites. HCD also recommends outreach efforts to persons who might benefit from these programs.
- ***Funding Sources.*** HCD asks for an identification of the specific funding sources of a program.
- ***Responsible Party.*** HCD also asks the local agency to identify the party that will be responsible for carrying out particular programs.

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<sup>20</sup> Cal. Gov’t Code §§ 65915 and following.

<sup>21</sup> See Cal. Gov’t Code § 65917.

## 7. EQUAL OPPORTUNITY

The element must promote housing opportunities for all persons regardless of race, religion, sex, marital status, ancestry, national origin, or color.<sup>22</sup> For this requirement, HCD typically looks for a description of how information is disseminated to potential complainants and what organization enforces fair housing laws. Where appropriate, HCD also looks to see if fair housing information is distributed in languages other than English. In addition, fair housing information can be distributed in a variety of locations, including buses, public libraries, community and senior centers and local social service offices.

Note that one common error in drafting housing elements is to include age as a proscribed category of discrimination. State Equal Opportunity requirements do not apply to age.<sup>23</sup> In fact, restricting housing to persons of certain age is permissible in limited circumstances, such as senior housing, and if the jurisdiction has senior housing developments it should clearly not proscribe them in the housing element.<sup>24</sup>

## 8. PUBLIC PARTICIPATION

The element should describe the local agency's diligent efforts to achieve public participation of all economic segments of the community in the development of the housing element.<sup>25</sup> This is another category that HCD scrutinizes closely. HCD looks for information on how low-income groups were notified of the housing element revision. As with the equal opportunity information, one way the local agency can promote awareness is by distributing brochures at senior and community centers, libraries, public offices and other locations. HCD also will examine how the input of low-income groups was *utilized* in the element.

## 9. REVIEW OF PREVIOUS ELEMENT

The new element must contain an analysis of the effectiveness of the previous housing element in attainment of the community's housing goals and objectives.<sup>26</sup> For this requirement, HCD looks for quantified results, rather than simply qualitative observations. Accordingly, the element should include numbers demonstrating the effectiveness of the previous element. Where previous programs have been ineffective, HCD will look to see how the jurisdiction will improve and strengthen the programs to improve implementation.

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<sup>22</sup> Cal. Gov't Code § 65583(c)(5).

<sup>23</sup> See Cal. Gov't Code § 65583(c)(5).

<sup>24</sup> Cal. Civ. Code § 51.2; Cal. Gov't Code §§ 12955.9, 65852.1 and 65906.

<sup>25</sup> Cal. Gov't Code § 65583(c)(6)(B).

<sup>26</sup> Cal. Gov't Code § 65588.

In sum, the growing need for affordable housing makes housing element certification a virtual necessity. However, the housing element statutes are not the only affordable housing laws with which local agencies must comply. The next section provides an overview of the various affordable housing statutes designed to implement the State’s housing goals of providing affordable housing to all income groups.

## II. AFFORDABLE HOUSING STATUTES

In an effort to both increase the available housing stock and to make it affordable, the Legislature enacted a number of laws and programs (collectively the “State housing law”). State housing law takes different forms, sometimes imposing affirmative obligations on local agencies and sometimes restricting the exercise of local authority. While most jurisdictions are familiar with the statutory requirement to adopt a housing element, local jurisdictions will need to become increasingly familiar with obligations under other provisions of State housing law.

### DENSITY BONUSES AND OTHER INCENTIVES

State law requires a local agency to grant a density bonus or equivalent incentive to a developer who agrees to construct affordable housing.<sup>27</sup>

A density bonus is a “density increase of at least 25 percent” over the maximum allowable density under the applicable zoning ordinance.<sup>28</sup> Equivalent incentives may include the following:

- a reduction in site development standards;
- a modification of zoning code requirements (including a reduction in setbacks, square footage requirements, required parking, or architectural design requirements);
- approval of mixed-use zoning in conjunction with the housing project;
- other regulatory incentives or concessions proposed by the local agency or the developer that result in identifiable cost reductions.<sup>29</sup>

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<sup>27</sup> Cal. Gov’t Code § 65915.

<sup>28</sup> Cal. Gov’t Code § 65915(f).

<sup>29</sup> Cal. Gov’t Code § 65915(h).

The density bonus requirements apply when a housing developer agrees to reserve a portion of new units for affordable housing. The minimum percentage of affordable housing required to trigger application of the statutes varies with the eligibility classification of potential residents:

- at least 20 percent of the total units for occupancy by “lower income” households<sup>30</sup>;
- at least 10 percent of the total units for occupancy by “very low income” households<sup>31</sup>; or
- at least 50 percent of the units for occupancy by “qualifying residents.”<sup>32</sup>

Under these circumstances, the local agency must either grant a density bonus and at least one other development concession or incentive<sup>33</sup> or provide other incentives of equivalent value based upon land cost per dwelling.<sup>34</sup>

A developer who receives a density bonus or other concession or incentive from a local agency must agree to ensure the continued affordability of all lower income density bonus units for a specified number of years.<sup>35</sup> The duration of the agreement depends on whether the local agency grants any additional concession or incentive. The use of redevelopment monies or other public funds to subsidize the cost of construction may also affect the length of the covenant.

The local agency must establish procedures for waiving or modifying development and zoning standards that would otherwise bar the award of the density bonus on a particular site.<sup>36</sup> Examples of zoning standards that might inhibit the development of affordable housing include:

- minimum unit sizes;
- minimum lot sizes;
- maximum lot coverages; and
- outdoor living area requirements.

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<sup>30</sup> As defined by Cal. Health and Safety Code § 50079.5.

<sup>31</sup> As defined by Cal. Health and Safety Code § 50105.

<sup>32</sup> As defined by Cal. Civ. Code § 51.3.

<sup>33</sup> See Cal. Health and Safety Code § 20052.5. The local agency may claim an exception if it can demonstrate that a concession or incentive is not required in order to make the units affordable.

<sup>34</sup> Cal. Gov't Code § 65915(b).

<sup>35</sup> Cal. Gov't Code § 65915(c).

<sup>36</sup> Cal. Gov't Code § 65915(d).

The density bonus standards represent minimum standards. Local agencies are free to adopt their own procedures to meet their communities' unique circumstances. Local agencies will be well served by proactive efforts to comply with state mandates to ensure that their unique circumstances and needs are addressed.

## SECOND DWELLING UNITS

State law also encourages local agencies to adopt ordinances that provide for the creation of second units.<sup>37</sup> Local agencies that do not adopt a second unit ordinance must grant a conditional use permit for second units that meet the legal requirements.<sup>38</sup>

A local agency may adopt an ordinance that provides for the development of second units in single-family and multifamily residential zones.<sup>39</sup> Among other things, the ordinance may:

- designate areas within the jurisdiction where second units may be permitted;
- impose standards on second units that may include parking, height, setback, lot coverage, architectural review and maximum unit size;
- provide that second units are compatible with the existing zoning ordinance and general plan;
- establish a process for issuance of a conditional use permit or similar special use permit for second units.<sup>40</sup>

The second unit statute makes it difficult for local agencies to avoid its application. Except under limited circumstances, local agencies may not prohibit second dwelling units.<sup>41</sup> For example, a court ordered Laguna Beach to issue second unit use permits when it determined that the city had not adopted a second unit ordinance within the required timeframe.<sup>42</sup>

More recently, another court struck down an ordinance that allowed the creation of second units in single-family residential zones, but only if the person occupying the second unit was the property owner, his or her dependent, or a caregiver for the property owner or dependent.<sup>43</sup> Three important points came out of the decision:

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<sup>37</sup> Cal. Gov't Code § 65852.150.

<sup>38</sup> Cal Gov't Code § 65852.2(b).

<sup>39</sup> Cal. Gov't Code § 65852.2(a).

<sup>40</sup> Cal. Gov't Code § 65852.2(a).

<sup>41</sup> Cal. Gov't Code § 65852.2.

<sup>42</sup> *Wilson v. City of Laguna Beach*, 6 Cal. App. 4th 543 (1994).

<sup>43</sup> *Coalition Advocating Legal Housing Options v. City of Santa Monica*, 88 Cal. App. 4th 451 (2001).

- First, in striking the occupancy restriction from the ordinance, the court held that the second unit laws applied to charter cities.<sup>44</sup>
- Second, the court found that the occupancy restrictions on residents of second units based on family status violated the right to privacy under the California Constitution.<sup>45</sup>
- Finally, the court held that the ordinance classified uses of second units in violation of the equal protection clause of the California Constitution.<sup>46</sup>

Local agencies are not, however, required to approve every application for a second unit. For example, a court upheld Costa Mesa’s denial of a second unit permit based on the requirements of the city’s adopted second unit ordinance.<sup>47</sup> The court found that the property owner’s compliance with the city’s zoning laws and building codes did not require the city to issue a permit as a matter of right. Instead, the court determined that the city could deny the proposed second unit because it was incompatible with the surrounding neighborhood and would reduce property values.<sup>48</sup>

## **ZONING SUFFICIENT LAND FOR HOUSING FOR ALL INCOME LEVELS**

State law requires local agencies to designate and zone sufficient vacant land for residential use to meet low and moderate-income housing needs.<sup>49</sup> This duty is in addition to the requirement that local housing elements “[i]dentify adequate sites which will be made available through appropriate zoning and development standards...to facilitate and encourage the development of a variety of types of housing for all income levels.”<sup>50</sup> The requirement ensures that the local agency takes appropriate steps to accommodate its fair share of the regional housing need for all income categories “at the lowest possible cost.”<sup>51</sup>

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<sup>44</sup> *Id.* at 458.

<sup>45</sup> *Id.* at 461.

<sup>46</sup> *Id.* at 463-464.

<sup>47</sup> *Harris v. City of Costa Mesa*, 25 Cal. App. 4th 963 (1994).

<sup>48</sup> *Id.* at 972.

<sup>49</sup> Cal. Gov’t Code § 65913.1.

<sup>50</sup> Cal. Gov’t Code § 65583(c)(1)(A). However, urbanized jurisdictions do not need to zone a site for a density that exceeds the density on adjoining residential parcels by 100 percent. *See* Cal. Gov’t Code § 65913.1(b).

<sup>51</sup> Cal. Gov’t Code §§ 65913.1 and 65913.1(a)(1).

The penalties for noncompliance can be severe. Failure to zone adequate land to provide housing for all income levels or to adopt standards which comport with the least cost zoning provisions can result in the courts forcing the local agency to approve the disputed application and others like it.<sup>52</sup>

### **DENIAL OF AFFORDABLE HOUSING PROJECTS RESTRICTED**

Existing State housing law restricts a local agency's ability to disapprove a housing development project affordable to very low, low, or moderate-income households (referred to here as a "qualified housing project"). In addition, a local jurisdiction may not condition approval of a project in a manner that makes the development infeasible unless it can make one of the following findings:<sup>53</sup>

- the local agency has adopted a housing element that complies with State law and the project is not needed for the jurisdiction to meet its share of the regional housing need; or
- the proposed project would have a specific adverse impact upon the public health or safety that could not be satisfactorily mitigated without rendering the project unaffordable; or
- denial of the project or imposition of conditions is required under federal or state law and there is no feasible method to comply with that law without rendering the project unaffordable to low and moderate-income households; or
- approval of the project would increase the concentration of lower income households in a neighborhood that already has a disproportionately high number of lower income households; or
- the project is proposed on land zoned for agriculture or resource preservation and is surrounded on at least two sides by land being used for agricultural or resource preservation purposes; or
- the project is inconsistent with both the jurisdiction's zoning ordinance and general plan as they existed on the date the application was deemed complete and the jurisdiction has adopted a housing element in compliance with State law.<sup>54</sup>

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<sup>52</sup> See, for example, *Hoffmaster v. City of San Diego*, 55 Cal. App. 4th 1098 (1997) (affirming judgment ordering San Diego to approve all conditional use permit applications for homeless shelters until it complied with Government Code Sections 65583(c)(1)(A) and 65913.1. It should also be noted that in any action that alleges that a local ordinance violates the "least cost zoning" provisions of Government Code Section 65913.1, the usual presumption that the land use regulation is valid does not apply. The local agency bears the burden of proving that the regulation is reasonably related to the public health, safety or welfare. See *Hernandez v. City of Encinitas*, 28 Cal. App. 4th 1048 (1994); Cal. Evid. Code § 669.5.

<sup>53</sup> Cal. Gov't Code § 65589.5.

<sup>54</sup> Cal. Gov't Code § 65589.5(d).

These findings are difficult to satisfy, and the provision may effectively limit the ability of a local jurisdiction to deny a qualified project that complies with all general plan and zoning policies.<sup>55</sup>

In any legal challenge to a local agency's decision denying an affordable housing project or imposing conditions that have "a substantial adverse effect on the viability or affordability" of the project, the local agency will bear the burden of proving that its decision complies with the findings.<sup>56</sup> If a court finds that a local agency disapproved an affordable housing project without making the required findings, the court is required to issue an order compelling compliance within 60 days.<sup>57</sup>

A local agency may also be liable for attorneys' fees when a party successfully challenges a local agency's denial of a project or imposition of conditions.<sup>58</sup> This provision represents a departure from the general standard that allows the private party to recover attorneys' fees only when the underlying decision in the case serves some general public purpose and underscores the importance the Legislature places on promoting the development of affordable housing projects.

## **REQUIREMENTS FOR MORATORIA ON MULTI-FAMILY HOUSING PROJECTS**

In most cases, local jurisdictions adopt urgency or interim ordinances (also known as "moratoria" or "moratoriums") for an initial time period of 45 days that prohibit any uses in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body is considering or studying.<sup>59</sup> However, such an urgency ordinance must be adopted by a four-fifths vote and must contain certain legislative findings.<sup>60</sup> After notice and a public hearing, the interim ordinance may be extended for 10 months and 15 days and subsequently extended for one year.<sup>61</sup>

In addition, any interim ordinance that has the effect of precluding the

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<sup>55</sup> See *Sequoiah Hills Homeowners Ass'n v. City of Oakland*, 23 Cal. App. 4th 704 (1993).

<sup>56</sup> Cal. Gov't Code § 65589.5(i).

<sup>57</sup> Cal. Gov't Code § 65589.5(k).

<sup>58</sup> Cal. Gov't Code § 65589.5(k).

<sup>59</sup> Cal. Gov't Code § 65858.

<sup>60</sup> Cal. Gov't Code § 65858(c).

<sup>61</sup> Cal. Gov't Code § 65858(a).

development of projects that include a “significant component of multifamily housing”<sup>62</sup> may not be extended beyond 45 days, unless the local agency makes burdensome findings supported by substantial evidence:

- approval of the multifamily housing projects would have a specific, adverse impact upon the public health or safety;
- the interim ordinance is necessary to mitigate or avoid the adverse impact identified; and
- there is no feasible alternative to satisfactorily mitigate the impacts.<sup>63</sup>

The evidence required to support the findings must be quantifiable, direct and based on written public health or safety standards.<sup>64</sup>

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<sup>62</sup> A “significant component of multifamily housing” means any project in which multifamily housing consists of at least one-third of the total square footage of the project. Cal. Gov’t Code § 65858(c).

<sup>63</sup> Cal. Gov’t Code § 65858(c).

<sup>64</sup> *Id.*

## REDEVELOPMENT INCLUSIONARY AND PRODUCTION HOUSING REQUIREMENTS

*David Beatty & Seth Merewitz\**

The California Redevelopment Law also plays a significant role in developing affordable housing opportunities in redevelopment project areas. Although many provisions within the Redevelopment Law may affect affordable housing programs, three sections are often cited as the law's "primary" requirements:

- **Replacement of Lost Housing Units.** Every housing unit occupied by a very low-, low- or moderate-income household that is destroyed or removed from the housing market as part of a redevelopment project, i.e. subject to written agreement with, or receives financial assistance from a redevelopment agency, must be replaced within four years.
- **Low- and Moderate-Income Housing Fund.** Set aside at least 20 percent of the tax increment generated by a redevelopment project area into a separate Low- and Moderate-Income Housing Fund, and spend the housing fund to increase, improve and preserve the community's supply of affordable housing for persons and families of low- and moderate-income. (The term "low- and moderate-income" as used in the Redevelopment Law also includes very low-income).
- **Inclusionary Housing Requirements.** Assure through the use of recorded affordability covenants and other means that certain minimum percentages of all new or substantially rehabilitated housing developed within a redevelopment project area are affordable to very low-, low- and moderate- income households

This summary focuses on the primary components of the inclusionary housing requirement.

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### EDITOR'S NOTE

*The subject of inclusionary housing and redevelopment law is probably worthy of its own publication. In this selection, the authors succinctly summarize the inclusionary requirements most commonly associated with the California Redevelopment Law. It is adapted from the forthcoming 3rd Edition of REDEVELOPMENT IN CALIFORNIA, by Solano Press. The authors of this piece – David Beatty and Seth Merewitz, with the law firm of McDonough, Holland & Allen – have revised and condensed this section for inclusion in this publication.*

## INCLUSIONARY HOUSING IN REDEVELOPMENT AREAS

Unlike the typical inclusionary housing ordinance, which is usually applied on a project-by-project basis, the inclusionary requirements of the Redevelopment Law apply to all new construction and substantial rehabilitation of dwelling units within a redevelopment project area. Accordingly, the law provides more flexibility than the typical ordinance because it affords the opportunity to include more inclusionary units in one project and less in another.

The Redevelopment Law actually contains two inclusionary requirements for redevelopment project areas:<sup>1</sup> one for projects constructed and owned solely by a redevelopment agency and another for non-agency projects (specifically, projects that are developed by public and private entities or persons other than the redevelopment agency). This first requirement, however, is rarely applicable because nearly all housing that is assisted by redevelopment agencies is developed and owned by private or non-profit entities. Accordingly, most of the remainder of this section focuses on the second requirement.

## STANDARDS FOR NON-AGENCY DEVELOPED PROJECTS

At least 15 percent of all new or substantially rehabilitated units developed in redevelopment areas adopted after 1975, by a public or private entity (or person), must be affordable to low- or moderate-income households.<sup>2</sup> This is sometimes referred to as the “15 percent requirement.” In addition, at least 40 percent of the units included in the 15 percent requirement must be affordable to very low-income households. The units must remain affordable for the longest feasible time, but for not less than 55 years for rental units and 45 years for owner-occupied units.<sup>3</sup> In order for the new or substantially rehabilitated rental or owner-occupied unit to count towards the 15 percent requirement, the agency must require the recording in the office of the county recorder of covenants or restrictions implementing this restriction for each unit subject to the restriction. The covenants or restrictions must run with the land and shall be enforceable, against the original owner and successors in interest, by the agency or the community.<sup>4</sup>

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<sup>1</sup> Cal. Health & Safety Code § 33413(b). All additional references are to the California Health and Safety Code unless acknowledged otherwise.

<sup>2</sup> § 33413(b)(2)(i).

<sup>3</sup> § 33413(c).

<sup>4</sup> §§ 33413(c)(3) and 33334.3(f)(2).

The Redevelopment Law does authorize redevelopment agencies to permit the sale of owner-occupied units prior to the end of the 45 year affordability period if the agency's investment of monies from the Low- and Moderate-Income Housing Fund is protected by an adopted program—such as an equity sharing program—that allows the redevelopment agency and the seller to share in the excess proceeds of the sale, based on the length of the occupancy. Funds received by the redevelopment agency are to be deposited into the Low- and Moderate-Income Housing Fund. This authority to allow sales at a price in excess of that permitted by the affordability covenant is conditioned on the redevelopment agency expending funds to make affordable an equal number of housing units at the same income level as the number of units sold within 3 years from the date of the sale of these affordable units.<sup>5</sup>

## **SUBSTANTIAL REHABILITATION**

One issue that arises with some frequency is what actually constitutes a “substantially rehabilitated dwelling unit.” There are two definitions that clarify what type of dwelling unit is included in the term, depending upon the date the unit was rehabilitated. Prior to January 1, 2002, the term meant, “substantially rehabilitated multifamily rented dwelling units with three or more units regardless of whether there is redevelopment agency assistance, or substantially rehabilitated, with redevelopment agency assistance, single-family dwelling units with one or two units.” After January 1, 2002, however, the term means “all units substantially rehabilitated, with agency assistance.”<sup>6</sup> In addition, the term “substantially rehabilitated” is defined to mean a rehabilitation where the rehabilitation value constitutes 25 percent or more of the after rehabilitation value of the dwelling (inclusive of the land value).<sup>7</sup>

## **IMPLEMENTATION PLAN REQUIREMENT**

Historically, the inclusionary housing requirements within the Redevelopment Law have not been well understood or universally implemented. Accordingly, the Legislature now requires redevelopment agencies to adopt a plan demonstrating how the agency will comply with the inclusionary requirements and ensuring that they will be met every 10 years.<sup>8</sup> The implementation plan must be reviewed every 5 years in

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<sup>5</sup> § 33413(c)(1).

<sup>6</sup> § 33413(b)(2)(A)(iii).

<sup>7</sup> § 33413(b)(2)(A)(iv).

<sup>8</sup> § 33413(b)(4). *See also* § 33490.

conjunction with either the implementation plan cycle or the housing element update cycle. If these inclusionary requirements are not met during the 10 year period, the redevelopment agency must meet the goals on an annual basis until the requirements for the ten-year period are met. Furthermore, the redevelopment agency must meet these requirements prior to termination of a redevelopment plan.

## INCLUSIONARY IMPLEMENTATION METHODS

In addition to the new construction and substantial rehabilitation of dwelling units within a redevelopment project area, a redevelopment agency may satisfy its inclusionary housing obligations by other means. These alternatives are: the two-for-one alternative; the aggregation of units between redevelopment project areas; and the purchase of affordability covenants.

- ***Two-for-One Alternative.*** A redevelopment agency may provide two units outside a redevelopment project area (by regulation or agreement) that are affordable to low- and moderate-income households for each housing unit that otherwise would have to be available inside the redevelopment project area.<sup>9</sup>
- ***Aggregation Between Project Areas.*** A redevelopment agency may aggregate new or substantially rehabilitated dwelling units in one or more redevelopment project areas to meet the 15 percent requirement if the agency finds, based on substantial evidence and after a public hearing, that the aggregation will not cause or exacerbate racial, ethnic, or economic segregation.<sup>10</sup>
- ***Purchase of Affordability Covenants.*** A redevelopment agency may also acquire long-term affordability covenants on multifamily units that restrict the cost of renting or purchasing those units that either: (i) are not presently available at an affordable housing cost to low- or very low-income households, or (ii) are units that are presently available at an affordable housing cost to low- or very low-income households, but are units that the redevelopment agency finds, based on substantial evidence, after a public hearing, cannot reasonably be expected to remain affordable to this same group of persons or families.<sup>11</sup>

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<sup>9</sup> § 33413(b)(2)(A)(ii).

<sup>10</sup> § 33413(b)(2)(A)(V).

<sup>11</sup> § 33413(b)(2)(B).

The option of purchasing affordability covenants raises additional issues. For example, in order for units to count towards satisfying the agency's inclusionary requirement, the covenants must require that the units remain affordable to, and occupied by, low- and very-low income households for a minimum of 55 years for rental units and 45 years for owner-occupied units.<sup>12</sup> Covenants running with the land are to be recorded implementing these provisions.<sup>13</sup> In addition, the purchase or acquisition of long-term affordability covenants cannot be used to satisfy more than 50 percent of the 15 percent requirement,<sup>14</sup> and at least half of such units must be affordable to very low-income households.<sup>15</sup>

### **PRODUCTION HOUSING REQUIREMENTS FOR AGENCY PROJECTS**

Redevelopment agencies that develop, i.e. construct and own, housing units must ensure that at least 30 percent of those units must be available at affordable housing cost to, and occupied by, persons of low- or moderate-income regardless of where these units are constructed.<sup>16</sup> Not less than 50 percent of these dwelling units are required to be available at and affordable to and occupied by, very low-income households. As noted earlier, this provision is rarely applicable as nearly all housing that is assisted by redevelopment agencies is developed and owned by private or non-profit entities.

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<sup>12</sup> § 33413(b)(2)(C).

<sup>13</sup> § 33413(c)(3).

<sup>14</sup> § 33413(b).

<sup>15</sup> § 33413(b)(2)(C).

<sup>16</sup> § 33413(b)(1).



## LEGAL ISSUES ASSOCIATED WITH INCLUSIONARY HOUSING ORDINANCES

### *Institute for Local Self Government*

A variety of legal issues may be raised when a locality adopts a regulation that requires new developments to include affordable housing. This paper provides an overview of the sources of, and limitations on, the authority of local agencies to adopt inclusionary housing programs:

- Police Power: Source of Authority to Adopt Inclusionary Programs
- Takings Issues
- Substantive Due Process and Equal Protection
- Special Considerations Associated With Fees
- The Costa-Hawkins Act

The paper concludes with a summary of best practices for avoiding liability.

### I. POLICE POWER: AUTHORITY FOR INCLUSIONARY PROGRAMS

The authority for local governments to adopt inclusionary zoning ordinances and most other land use policies is the “police power.” This power emanates from the Tenth Amendment to the United States Constitution, and entitles communities to take actions and adopt laws and policies that protect the public’s health, safety and welfare.<sup>1</sup>

#### A. SCOPE OF AUTHORITY IN CALIFORNIA

The California Constitution provides that cities and counties “may make and enforce within their limits all local, police, sanitary, and other ordinances or regulations not in conflict with the general laws.”<sup>2</sup> In the field of land use regulation, courts have liberally construed this power:

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<sup>1</sup> See *Euclid v. Amber Realty Company*, 272 U.S. 365 (1926) (holding that local governments may protect the general welfare through enactment of residential zoning ordinances).

<sup>2</sup> Cal. Const. article XI, § 7. *Miller v. Board of Public Works*, 195 Cal. 477 (1925).

### EDITOR’S NOTE

*This selection was developed by the staff of the Institute for Local Self Government. The idea was to provide a brief overview of the sources of authority and common initial challenges associated with inclusionary programs. The section within this paper that addresses the takings issue was developed as part of the Institute’s ongoing efforts on the takings issue, which is funded by the Resources Legacy Fund ([www.resourceslegacyfund.org](http://www.resourceslegacyfund.org)). The Institute is also grateful to Mike Rawson of the Affordable Housing Law Project and the Western Center on Law and Poverty for providing an advance copy of his paper on this issue (entitled Inclusionary Zoning – Legal Issues), which was funded in part by the San Francisco Foundation.*

“[C]ounties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. Apart from this limitation, the police power...is as broad as the police power exercisable by the legislature itself.”<sup>3</sup>

The police power is also “elastic,” meaning that it expands to meet the changing conditions of society.<sup>4</sup> Moreover, legislative acts adopted under the police power are presumed justified and entitled to great judicial deference.<sup>5</sup> Land use regulations are generally constitutional unless they are “clearly arbitrary and unreasonable” and have no substantial relation to the public health, safety, morals, or general welfare.”<sup>6</sup> Courts have found that a wide variety of local concerns legitimately fall within the general welfare, including socio-economic balance,<sup>7</sup> rent control<sup>8</sup> and growth management.<sup>9</sup> Inherent in the police power, then, is the power to condition development with particular characteristics that further the general welfare of the community.

But this authority is not unlimited. Federal and state laws – especially state-mandated local planning laws and fair housing laws – place significant limitations on local discretion to make housing decisions. Generally, these laws not only restrict exclusionary or discriminatory land use policies, but also require communities to affirmatively plan for inclusion of affordable housing. For example, cities and counties must adopt a housing element that “makes adequate provision for the housing needs of all economic segments of the community.”<sup>10</sup> California’s fair housing laws also expressly prohibit discriminatory land use policies<sup>11</sup> and discrimination against affordable housing<sup>12</sup> and the state’s “anti-Not-In-My-Back-Yard” law requires local government to approve certain affordable housing developments unless certain rigorous findings are made.<sup>13</sup>

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<sup>3</sup> *Candid Enterprises, Inc. v. Grossmont Union High School Dist.*, 39 Cal. 3d 878, 886 (1985).

<sup>4</sup> See *Euclid* at 387, *Agins v. City of Tiburon*, 447 U.S. 255, 260-63 (1980), and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>5</sup> *Consolidated Rock Products v. City of Los Angeles*, 57 Cal. 2d 515 (1962).

<sup>6</sup> *Euclid* at 395; and see *Miller* at 490.

<sup>7</sup> *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4-6 (1974).

<sup>8</sup> *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129 (1976).

<sup>9</sup> *DeVita v. County of Napa*, 9 Cal. 4th 763 (1995).

<sup>10</sup> Cal. Gov’t Code § 65580 and following.

<sup>11</sup> Cal. Gov’t Code § 12955 and following.

<sup>12</sup> Cal. Gov’t Code § 65008.

<sup>13</sup> Cal. Gov’t Code § 65589.5.

## B. STATUTORY AUTHORITY FOR INCLUSIONARY HOUSING

In addition to the police power, there are specific instances when inclusionary programs are actually required or implicitly authorized under California law:

- ***Community Redevelopment Law.*** Local redevelopment areas must include affordable housing project if housing is developed in the area. Thirty percent of all redevelopment agency developed housing and fifteen percent of all non-agency developed housing must be affordable to lower- and moderate-income households.<sup>14</sup>
- ***Coastal Zone.***<sup>15</sup> New housing developed in the coastal zone must “provide housing units for persons and families of low or moderate income” where feasible. If including the housing within the development is not feasible, the developer must provide the housing at another location within the community unless it would be infeasible.<sup>16</sup>
- ***Least Cost Zoning Law.***<sup>17</sup> Communities must zone sufficient vacant land with appropriate standards to meet the housing needs identified in the community’s housing element for all income levels.
- ***Housing Element Law.*** Local agencies must conduct an analysis of “assisted housing developments” that are eligible to change from affordable to market rate housing within the next 10 years. Assisted housing development is defined to include multifamily rental units that were developed under a local inclusionary housing program.<sup>18</sup>

## II. TAKINGS ISSUES

Takings claims are perhaps the most often raised constitutional challenge to inclusionary housing programs.<sup>19</sup> There are several common misperceptions about what constitutes a taking. Much of this confusion derives from the fact that courts have been unable to articulate a uniform standard for judging taking claims, opting instead for a case-by-case

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<sup>14</sup> Cal. Health & Safety Code § 33413(b)(1).

<sup>15</sup> Cal. Gov’t Code § 65590.

<sup>16</sup> Cal. Gov’t Code § 65590(d).

<sup>17</sup> Cal. Gov’t Code § 65913.1

<sup>18</sup> See Cal. Gov’t Code § 65583(a)(8).

<sup>19</sup> The term derives from the Takings Clause of the Fifth Amendment of the U.S. Constitution, which states that public agencies may not take property for public use without paying just compensation. To the same effect is article 1, section 19 of the California Constitution: “Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid.”

determination.<sup>20</sup> Despite this uncertainty, the reasonable application of an inclusionary housing program seldom rises to the level of an unconstitutional taking for three reasons:

- ***Building Affordable Housing is an Important Government Interest.*** Public agencies are advancing an important governmental interest in providing affordable housing. Regulations that advance such interests are on firmer legal ground than those that are more arbitrary in nature.
- ***Legislatively Imposed Conditions.*** Most inclusionary requirements are adopted by ordinance, which courts treat with deference. Courts reserve increased scrutiny – sometimes called heightened scrutiny – for those cases where the local agency is imposing a condition on a single landowner as part of an adjudicative decision.
- ***Property Remains Economically Viable.*** Inclusionary housing ordinances are applied only to projects where the property owner is proceeding with an economically viable use (residential units). Thus, it is difficult for the developer to assert that the ordinance denies all economic use of property.

These three reasons, however, are not guarantees. The possibility remains that an inclusionary housing ordinance may be implemented in a manner that causes a taking of property. The two types of takings challenges that are most common are “substantially advance” claims and “condition on development” cases. A third type of challenge, “denial of economic use,” is theoretically possible but in most instances unlikely. Each is addressed below.

## A. “SUBSTANTIALLY ADVANCE” CLAIMS

A land use regulation may constitute a taking if it fails to substantially advance a legitimate state interest.<sup>21</sup> A regulation may not unreasonably or arbitrarily restrict property. Courts determine whether there is a logical relationship - or “nexus” - between the purpose and effect of the regulation.<sup>22</sup> Put another way, the means by which the government imposes the regulation must be reasonably related to the end it is trying to achieve. A regulation is usually upheld when this connection can be drawn.

Most “substantially advance” claims are judged under a deferential standard of review, meaning that courts will defer to public agency regulation (and thus find no taking) unless the regulation is arbitrary or has no relation to a valid

<sup>20</sup> *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

<sup>21</sup> *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

<sup>22</sup> *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952 (1999).

public purpose. Given the latitude to regulate land use afforded local agencies under the police power, public agencies will usually prevail against such challenges to inclusionary housing programs.

For example, in *Home Builders Association of Northern California v. City of Napa (Napa)*, the challengers claimed the inclusionary housing ordinance was invalid because the inclusionary requirement would not meet its stated objective. The challengers argued that the ordinance would actually decrease the number of housing units because it would make building housing more difficult. The court rejected this argument, noting that both state statutes and case law recognize that creating affordable housing for low- and moderate-income families is a legitimate state interest.<sup>23</sup> Moreover, the court stated that by “requiring developers in City to create a modest amount of affordable housing (or to comply with one of the alternatives) the ordinance will necessarily increase the supply of affordable housing.”<sup>24</sup> Thus, the Napa ordinance was sufficiently related to the stated purpose to substantially advance a legitimate state interest.<sup>25</sup>

## **B. FEES AND CONDITIONS ON DEVELOPMENT**

A second type of takings challenge is that the condition imposed on the development amounts to an unconstitutional exaction. Conditions on development – such as dedications and (in California) fees – are treated as a special category under takings law. Conditions on development will usually survive judicial challenge when they are adopted legislatively and apply to a broad class of landowners.<sup>26</sup>

But fees and dedications that are imposed on a project-by-project basis must meet a more stringent test. The agency must demonstrate that there is a “nexus” *and* “rough proportionality” between the condition imposed and the impact of the development. This is also commonly referred to as the *Nollan-Dolan* standard, or heightened scrutiny.<sup>27</sup> This is a tougher, but not impossible, standard for public agencies to overcome. The reason for the

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<sup>23</sup> *Home Builders Association of Northern California v. City of Napa*, 90 Cal. App. 4th 188, 195 (2001). See Cal. Gov’t Code §§ 65913.9 (finding housing for all is a matter of statewide concern) and 65580(d) (declaring local agencies have a responsibility to promote housing for all segments of the community). See also 4 Witkin, *Summary of California Law*, Real Property § 54 (summarizing state housing and urban development law). *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th at 970.

<sup>24</sup> *Napa*, 90 Cal. App. 4th at 196.

<sup>25</sup> This is not to say that a substantially advance challenge would never succeed. *Napa* involved a facial challenge, meaning that the challenger had to show that there is no way that the ordinance could be applied constitutionally. The city had included an adjustment mechanism within the ordinance, which allowed developers to apply for a reduction, adjustment or waiver. The court concluded the ordinance could not result in a taking on its face because the city could adjust its provisions to avoid an unconstitutional result. See *Napa*, 90 Cal. App. 4th at 194.

<sup>26</sup> See *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643 (2002).

stricter standard is that courts are concerned that local agencies might “leverage” their permit approval authority to obtain excessive conditions from a single property owner. Local agencies can address this concern by legislatively adopting conditions that apply to a broad class of landowners.

In *Napa*, the court determined that the inclusionary housing program was not subject to heightened scrutiny precisely because the measure was adopted legislatively:

Here, we are not called upon to determine the validity of a particular land use bargain between a governmental agency and a person who wants to develop his or her land. Instead we are faced with a facial challenge to economic legislation that is generally applicable to all development in [the] City.<sup>28</sup>

The California Supreme Court also recently addressed this issue in *San Remo Hotel v. City and County of San Francisco*.<sup>29</sup> The case involved a fee on the conversion of single resident occupancy hotels (an important source of low-income housing in San Francisco) to tourist hotels. The city requires that the hotel owners replace the lost affordable units on another site or pay an in-lieu fee. Again, the issue was the applicable level of judicial review. The hotel owners argued that heightened scrutiny should apply because the ordinance only affected hotel owners in the city instead of all landowners equally.

The California Supreme Court rejected the argument – finding that the increased level of scrutiny should be reserved for those *ad hoc* decision-making processes where the dangers of agencies leveraging their permit approval authority were the greatest. In doing so, the California Supreme Court laid out a blueprint for development fees for local agencies: courts will defer to legislatively imposed fees that apply without “discretion or discrimination,” such that the method of imposing the fee gives no discretion to the public agency in the imposition or calculation of the fee, and the ordinance is generally applicable to a class logically subject to its strictures.<sup>30</sup>

## C. DENIAL OF ECONOMIC USE CLAIMS

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<sup>27</sup> *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). See also *Erlich v. City of Culver City*, 12 Cal. 4th 854 (1996) (extending heightened scrutiny requirement to fees imposed on an individual or discretionary basis). See also *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952 (1999).

<sup>28</sup> *Napa*, 90 Cal. App. 4th at 197.

<sup>29</sup> *San Remo Hotel*, 27 Cal. 4th 643 (2002).

A possible, but unlikely challenge, to an inclusionary housing program would be that the financial impact of the inclusionary housing denies the owner of all economic use of the property. Such claims are usually evaluated by three criteria: 1) the economic impact of the regulation; 2) the degree of interference with “investment-backed” expectations; and 3) the character of the action.<sup>31</sup> Most regulations, however, will not be deemed a taking under this test. Only those that have the effect of severely diminishing the value of property will be a taking.

Inclusionary housing ordinances are seldom vulnerable to such challenges because, almost by definition, they do not deny all economic use of property. Instead, they merely place a condition on building housing – a very substantial use of property. Some have argued that a regulation constitutes a taking under this test where it denies a more beneficial use of property (such as the opportunity to develop free of the inclusionary requirement). However, there is no constitutional right to maximize the profit from the use of property. Thus, a regulation that denies the most profitable use, but leaves the property owner with an economically viable use, is not a taking.

### III. OTHER CONSTITUTIONAL CHALLENGES

In addition to takings challenges, two other less common constitutional challenges to inclusionary housing programs are substantive due process claims and equal protection claims.

#### A. SUBSTANTIVE DUE PROCESS

The 14th Amendment to the U.S. Constitution provides that no state may “deprive any person of life, liberty, or property without due process of law.”<sup>32</sup> This guarantee prevents public agencies from “enacting legislation that is ‘arbitrary’ or ‘discriminatory’ or lacks ‘a reasonable relation to a proper legislative purpose.’”<sup>33</sup>

Opponents to inclusionary housing sometimes argue that such policies fail the reasonable relationship test because they do not assure a “fair

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<sup>30</sup> *Id.* at 668-669.

<sup>31</sup> *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). These factors are sometimes mischaracterized as a balancing test. Nothing in the *Penn Central* decision indicates that the factors should be balanced against one another.

<sup>32</sup> Article I, section 7 of the California Constitution contains similar due process guarantees.

<sup>33</sup> *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 771 (1997) (citing *Nebbia v. New York*, 291 U.S. 502, 537 (1934)).

return” on their investments.<sup>34</sup> This argument relies on cases where courts have determined that rent control ordinances may violate the due process clause if they prevent investors from receiving a fair return on their investments.<sup>35</sup> Such arguments will generally fail for two reasons:

- ***Substantive Due Process Not Applicable to Most Economic Damage Claims.*** Substantive due process applies mostly to “‘personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,’ as well as with an individual’s bodily integrity.”<sup>36</sup> Although courts have created a small exception for highly regulated industries, the use of substantive due process to extend constitutional protection to economic and property rights has been largely discredited.<sup>37</sup>
- ***Takings Provides a More Appropriate Remedy.*** When there is a more appropriate remedy that “‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing such a claim.’”<sup>38</sup> In other words, when the Takings Clause provides constitutional protection, a substantive due process claim may be precluded.<sup>39</sup> The Takings Clause more directly relates to land use regulation than substantive due process.

Nevertheless, there are instances where novel challenges are forwarded that attack inclusionary requirements as price controls that violate the due process clause. For example, in the *Napa* case, the Home Builders Association contended that the inclusionary zoning ordinance was invalid under the due process clause because “the inclusionary zoning law provides no mechanism to make a fair return for property owners who are forced to sell or rent units at an amount unrelated to market prices.” The court doubted that developers are entitled to a “fair return” under the due

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<sup>34</sup> Opponents of inclusionary zoning ordinances who use rent control cases to convince the courts that these cases apply in the zoning context must show that inclusionary zoning is similar to rent control. However, “it could be argued that rent control is essentially a species of price control rather than a land use regulation,” *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952, 967 (1999).

<sup>35</sup> See discussion in *Napa*, 90 Cal. App. 4th 188, 198 (2001).

<sup>36</sup> *Armendariz v. Penman*, 75 F.3d 1331, 1318-1319 (9th Cir. 1996).

<sup>37</sup> *Id.*

<sup>38</sup> *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

<sup>39</sup> *Armendariz*, 75 F.3d at 1324.

process clause, but did not address the issue in great detail.<sup>40</sup> The court noted that the “fair return” standard developed in evaluating restrictions placed on regulated industries such as railroads and public utilities. Although it has since been used in assessing rent control ordinances,<sup>41</sup> the *Napa* court stated that no authority existed to extend this protection to a housing developer.<sup>42</sup>

## B. EQUAL PROTECTION ISSUES

Although the issue is sometimes raised in connection with litigation, inclusionary housing programs seldom raise equal protection issues. Under the Equal Protection Clause of the U.S. Constitution, land use regulations may not deprive a person of equal protection of the laws.<sup>43</sup> This is not to say that an equal protection issue is raised each time a land use regulation affects individuals differently. Inherently, land use regulation is a system classifying property. As a result, nearly every regulation affects owners differently. What is significant for the equal protection analysis is the extent to which such distinctions are based upon personal characteristics that are otherwise protected.

Courts generally use one of three levels to analyze equal protection claims: strict scrutiny for laws that make a distinction based on a suspect classification (such as race or national origin); intermediate scrutiny for when a law makes a distinction based on quasi-suspect classifications (such as gender); and the rational basis test for all other distinctions.

Most social and economic legislation – including inclusionary housing – will usually be reviewed under the rational basis standard. Courts will uphold a local land use regulation under the rational basis test if it bears a rational relationship to a legitimate governmental interest.<sup>44</sup> Almost all successful equal protection challenges of land use regulations allege that a regulation has been applied in an unequal, discriminatory manner.<sup>45</sup>

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<sup>40</sup> *Napa*, 90 Cal. App. 4th at 199 (“...[W]e are not aware of...any case that holds a housing developer is entitled to “fair return” on his or her investment”).

<sup>41</sup> *Id.* (citing *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 679 (1984)).

<sup>42</sup> *Id.* The court in *Napa* stopped short of holding that the “fair return” standard did not apply in inclusionary zoning cases because it could find the *Napa* ordinance facially valid on other grounds.

<sup>43</sup> U.S. Const. amend. XIV; Cal. Const. art. I, § 7.

<sup>44</sup> See *Construction Industry Association of Sonoma County v. City of Petaluma*, 522 F.2d 897, 906 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976). Only if a land use regulation intentionally discriminates against a “suspect class” of persons (for example, racial or ethnic minorities) or denies someone a “fundamental right” (for example, the right to live as a family) will it be held to the much tougher “strict scrutiny” test. Under that test, the local agency would have to show that the regulation served a “compelling governmental interest.”

Accordingly, inclusionary requirements should be based on a sound analysis of the need for affordable housing and apply uniformly to all similarly situated developers. All exemptions or categories of alternative performance should likewise have a clear basis and clear standards for eligibility.

## IV. SPECIAL CONSIDERATIONS FOR FEES

In-lieu fees are another area where legal issues are raised in connection with inclusionary housing ordinances. Inclusionary housing programs typically include such fees as an option for developers. Such programs usually require a developer to include a certain percentage of affordable housing within the project, or as an alternative, to pay a fee in lieu of building the housing.

### A. MITIGATION FEE ACT

One issue that arises in connection with in-lieu fees is whether the agency must comply with the Mitigation Fee Act (also called “AB 1600” fees after the Mitigation Fee Act’s adopting legislation).<sup>46</sup> The Mitigation Fee Act regulates the adoption, levy, collection and challenge to development fees imposed by local agencies and applies to fees imposed on a broad class of projects on a project-specific basis.<sup>47</sup>

Under takings law and California’s Mitigation Fee Act, the imposition of fees to mitigate the impacts of a development must be based on facts that establish a nexus between the need for and amount of the fee and the stated impacts. Thus, local agencies will often produce a “nexus study” assessing the impacts of development and the costs of effective mitigation before enacting an ordinance that imposes a fee.

The Mitigation Fee Act, however, does not technically extend to “in-lieu” fees because the fee is an alternative to the condition that affordable units be

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<sup>45</sup> See *Longtin’s California Land Use*, 2002 Update at §1.32[3], 27-29. See also *Village of Willowbrook v. Olech*, 528 U.S. 1073 (2000).

<sup>46</sup> See Cal. Gov’t Code §§ 66000 and following.

<sup>47</sup> See Cal. Gov’t Code § 66000(b).

included within the development. Having said this, a public agency is still well advised to have an identifiable basis for setting the in-lieu fees for inclusionary housing ordinances. A well-documented fee study that carefully explains its assumptions and conclusions will be more credible to the development community and the public. A good study will:

- Identify and quantify the adverse impacts that development has on the availability of affordable housing in the jurisdiction;
- Use local data rather than statewide data to justify the fee whenever possible;
- Use reasonable estimates where hard data is unavailable or prohibitively expensive; and
- Provide the basis for a sound but simple way of calculating the in-lieu fee to assist those affected and the public in understanding the fee.

The Mitigation Fee Act's template for designing an impact fee study can serve as a useful starting point. An ordinance should be based on sufficient facts and analysis to demonstrate the need for affordable housing in the community and the relationship or nexus of the inclusionary obligation to fulfillment of the need.

New fees sometimes are criticized as singling out developers to bear burdens that should be imposed on the public at large. Staff should anticipate this criticism by documenting the full range of existing and planned public resources devoted to the program financed by the fee.

## **B. CHALLENGES TO FEES AS TAXES AND FEE RESTRICTIONS**

This kind of challenge is similar to the Mitigation Fee Act challenge, inasmuch as it singles out the in-lieu fee portion of an inclusionary housing ordinance. In *Napa*, the challengers also contended the in-lieu fee was a tax, subject to various constitutional restrictions relating to how taxes are imposed. The court, in an unpublished portion of the opinion, rejected those claims. Here are the salient arguments from the public agency perspective:

- The in-lieu fee is an option under the ordinance and therefore does not have the “compulsory” element of being a tax.<sup>48</sup>
- The in-lieu fee does not violate Proposition 62 (and Proposition 62 does not apply to charter cities<sup>49</sup>) and is not a special tax.<sup>50</sup>

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<sup>48</sup> See *Loyola Marymount University v. Los Angeles Unified School Dist.*, 45 Cal. App. 4th 1256, 1267 (1996); *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3d 317, 328 (1981).

- It is also not a property-related fee<sup>51</sup> (or imposed as an incident of property ownership) and is thus exempt from Proposition 218.<sup>52</sup>
- Even if the ordinance were a tax, it is not on property, but on the privilege of developing land.
- Even if the ordinance were a tax, it has none of the incidents of a property tax.<sup>53</sup>

Having a well-documented fee study and findings that establish that the in-lieu fee is indeed an option should cause any legal analysis to begin and end with the first bullet.

## V. COSTA-HAWKINS ACT ISSUES

An issue that is arising with some frequency is whether the Costa-Hawkins Rental Housing Act (“Costa-Hawkins Act”)<sup>54</sup> preempts a local agency’s authority to set maximum rents on inclusionary rental units. Some have argued that the Costa-Hawkins Act prohibits local agencies from regulating rents on inclusionary units. If a court upheld this argument, the affordability requirements imposed on inclusionary rental units would be meaningless. Landlords could simply ignore the affordability

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<sup>49</sup> *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 64 Cal. App. 4th 1217, 1226-27 (1998); *Fisher v. County of Alameda*, 20 Cal. App. 4th 120, 125-30 (1998); *Fielder v. City of Los Angeles*, 14 Cal. App. 4th 137 632-35 (1993); *see also Santa Clara County Local Transportation Authority v. Guardino*, 11 Cal. 4th 220, 260-61 (1995) (acknowledging that ballot materials advised voters that Proposition 62 is inapplicable to charter cities).

<sup>50</sup> *Terminal Plaza Corp. v. City & County of San Francisco*, 177 Cal. App. 3d 892, 905-7 (1986) (stating that fees are not taxes when they are: 1) limited to amounts necessary to construct affordable housing, 2) not imposed for general revenue purposes, 3) not imposed upon land generally, but on the privilege of developing residential property, and 4) not compulsory, because a developer retains the option not to develop). *See also* Cal. Gov’t Code § 66024 (requiring challenger to pay fee before initiating legal challenge).

<sup>51</sup> *See* Cal. Const. art. XIID, § 2.

<sup>52</sup> *See* Cal. Const. art. XIID, § 1(b) (expressly exempting fees or charges as a condition of property development). Any in-lieu fees for inclusionary housing, if paid by a developer, are paid as a condition of property development.

<sup>53</sup> *See Flynn v. San Francisco*, 18 Cal. 2d 210, 214 (1941) (whether a particular enactment amounts to a tax on property must be determined by its incidents, and from the natural and legal effect of the language of the act); *City of Oakland v. Digre*, 205 Cal. App. 3d 99, 106-7 (1988) (describing characteristics of property taxes: tax ownership per se without conditions; often measured by the size and type of the property taxed; levied without regard for the use to which the property is put; generally due and payable annually at a set time; and generally secured by the property taxed); *Terminal Plaza Corp. v. City & County of San Francisco*, 177 Cal. App. 3d 892, 907 (1986) (holding that a fee imposed upon the privilege of development is a regulatory fee, not tax on property).

<sup>54</sup> Cal. Civ. Code §§ 1954.50-1954.535. The Costa-Hawkins Act was enacted in 1995 to “establish a comprehensive statewide scheme to regulate local residential rent control.” *Cobb v. City and County of San Francisco Residential Rent Stabilization and Arbitration Board*, 98 Cal. App. 4th 345 (2002).

controls and set their own rents. Although the language of the Costa-Hawkins Act does not address this issue squarely, as is described more fully below, the more plausible conclusion is that the Costa-Hawkins Act does not apply to inclusionary rental units.<sup>55</sup>

The Costa-Hawkins Act was adopted to limit the authority of local agencies to adopt rent control programs by providing property owners the sole authority to establish the rental rates for dwelling units constructed after February 1, 1995. The Act, however, includes one important exception; it does not apply to rental units when:

[t]he owner has otherwise agreed by contract with a public entity in consideration for a direct financial contribution or any other forms of assistance specified in Chapter 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code.<sup>56</sup>

Chapter 4.3 – often referred to as the “Density Bonus Law” – encourages low-income housing in exchange for incentives such as increasing the number of permitted units within a zoning designation, relaxing development or architectural design standards, approving mixed development, providing infrastructure, “writing down” land costs or subsidizing the cost of construction.<sup>57</sup> In other words, a rental unit is not subject to the Costa-Hawkins Act if it has been built under a contract with a public agency in exchange for a financial contribution or other form of assistance included in the Density Bonus Law.<sup>58</sup>

The legislative history of the Costa-Hawkins Act also indicates that the Act was not intended to apply to inclusionary programs. There are at least four “sponsor statements”<sup>59</sup> from co-author Assemblyman Phil Hawkins stating that the Costa-Hawkins Act would only affect five cities that had “extreme vacancy control,” meaning that they had adopted rent controls that

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<sup>55</sup> The Costa-Hawkins Act only applies to rental units and is therefore not an issue for owner-occupied units.

<sup>56</sup> See Cal. Civ. Code § 1954.53(a)(2).

<sup>57</sup> Cal. Gov’t Code § 65916.

<sup>58</sup> It is less clear to what extent similar incentives provided outside of the Density Bonus Law are similarly excepted. A good argument exists that such units are similarly excepted because the Costa-Hawkins Act refers only to the “forms” of assistance mentioned in the Density Bonus Law, not to actual assistance. See Cal. Civ. Code § 1954.52(a)(2). Assuming that the “or” is disjunctive, the Costa-Hawkins Act should not apply to rental units created under an inclusionary agreement where the developer has received financial assistance or incentives from the local agency, whether or not such assistance originated under the color of a density bonus law.

<sup>59</sup> Courts may consider “sponsor statements” in determining legislative intent. See *Nadia El Mallakh, Does the Costa-Hawkins Act Prohibit Local Inclusionary Zoning Programs?*, 89 Cal. L. Rev. 1847, 1866 (2001) (citing *Lopez v. Tulare Joint Union High Sch. Dist.*, 34 Cal. App. 4th 1302, 1324 n.6 (1995); *Kern v. County of Imperial*, 226 Cal. App. 3d 391, 401 n.8 (1990)).

required rents to remain the same even when a tenant voluntarily or lawfully vacated a unit. At the time, more than 70 local agencies had inclusionary rental programs, which were not deemed extreme rent control by the author.<sup>60</sup>

The conclusion that the Costa-Hawkins Act does not apply to inclusionary rental housing is also supported by language in the housing element law.<sup>61</sup> One of the law’s requirements (in effect at the Costa-Hawkins Act’s passage) is that local agencies must analyze existing “assisted housing developments” that are in danger of transitioning out of low-income status. “Assisted housing developments” are defined to include “multifamily rental units that were developed pursuant to a local inclusionary housing program.”<sup>62</sup> If the Costa-Hawkins Act prohibits the regulation of rents on inclusionary units, this provision of the housing element law would be meaningless: local agencies would be required to account for a source of housing that they could not manage. Such a result would conflict with the general rule that the Legislature is presumed to be aware of existing law and that a court’s duty is to give effect to all law if possible.<sup>63</sup>

Despite this reasoning that inclusionary rental programs are outside of the reach of the Costa-Hawkins Act, the issue is ultimately one of statutory construction that would benefit from clarification by the courts or the Legislature. To date, the issue has been presented to at least two California courts, but neither had the opportunity to reach the merits of the issue. In one case against the County of Santa Cruz, a court of appeal decision applied a 90-day statute of limitations to a Costa-Hawkins claim.<sup>64</sup> The second case was dismissed when the City of Santa Monica amended its ordinance.<sup>65</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> Cal. Gov’t Code § 65580 and following.

<sup>62</sup> See Cal. Gov’t Code § 65583(a)(8).

<sup>63</sup> *In re Lance W.*, 37 Cal. 3d 873, 891 n. 11 (1985) (“The adopting body is presumed to be aware of existing laws and judicial construction thereof (*Bailey v. Superior Court*, 19 Cal.3d 970, 978, fn. 10 (1977)) and to have intended that its enactments be constitutionally valid. (*In re Kay* (1970) 1 Cal.3d 930, 942.)”). See also *Halbert’s Lumber, Inc. v. Lucky Stores*, 6 Cal. App. 1233, 1238-39 (1992) (discussing sequence for applying rules of statutory construction).

<sup>64</sup> See *Travis v. County of Santa Cruz*, 100 Cal. App. 4th 609 (2002), *rev. granted*.

<sup>65</sup> *El Mallakh*, *supra* at 1851. The City of Santa Monica’s solution was unique. The ordinance was amended to permit developers to meet their mandatory affordable housing obligations by either (1) paying a fee or (2) in lieu of paying a fee, develop affordable units that qualify for a density bonus under state law. In other words, where most inclusionary ordinances require the developer to build housing or pay an in-lieu fee, Santa Monica reversed this process; developers must pay a fee or build in-lieu housing. Santa Monica, Cal., Code § 9.56.050.

## **VI. PROACTIVE MEASURES TO AVOID LITIGATION**

### **A. CREATE REALISTIC EXPECTATIONS IN THE GENERAL PLAN**

An up-to-date and comprehensive general plan, supported by a master environmental document, lays a solid foundation for all land use regulation. These documents also create realistic expectations among landowners by describing the community's vision for development. A clear statement within the general plan that demonstrates the community's commitment to affordable housing and use of inclusionary policies helps set such expectations. Provided with this direction, landowners are more likely to propose new land uses that are consistent with the vision articulated in the general plan, which reduces the potential for litigation.

### **B. IMPLEMENT INCLUSIONARY REQUIREMENT LEGISLATIVELY**

Some jurisdictions have imposed inclusionary requirements on the basis of general statements of policy in their housing element or other housing strategy documents. This can lead to the kind of individualized ad hoc application that invites takings or other legal challenges. Local agencies are on firmer ground if they impose conditions of development legislatively (by ordinance).

### **C. PROVIDE INCENTIVES AND ALTERNATIVES.**

Including significant incentives and regulatory concessions for developers that comply with the inclusionary requirement will also make such regulations easier to accept. In *Napa*, the court cited the city's use of expedited processing, fee deferrals, loans or grants and density bonuses with approval. Many of these incentives – such as density bonuses and expedited processing – are inexpensive to provide and can be very significant to a developer. One study has shown that a such programs can offset the developer's costs in providing the inclusionary units.<sup>66</sup>

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<sup>66</sup> Andrew G. Dietderich, *An Egalitarian Market: The Economics of Inclusionary Zoning Reclaimed*, 24 Fordham Urb. L.J. 23 (1996).

### **D. INCLUDE A VARIANCE TO ACT AS A SAFETY VALVE**

Local agencies should consider including a variance or adjustment process as part of an inclusionary housing ordinance. As a general rule, landowners must seek a variance, if one is offered, before going to court. A procedure that allows for exceptions in cases of extreme economic hardship ensures that the agency has the opportunity to modify its policies to avoid unfair results.

Indeed, the inclusion of a waiver provision was important to the *Napa* court’s finding that the inclusionary ordinance did not constitute a taking on its face. While the process should be clear and easy to use, the onus should be on the developer to demonstrate that a reduction or waiver of inclusionary requirements is necessary. The variance or waiver provision should set standards for the extent of the reduction if it is determined that the terms of the ordinance should be modified. For example, many agencies permit a reduction or waiver only to the extent that the developer can show that the inclusionary requirement would violate the California or U.S. Constitutions.

### **E. USE FINDINGS TO DEMONSTRATE NEXUS**

“Findings” are written explanations of why – legally and factually – a public entity is making a particular decision. Findings need to explain how and why the regulation involved meets the constitutionally or statutorily required standard.<sup>67</sup> An inclusionary housing ordinance should contain findings that demonstrate the need for affordable housing and explain how the ordinance will address that need. Findings may be based on public input, studies and other objective sources of information. In *Napa*, for example, the court noted that the city supported its position with 700 pages of reports and materials that the city had relied on in adopting the ordinance.<sup>68</sup>

Good findings depend on good information. Many local agencies conduct a nexus study to establish the need for a fee. There are many existing sources of data that demonstrate the need for affordable housing. For example, the housing element often includes the community’s allocated share of the regional need for housing affordable to lower income households. Local jurisdictions that receive certain entitlement funds from the U. S. Department of Housing and Urban Development must prepare

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<sup>67</sup> *Findings 101: Explaining a Public Agency Decision, Western City*, May 2000, at 13.

<sup>68</sup> *Napa*, 90 Cal. App. 4th 188, 193 (2001).

an analysis of impediments to fair housing. This analysis can provide data supporting inclusionary zoning as a means of combating housing segregation. There are many other sources of information, including the local public housing authority, social services offices and homeless services providers.

## **F. ADDRESS COSTA-HAWKINS ACT ISSUES**

While the Costa-Hawkins Act should not apply to inclusionary rental units, absent clarifying legislation or a court opinion, there is no way to be fully certain. One strategy a local agency can employ to minimize risk in this regard is to provide assistance, such as an increased number of units, relaxed design standards or subsidies, for inclusionary units and require a contract between the agency and the developer to develop the inclusionary rental units (*See Part V above*).

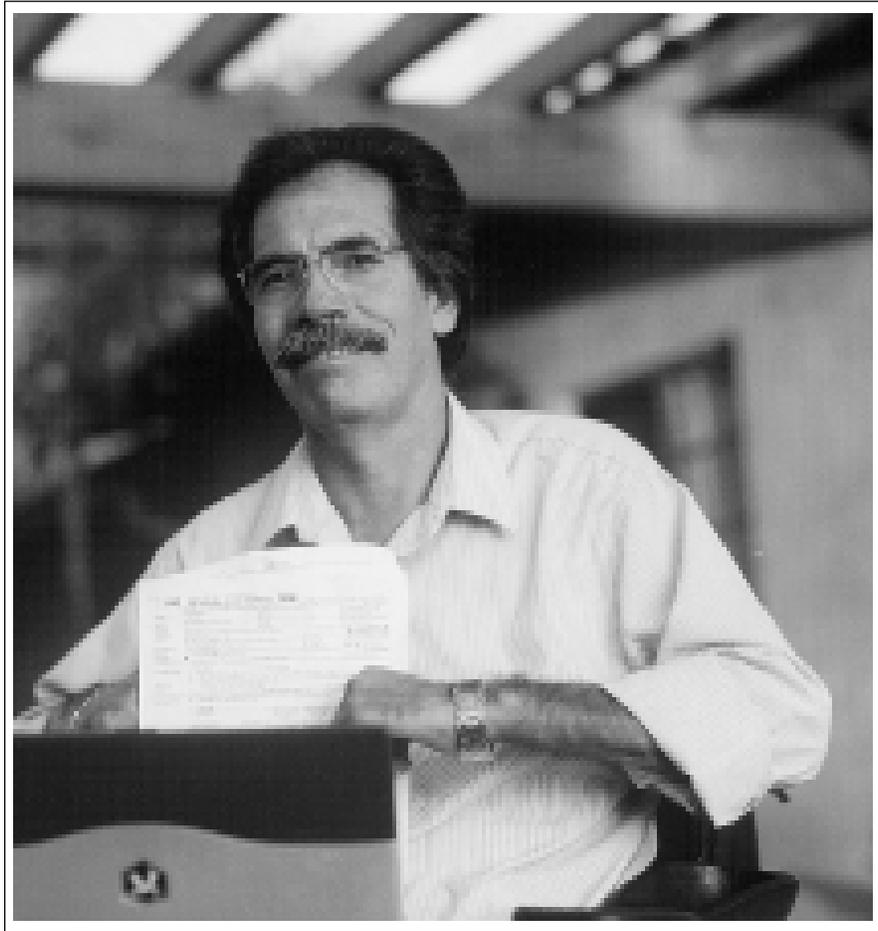
## **G. BE FAIR**

Finally, consider the fairness of an agency's approach to inclusionary housing. Courts often view their fundamental role as dispensing justice. A public agency will have an easier time in the courtroom if the regulation was adopted with significant public involvement and ample opportunities to avoid unjust results.



# Part VI

## A SAMPLE ORDINANCE



### THE FACES OF AFFORDABLE HOUSING

#### Nick Renteria

*“Living in affordable housing has helped me manage to get started in my business. Now I can see growing it in a way that I can provide for my family.”*

Nick was born in Zacatecas, Mexico and moved to Santa Barbara in 1972. He lives with his family and works in accounting and tax preparation. One of the best things about his job is building relations with clients and being able to help and talk with them as friends. Nick’s most memorable life experience is graduation from Santa Barbara Business College. Nick lives in an 11 unit family complex that serves as a good example of the Housing Authority’s efforts to build within the urban core and along transportation corridors. Ten of the units are townhouse in design and one is fully accessible for the handicapped. Built in the style of a European Village by the Housing Authority in 1995, it offers affordable housing that is close to shopping, public transportation and local schools.

*- Housing Authority of the City of Santa Barbara - 2002 Calendar*



## ANNOTATED SAMPLE INCLUSIONARY HOUSING ORDINANCE

This selection consists of a sample inclusionary housing ordinance. The word “sample” is chosen carefully because this is not intended to be –nor should it be mistaken for– a “model” ordinance. Instead, it is presented as a potential starting point for local agencies in California considering adopting or revising an inclusionary housing ordinance.

### **A REFERENCE TOOL, NOT A TEMPLATE**

The ordinance presented here is probably not in the best form to actually be incorporated into a local municipal code. It was designed to be more of a teaching device than an actual ordinance. As a result, provisions have been included that many agencies would normally exclude or include in a different ordinance. For example, at least two of the people who reviewed the ordinance (recognized below) recommended that we omit the section of the ordinance that applied to commercial development. It would be cleaner, they argued, if the fee on development was encompassed in a separate ordinance instead of combined with the provisions and process of a typical inclusionary housing ordinance. Their recommendation is a good one, but we nevertheless left the provision in to raise the issue as an option for local agencies.

This ordinance may also be a little heavy on detail. In practice, many agencies adopt less detailed ordinances and then develop a set of implementation procedures to deal with day-to-day implementation issues. This two-step process affords local agencies the opportunity to design programs more carefully and even seek additional input from those most likely to be affected by the ordinance. It also allows the flexibility to manage the inclusionary program over several decades. As a reference tool, however, the Sample Ordinance, addresses several of these underlying issues in an effort to highlight many of the issues that are likely to arise after the initial adoption of an inclusionary housing ordinance.

Another feature of the ordinance is the Drafting Notes, which provide practice tips and references that discuss policy choices and legal issues that arise in connection with specific provisions. The issues are raised with the hope that they may be useful in helping tailor an ordinance to fit the needs of a specific community.

In short, this sample document is offered to further the discussion of inclusionary housing in California. The Institute believes that there are still many improvements and corrections that could be made, and would welcome any comments or suggestions that anyone would have.

### **THANK YOU TO OUR REVIEWERS**

Several individuals lent their valuable time and considerable expertise by reviewing the Sample Ordinance and offering helpful suggestions. Each deserves a great deal of credit for raising issues and questions on early drafts and shaping the final product:

- **Richard Judd**, Goldfarb and Lipman (San Francisco)
- **Michael Colantuono**, Colantuono, Levin & Rozell (Los Angeles)
- **Susan Cleveland**, Deputy City Attorney, San Francisco
- **Iris Yang**, Shareholder, McDonough, Holland & Allen (Sacramento)
- **Craig Labadie**, City Attorney, City of Concord
- **Michael Rawson**, California Affordable Housing Project (Oakland)

Despite these acknowledgements, the participation by the reviewers is not an endorsement of the sample ordinance. All final decisions as to content were made by the staff of the **Institute for Local Self Government**. As explained above, some of the comments and suggestions we received were not included in the final version. Thus, to the extent that there are any mistakes or errors, the Institute bears sole responsibility.

# ANNOTATED SAMPLE INCLUSIONARY HOUSING ORDINANCE<sup>1</sup>

## Chapter 10-10 of the Municipal Code

### SECTION 10-10-100. PURPOSE.

The purpose of this Chapter is to:

- (a) Encourage the development and availability of housing affordable to a broad range of Households with varying income levels within the City as mandated by State Law, California Government Code Sections 65580 and following.
- (b) Promote the City's goal to add affordable housing units to the City's housing stock in proportion to the overall increase in new jobs and housing units;
- (c) Offset the demand on housing that is created by new development and mitigate environmental and other impacts that accompany new residential and Commercial Development by protecting the economic diversity of the City's housing stock, reducing traffic, transit and related air quality impacts, promoting jobs/housing balance and reducing the demands placed on transportation infrastructure in the region;
- (d) *[Identify additional local policies, especially in the General Plan, which this ordinance serves, to provide a stronger policy basis and deeper record to support the ordinance.]*

### SECTION 10-10-110. FINDINGS.<sup>2</sup>

The City Council finds and determines:

- (a) Both California and the City face a serious housing problem that threatens their economic security. Lack of access to affordable housing has a direct impact upon the health, safety

### **DRAFTING NOTES**

<sup>1</sup> **VOLUNTARY VERSUS MANDATORY PROGRAMS.** The Sample Ordinance provides a mandatory compliance procedure for inclusionary housing. Some agencies have adopted voluntary programs, but anecdotal evidence suggests that they have been less effective in producing Inclusionary Units.

<sup>2</sup> **FINDINGS.** Findings describe how the ordinance addresses the community's need for affordable housing. The findings should reference the general plan policies to be implemented by the ordinance and should refer to and incorporate by reference any economic studies or other reports on which the ordinance is based. Findings should include a description of the reasons why the local agency has decided to take the action. Findings should be as specific to the jurisdiction as possible. *See Findings 101: Explaining a Public Agency Decision, Western City, May 2000, at 13 (www.westerncity.com/Findings101May00.htm).*

and welfare of the residents of the City. The City will not be able to contribute to the attainment of State housing goals or to retain a healthy environment without additional affordable housing. The housing problem has an impact upon a broad range of income groups including many who are not impoverished by standards other than those applicable to California's and the City's housing markets, and no single housing program will be sufficient to meet the housing need.

- (b) The [*insert source*,]<sup>3</sup> has determined that [*insert relevant facts specific to the locality, for example: "65 percent of the new Households in the City will have Very Low-, Low- or Moderate-Incomes"*]. A lack of new Inclusionary Units will have a substantial negative impact on the environment and economic climate because (i) housing will have to be built elsewhere, far from employment centers and therefore commutes will increase, causing increased traffic and transit demand and consequent noise and air pollution; and (ii) City businesses will find it more difficult to attract and retain the workers they need. Inclusionary housing policies contribute to a healthy job and housing balance by providing more affordable housing close to employment centers.
- (c) Among City groups with especially significant housing needs are: [*insert groups, for example: (1) families earning less than 80 percent of the median county income (\$38,000 per year for a family of four) and (2) families earning less than 110 percent of the median county income (\$52,000 per year for a family of four) and desiring to purchase their first home*].
- (d) Development of new commercial projects and market-rate housing encourages new residents to move to the City. These new residents will place demands on services provided by both the public and private sectors. Some of the public and private sector employees needed to meet the needs of the new residents or Commercial Development earn incomes only adequate to pay for affordable housing. Because affordable housing is in short supply within the City, these employees may be forced to live in less than adequate housing within the City, pay a disproportionate share of their incomes to live in adequate housing within the City, or commute ever-increasing distances to their jobs from housing located outside the City. These circumstances harm the City's ability to attain goals articulated in the City's General Plan and strain the City's ability to accept and service new market-rate housing development.

### **DRAFTING NOTES**

<sup>3</sup> **SOURCES OF DATA.** There are many sources of data that can demonstrate the need for affordable housing. This information can be incorporated into findings by reference. For example, the City's Housing Element will include the community's allocated share of the regional need for housing affordable to lower income households. For HUD entitlement jurisdictions, the Analysis of Impediments to Fair Housing Choice (AI) in the local Consolidated Plan can provide data supporting inclusionary zoning as a means of combating housing segregation. There are many other sources of information, including the local public housing authority, councils of government, developers, social services offices and homeless services providers.

- (e) The California Legislature has required each local government agency to develop a comprehensive, long-term general plan establishing policies for future development. As specified in the Government Code (at Sections 65300, 65302(c), and 65583(c)), the plan must: (i) “encourage the development of a variety of types of housing for all income levels, including multifamily rental housing;” (ii) “[a]ssist in the development of adequate housing to meet the needs of low- and moderate-income households;” and (iii) “conserve and improve the condition of the existing affordable housing stock, which may include addressing ways to mitigate the loss of dwelling units demolished by public or private action.”
- (f) The citizens of the City seek a well-planned, aesthetically pleasing and balanced community, with housing affordable to Very Low-, Low- and Moderate-Income Households. Affordable housing should be available throughout the City, and not restricted to a few neighborhoods and areas. However, there may also be trade-offs where constructing affordable units at a different site than the site of the principal project may produce a greater number of affordable units without additional costs to the project applicant. Thus, the City finds that in certain limited circumstances, the purposes of this Chapter may be better served by allowing the Developer to comply with the inclusionary requirement through alternative means, such as the payment of in-lieu fees, development of offsite housing or dedication of land. For example, if a project applicant can produce a significantly greater number of affordable units off-site, then it may (but not always) be in the best interest of the City to permit the development of affordable units at a different location than that of the principal project.
- (g) Federal and state funds for the construction of new affordable housing are insufficient to fully address the problem of affordable housing within the City. Nor has the private housing market provided adequate housing opportunities affordable to Moderate-, Low- and Very Low-Income Households.
- (h) The City Council established an Affordable Housing Task Force<sup>4</sup> that was charged with recommending an appropriate affordable housing program. The Task Force conducted an investigation, held hearings and solicited comments from the community regarding a range of options. On \_\_\_\_\_, the Task Force presented a number of recommendations, including a proposed inclusionary housing ordinance. The Planning Commission accepted the Task

### **DRAFTING NOTES**

<sup>4</sup> **DESCRIPTION OF PROCESS.** This finding would be applicable if the City engaged in a stakeholder or other public input process to develop the inclusionary housing ordinance. Such findings are not essential if the local agency has developed a good record that describes the need for affordable housing and its nexus to new development. However, findings are also a place to highlight the “good facts” that helped a local agency reach a particular decision, particularly when there is a chance that the ordinance might be challenged. One appellate court, for example, noted that the City of Napa had employed a consensus process in developing an inclusionary housing ordinance. *See Home Builders Association of Northern California v. City of Napa*, 90 Cal. App. 4th 188 (2001).

Force’s Final Report on \_\_\_\_\_. The City Council gave conceptual approval to an inclusionary housing program and directed staff to develop an ordinance that reflected the recommendations of the Task Force. Based on the findings of the Task Force, the City Council finds that it is necessary to adopt an inclusionary housing ordinance in order to address the City’s housing crisis.

- (i) The City is aware that there may be times when the inclusionary housing requirements make market-rate housing more expensive.<sup>5</sup> In weighing all the factors, including the significant need for affordable housing, the City has made the decision that the community’s interests are best served by the adoption of the inclusionary housing ordinance.
- (j) *[To the extent that an ordinance includes a fee on commercial development, include findings required by the Mitigation Fee Act (see Note 16). Such findings will be specific to each community. In most cases, findings are based on a supporting nexus study that demonstrates the connection between new commercial development and the need for affordable housing.]*

#### **SECTION 10-10-120. DEFINITIONS.<sup>6</sup>**

As used in this Chapter, the following terms shall have the following meanings:

- (a) **Affordable Rent** means monthly rent that does not exceed one-twelfth of 30 percent of the maximum annual income for a Household of the applicable income level (Moderate-, Low- or Very Low-Income).
- (b) **Affordable Ownership Cost** means a sales price that results in a monthly housing cost (including mortgage, insurance and home association costs, if any) that does not exceed one-twelfth of 30 percent of the maximum annual income for a Household of the applicable income (Moderate-, Low- or Very Low- Income).

#### **DRAFTING NOTES**

<sup>5</sup> **EFFECT OF INCLUSIONARY ORDINANCE ON HOUSING PRICES.** Whether or not inclusionary housing policies actually make new homes more expensive is debatable. Developers often argue that consumers of new market rate housing must pay higher prices to cover the cost of inclusionary housing. Inclusionary housing advocates counter that the long-term impact is to reduce the value of raw land – that is, the developer will pass on the additional cost to the original landowner in the form of a lower purchase price. The Sample Ordinance raises the issue here merely to underscore that the legislative body considered the potential economic consequences and, on balance, determined that the community’s interests are best served by the adoption of the ordinance.

<sup>6</sup> **DEFINITIONS GENERALLY.** This section defines all key terms used in the ordinance. Although some definitions simply clarify the terms in the ordinance, others will have a significant effect on the scope and implementation of the ordinance. Since ordinances are sometimes challenged for being vague, a good rule is to define as many terms as possible to limit misunderstanding. All definitions should be consistent with terms used in existing local agency ordinances and policies, such as the general plan, zoning ordinances and other housing policies.

- (c) **Alternative Housing Proposal** means a proposal to build Inclusionary Units in lieu of paying a fee on Commercial Development as provided in Section 10-10-140(b).
- (d) **Area Median Income** means the median Household income as provided in Section 50093(c) of the California Government Code.
- (e) **City** means the City of \_\_\_\_\_.
- (f) **City Manager**<sup>7</sup> means the City Manager of the City or his or her designee.
- (b) **Commercial Development** means the construction of any commercial or industrial project, as defined by Section [*insert section number*] of the Zoning Code, for which a tentative map or building permit application was received after [*insert effective date of ordinance*].
- (h) **Construction Cost Index** means [*insert reference to local construction cost index such as the Engineering News-Record San Francisco Building Cost Index*]. If that index ceases to exist, the City Manager will substitute another Construction Cost Index, which, in his or her judgment, is as nearly equivalent to the original index as possible.
- (i) **Developer** means any person,<sup>8</sup> firm, partnership, association, joint venture, corporation, or any entity or combination of entities, which seeks City approvals for all or part of a Residential or Commercial Development.
- (j) **Household** means one person living alone or two or more persons sharing residency whose income is considered for housing payments.
- (k) **Inclusionary Housing Plan** means a plan for a residential or Commercial Development submitted by a Developer as provided by Section 10-10-240(b).
- (l) **Inclusionary Housing Agreement** means a written agreement between Developer and the City as provided by Section 10-10-240(c).
- (m) **Inclusionary Unit** means a dwelling unit that must be offered at Affordable Rent or available at an affordable housing cost to Moderate-, Low- and Very Low-Income Households.

### **DRAFTING NOTES**

<sup>7</sup> **CITY MANAGER'S ROLE.** The Sample Ordinance delegates most of the implementation authority – such as entering into Affordable Housing Agreements and waiver and adjustment determinations – to the City Manager. However, such delegation can vary. Depending on the organizational structure of the local agency, such authority can be delegated to the Planning Commission, Housing Authority Director or Community Development Director.

<sup>8</sup> **DEFINITION OF “PERSON.”** Many local agencies already have an adequate definition of “person” in their code, in which case, “firm...entities,” can be deleted.

- (n) **Low-Income Household** means a Household whose annual income does not exceed the qualifying limits set for “lower income households” in Section 50079.5 of the California Government Code.<sup>9</sup>
- (o) **Market-rate Unit** means a dwelling unit in a Residential Development that is not an Inclusionary Unit.
- (p) **Moderate-Income Household** means a Household whose income does not exceed the qualifying limits set for “persons and families of low or moderate income” in Section 50079.5 of the California Government Code.
- (q) **Off-Site Unit** means an Inclusionary Unit that will be built separately or at a different location than the main development.
- (r) **On-Site Unit** means an Inclusionary Unit that will be built as part of the main development.
- (s) **Residential Development** means the construction of any residential dwelling units where the tentative map, parcel map or, for project not processing a map, the building permit was received after [*insert effective date of ordinance*].<sup>10</sup>
- (t) **Very Low-Income Household** means a Household whose income does not exceed the qualifying limits set for “very low income households” in Section 50079.5 of the California Government Code.

### **DRAFTING NOTES**

<sup>9</sup> **INCOME HOUSEHOLD DEFINITIONS.** Definitions that cross-reference the California Health & Safety Code should make local action to update income levels unnecessary. *See* Cal. Health & Safety Code §§ 50079.5, 50093; 50105 and 50106. These standards are published in the California Code of Regulations. *See* Cal. Code of Regs. tit. 25, §§ 6926 – 6932. Many public funding sources rely on statutory income and housing or rental cost definitions in providing funds for affordable housing. Thus, unless the local agency is addressing a specific local need, it is usually helpful if local agencies include these statutory definitions to assure consistency with state and federal housing programs. However, communities whose affordability characteristics differ from those of the county of which they are a part may choose to accept the funding complications and other complexities involved in defining their own affordability thresholds. Such provisions should be carefully drawn and be based upon a record that justifies selection of the threshold so defined.

<sup>10</sup> **EFFECTIVE DATE.** Note that this provision is being used to set the effective date of the ordinance. The inclusionary requirements will apply to all map applications received after the effective date.

<sup>11</sup> **RESIDENTIAL INCLUSIONARY REQUIREMENT.** The California Department of Housing and Community Development (HCD) may require a showing that the inclusionary requirement will not unduly constrain the development of affordable housing. *See* Cal. Gov’t Code § 65583(a)(4). Consequently, the existence of clear standards and procedures make it easier to demonstrate that the requirements will result in additional affordable housing. Most local agencies in California that

*(continued on next page)*

**SECTION 10-10-130. RESIDENTIAL DEVELOPMENT.<sup>11</sup>**

For all Residential Developments of 7 or more units, at least 15 percent of the total units must be Inclusionary Units restricted for occupancy by Moderate-, Low- or Very Low-Income Households.<sup>12</sup> The number of Inclusionary Units required for a particular project will be determined only once, at the time of tentative or parcel map approval, or, for developments not processing a map, prior to issuance of a building permit. If a change in the subdivision design results in a change in the total number of units, the number of Inclusionary Units required will be recalculated to coincide with the final approved project.

- (a) **Calculation.** For purposes of calculating the number of affordable units required by this Section, any additional units authorized as a density bonus under California Government Code Section 65915(b)(1) or (b)(2) will not be counted in determining the required number of Inclusionary Units. In determining the number of whole Inclusionary Units required, any decimal fraction less than 0.5 shall be rounded down to the nearest whole number, and any decimal fraction of 0.5 or more shall be rounded up to the nearest whole number.
- (b) **Type of Inclusionary Units.**<sup>13</sup> At least one-third of the Inclusionary Units (or 5 percent of the total development) must be restricted to occupancy by Low-Income Households. An additional one-third of the Inclusionary Units (or 5 percent of the total development) must

**DRAFTING NOTES**

have adopted inclusionary housing programs have imposed an inclusionary requirement between 10 and 20 percent of the total units, though the range is from 5 to 60 percent. Other variations in application include:

- ***Special Provisions for Senior Housing.*** For example, the City of Napa requires that 50 percent of all units designated for senior residents be affordable.
- ***Different Requirements for Single and Multiple Family Housing.*** On the theory that multifamily units are more affordable than single-family units, some agencies adopt a higher requirement for single-family units. The local agency should lay out the justification for different treatment in the findings section.
- ***Location.*** Local agencies can target certain areas when the record supports such action. Some agencies increase the inclusionary requirement in their downtown or redevelopment zones. The rationale for such distinctions should be explained in supporting materials submitted to the decision-maker and incorporated by reference into the findings. In coastal areas, staff should consider whether the local coastal plan imposes special requirements and cite the policies of the Coastal Act even if it does not. *See* Gov't Code § 65590.

<sup>12</sup> **THRESHOLD SIZE.** Minimum project size varies widely among California local agencies, but most range from 5 to 20 units. Thresholds are adopted to make small projects more feasible. An increasing number of local agencies are applying inclusionary requirements to all projects, including small ones, but only require that a proportional fee be paid on small projects (in which case, the fee ceases to be “in-lieu,” and becomes the primary condition of development). *See* Note 16, below.

be restricted to occupancy by Very Low-Income Households. To encourage additional development of Low- and Very Low-Income housing, the following equivalents shall be used in determining compliance:

- (1) Each Very Low-Income unit is equivalent to 2 units affordable to Moderate-Income Households.
- (2) Each Low-Income unit is equivalent to 1.5 units affordable to Moderate-Income Households.

**(c) Sequence of Inclusionary Units.**<sup>14</sup> The first Inclusionary Unit occupied in any Development must be restricted to occupancy by a Low- or Very Low-Income Household; the second Inclusionary Unit must be restricted to occupancy by a Very Low-Income Household; and the third Inclusionary Unit must be restricted to occupancy by a Moderate-, Low- or Very Low-Income Household. This sequence repeats for the fourth, fifth and sixth Inclusionary Units occupied. The City Manager may approve an alternative sequence when the Developer elects to take advantage of the equivalents provided in subsection (b)(1) and (b)(2) of this Section. The sequence for projects that include 7 or more Inclusionary Units will be specified in the Inclusionary Housing Plan and Inclusionary Housing Agreement required by Section 10-10-240(b).

For Residential Developments of at least 7 and not more than 42 units, the first Inclusionary Unit occupied must be restricted to occupancy by a Moderate- Income Household, the second to occupancy by a Very Low-Income Household, and the third to occupancy by a Low-Income Household. This sequence repeats for the fourth, fifth and sixth Inclusionary Units occupied. The City Manager may approve an alternative sequence when the Developer elects to take advantage of the equivalents provided in subsection (b)(1) and (b)(2) of this Section. The sequence for projects of more than 42 units will be specified in the Inclusionary Housing Plan and Inclusionary Housing Agreement required by Section 10-10-240(b).

### **DRAFTING NOTES**

<sup>13</sup> **INCENTIVES FOR LOWER INCOME UNITS.** Developer reluctance to build low- and very low-income units can sometimes be offset with incentives. The Sample Ordinance allows a Developer to reduce the effective inclusionary requirement from 15 to 10 percent by building additional very low-income units in lieu of moderate income units. Alternatively, in markets where the needs of moderate-income households are sufficiently addressed, local agencies can also accomplish this goal by simply requiring that all inclusionary units be affordable to either low- and very low-income households.

<sup>14</sup> **SEQUENCING FOR SMALL PROJECTS.** This purpose of this provision is to assure that a balance of moderate-, low- and very low-income households. Without such a provision, some Developers may build all the moderate- and low-income units first. A more flexible alternative would be to develop the sequencing as part of the Affordable Housing Plan, which would eliminate the need to codify the sequencing requirements as part of the ordinance.

**10-10-140. COMMERCIAL DEVELOPMENT.**<sup>15</sup>

- (a) Approval of a tentative map or building permit for Commercial Development requires the payment of a fee<sup>16</sup> to the Affordable Housing Trust Fund for each 5,000 square feet of new commercial space within any 12-month period that is constructed or converted to a new use. The City Council may annually review the fee authorized by this Section, and may,

**DRAFTING NOTES**

<sup>15</sup> **APPLICATION TO COMMERCIAL DEVELOPMENT.** Whether to impose an inclusionary housing fee on commercial development is a policy choice. Statewide, most inclusionary ordinances apply only to residential development. The Sample Ordinance combines a residential inclusionary requirement and a commercial “linkage” fee. A more cautious approach would be to adopt two separate ordinances, one for commercial development and a second for residential development. That way, if either the commercial or residential requirement is struck down, the non-challenged requirement is less likely to be “tainted” by the process. While a standard severability clause that accompanies most ordinances can serve this function from a technical standpoint, the dual ordinance approach may be preferable from a political and implementation standpoint.

<sup>16</sup> **FEES IMPOSED AS CONDITION OF DEVELOPMENT.** The fee on commercial development is not an in-lieu fee, but a fee established under the Mitigation Fee Act. *See* Cal. Gov’t Code § 66000 and following. Thus, the agency must establish a connection, or nexus, between the demand for affordable housing that will occur as a result of the development and the purpose of the fee. *See Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) (upholding fee on nonresidential building to offset burdens caused by low-income workers moving to area to fill jobs created by project). The Mitigation Fee Act requires the following findings:

- The purpose of the fee is to offset the demand for housing that is created by the new development.
- Funds will be used for the construction of units for moderate-, low- and very low-income households. To the extent possible, incorporate supporting information included in the General Plan and any environmental impact report prepared with respect to the General Plan.
- The fee is reasonably related to the commercial development. (Put another way, show that the commercial development will benefit from the greater stock of affordable housing).
- The need for the public facility is a reasonably related to the commercial development. (The added commercial development creates a demand for additional affordable housing units).
- There is a reasonable relationship between the amount of the fee and the cost of the affordable housing units.

*See* Cal. Gov’t Code §§ 66001(a) and (b); *Garrick Development Co. v. Hayward Unified School Dist.*, 3 Cal. App. 4th 320 (1992). The amount of the fee should not exceed the estimated reasonable cost of providing the service or facility on which the fee is imposed. *See* Cal. Gov’t Code § 66005. Further guidance for establishing fees is found in *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643 (2002) (holding that courts must defer to legislatively enacted fees that are generally imposed on a class “logically subject to its strictures” and applied by formula without discretion on the part of the local agency).

based on that review, adjust the fee amount by resolution.<sup>17</sup> For any annual period during which the City Council does not review the fee authorized by this subsection, fee amounts will be adjusted once by the City Manager based on the Construction Cost Index. The amount of the fee required for a specific development will be determined only once, at the time of tentative or parcel map approval, or, for developments not processing a map, prior to issuance of a building permit. If a change in design results in a change in square footage, the amount of the fee will be recalculated.<sup>18</sup>

- (b) **Alternative Housing Proposal.** In lieu of paying a fee to the Affordable Housing Trust Fund and to the extent permitted by the City’s General Plan, zoning ordinance and other applicable laws, a Developer may propose an Alternative Housing Proposal to build Inclusionary Units on the site of the Commercial Development or on another site sufficiently close to the Commercial Development site to serve the housing demand created by the development. Developers making an Alternative Housing Proposal must do so by submitting an Affordable Housing Plan and enter into an approved Inclusionary Housing Agreement as provided by Section 10-10-240.

### **SECTION 10-10-150. EXEMPTIONS.**

The requirements of this Chapter do not apply to:

- (a) The reconstruction of any structures that have been destroyed by fire, flood, earthquake or other act of nature provided that the reconstruction of the site does not increase the number of residential units by more than 6 or increase the interior floor area of a non-residential structure by more than 4,999 square feet.
- (b) Developments that already have more units that qualify as affordable to Moderate-, Low- and Very Low-Income Households than this Chapter requires.<sup>19</sup>

### **DRAFTING NOTES**

<sup>17</sup> **PROCEDURE FOR ADOPTING AND INCREASING FEES.** The Mitigation Fee Act specifies the process for setting and increasing fees. *See* Cal. Gov’t Code §§ 66016-66018.5.

<sup>18</sup> **CONSISTENCY BETWEEN ALTERNATIVE HOUSING PROPOSALS AND RESIDENTIAL DEVELOPMENTS.** The intention of the Sample Ordinance is to allow a developer to submit an acceptable Affordable Housing Plan in lieu of paying the commercial fee. Some of the provisions in the remainder of the ordinance will need clarification in the context of the Alternative Housing Proposal. For example, Section 10-10-200 requires that the Inclusionary Units be similar in quality and bedroom size to Market Rate Units, which is an unhelpful distinction when applied to the underlying commercial development. The required Affordable Housing Plan and subsequent agreement (Section 10-10-240) is the appropriate place within the Sample Ordinance to address these issues.

<sup>19</sup> **NONPROFIT HOUSING ASSOCIATIONS.** Some inclusionary ordinances exclude nonprofit housing associations, but without further definition, “nonprofit” is probably not an effective screen. Some for-profit developers have formed affiliated nonprofits. Moreover, nothing prevents a nonprofit developer from developing a project that is solely market rate units.

- (c) Housing constructed by other government agencies.
- (d) Other Exemptions. [*Insert other appropriate exemptions, such as churches<sup>20</sup> or schools*].

### **SECTION 10-10-200. AFFORDABLE HOUSING STANDARDS.**

Inclusionary Units built under this Chapter must conform to the following standards:

- (a) **Design.**<sup>21</sup> Except as otherwise provided in this Chapter, Inclusionary Units must be dispersed throughout a Residential Development and be comparable in infrastructure (including sewer, water and other utilities), construction quality and exterior design to the Market-rate Units. Inclusionary Units may be smaller in aggregate size and have different interior finishes and features than Market-rate Units so long as the interior features are durable, of good quality and consistent with contemporary standards for new housing. The number of bedrooms must be the same as those in the Market-rate Units, except that if the Market-rate Units provide more than four bedrooms, the Inclusionary Units need not provide more than four bedrooms.<sup>22</sup>
- (b) **Timing.** All Inclusionary Units must be constructed and occupied concurrently with or prior to the construction and occupancy of Market-rate Units or development. In phased developments, Inclusionary Units may be constructed and occupied in proportion to the number of units in each phase of the Residential Development.
- (c) **Duration of Affordability Requirement.** Inclusionary Units produced under this ordinance must

#### **DRAFTING NOTES**

<sup>20</sup> **RELIGIOUS USE EXEMPTION.** Local agencies electing to exempt church uses should do so in a manner that does not distinguish religious from non-religious uses that are otherwise similar in order to avoid problems under the Religious Land Use and Institutionalized Persons Act. See 42 U.S.C. § 2000cc.

<sup>21</sup> **DESIGN STANDARDS.** Design standards are included to guard against the use of inferior materials and designs in the Inclusionary Units. Some agencies also specify minimum square footage or sizes for certain types of housing (for example, of two bedroom minimums for owner-occupied units). But design standards should be considered carefully. Such standards make the Inclusionary Units more expensive to construct (particularly when the local agency may be contributing financial assistance to the project). For example, requiring that the inclusionary units be of similar size to market rate units might be cost prohibitive in some large single-family home developments. On the other hand, too few standards may result in some (not all) developers producing substandard units. Local agencies will need to balance these competing interests to fit the needs of their communities.

<sup>22</sup> **NUMBER OF BEDROOMS.** The Sample Ordinance contemplates affordable units with up to four bedrooms. In most communities, affordable units are usually made up of two and three bedrooms, which can limit the opportunities for larger-sized low-income families to find comfortable accommodations.

be legally restricted to occupancy by Households of the income levels for which the units were designated for a minimum of 55 years for rental units and 45 years for owner occupied units.<sup>23</sup>

### **SECTION 10-10-210. IN-LIEU FEES.**<sup>24</sup>

For Residential Developments of 14 or fewer units,<sup>25</sup> including Inclusionary Units, the requirements of this Chapter may be satisfied by paying an in-lieu fee to the Affordable Housing Trust Fund as provided in Section 10-10-310. The fee will be sufficient to make up the gap between (i) the amount of development capital typically expected to be available based on the amount to be received by a Developer or owner from Affordable Housing Cost or Affordable Rent and (ii) the anticipated cost of constructing<sup>26</sup> the Inclusionary Units. The City Council may annually review the fee authorized by this Section by resolution, and may, based on that review, adjust the fee amount. For any annual period during which the City Council does not review the fee authorized by this subsection, fee amounts will be adjusted once by the City Manager based on the Construction Cost Index.

- (a) **Timing of Payment.** The fee must be paid within ten calendar days of issuance of a building permit for the Development or the permit will be null and void.<sup>27</sup> For phased developments,

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<sup>23</sup> **DURATION.** Duration periods vary from 20 years to permanent restrictions. The Sample Ordinance incorporates the affordability periods in the state Redevelopment Law. *See* Cal. Health and Safety Code § 33413(c). When a city or county (but not necessarily charter city) provides incentives such as those provided in Section 10-10-230, the duration should probably not be less than 30 years to be consistent with a strict reading of the Density Bonus Law. *See* Cal. Gov't Code § 65915(c). Local agencies are prohibited from offering incentives that would undermine the intent of the Density Bonus Law. *See* Cal. Gov't Code § 65917. A court could interpret anything less than a 30-year affordability period as undermining the intent of the Density Bonus Law.

<sup>24</sup> **CALCULATING IN-LIEU FEES.** The amount of the fee can be a function of a number of characteristics, including number of market-rate units constructed (most common), new parcels created, square footage or property value. The fee should be proportional to the cost of the affordability gap between the cost of construction price and the ability of a moderate-, low- or very low-income household to pay for a home, plus the reasonable cost of administering the City's Inclusionary Housing program. For example, if the cost of constructing an affordable unit is \$200,000 and the maximum price that the low-income household can afford is \$140,000, then the affordability gap is \$60,000. If the cost of administering the program is calculated at \$1,500 per unit, applying the 15 percent inclusionary requirement yields a fee of \$9,225 per unit (note that the affordability gap – and thus the fee (will differ for moderate- and very low-income households). For rental units, the affordability gap is the difference between the rent stream necessary to pay the cost of development and maintenance of the rental project over its useful life and the rent stream that could be expected from a project charging affordable rents.

<sup>25</sup> **CAP FOR IN-LIEU FEE ALTERNATIVE.** The Sample Ordinance limits the application of the in-lieu fee option to projects that include 14 or fewer units. Some communities have set even lower ceilings. Setting a cap allows small project Developers who can accomplish economies of scale and better sustain the burden of providing and administering units themselves to retain a degree of

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payments may be made for each portion of the Development within ten calendar days of a Building Permit for that phase. When payment is delayed, in the event of default, or for any other reason, the amount of the in-lieu fee payable under this Section will be based upon the fee schedule in effect at the time the fee is paid.

- (b) **Effect of No Payment.** No final inspection for occupancy will be completed for any corresponding Market-rate Unit in a Residential Development unless fees required under this Section have been paid in full to the City.

## SECTION 10-10-220. ALTERNATIVES.<sup>28</sup>

- (a) **Developer Proposal.**<sup>29</sup> A Developer may propose an alternative means of compliance in an Affordable Housing Plan as provided in Section 10-10-240 according to the following provisions.

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flexibility, while requiring that larger projects place Inclusionary Units on-site. Setting such limits is a policy consideration. Here, a 14-unit project size demarks the boundary because it equates to the project size that would require the inclusion of 2 affordable units at the 15 percent inclusionary requirement. It will also be useful to include some rationale for the ceiling chosen in the record of the adoption of the ordinance, perhaps via the staff report.

<sup>26</sup> **COST OF CONSTRUCTING VERSUS MEDIAN HOME PRICE.** The Sample Ordinance sets the fee as a function of the cost of constructing the Inclusionary Unit. In some cases, local agencies have set the fee based on the median price only to find out that the cost of constructing the unit is higher.

<sup>27</sup> **TIMING OF PAYMENT.** Requiring that the in-lieu fee be received upon issuance of the building permit increases the likelihood that the corresponding inclusionary units can be built at the same time as the market-rate project. This requirement is not generally available for fees imposed directly on development (as opposed to an in-lieu fee) because the Mitigation Fee Act provides that local agencies cannot require fees before the final inspection or upon issuance of a certificate of occupancy. *See* Cal. Gov't Code § 66007.

<sup>28</sup> **PROVIDING ALTERNATIVES.** In *Homebuilders Association of Northern California v. City of Napa*, 90 Cal. App. 4th 188 (2001), the California court of appeal expressed approval of the inclusion of several alternatives within the city's ordinance. However, this approval does not mean that local agencies must include alternatives, or if they do, that they have to provide a menu of alternatives. The Sample Ordinance includes two of the most common alternatives offered to developers: off-site construction and land dedication (in-lieu fees are also an option, but are treated separately here). Other alternatives include credit transfer programs that allow Developers to transfer Inclusionary Units between development projects and accepting rehabilitated units for the inclusionary requirement. If the local agency elects to accept rehabilitated units they should be prepared to address the often complex and thorny issues that are often raised with such programs. *See* Cal. Gov't Code § 65583.1(c).

<sup>29</sup> **ALTERNATIVES AND JUDICIAL SCRUTINY.** One ongoing issue in this area of the law is the extent to which a particular action will receive deferential scrutiny or heightened scrutiny from courts under the Takings Clause as it applies to conditions on development. In general, courts will apply

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- (1) *Off-Site Construction.*<sup>30</sup> Inclusionary Units may be constructed off-site if the Inclusionary Units will be located in an area where, based on the availability of affordable housing, the City Manager finds that the need for such units is greater than the need in the area of the proposed development.
- (2) *Land Dedication.*<sup>31</sup> In lieu of building Inclusionary Units, a Developer may choose to dedicate land to the City suitable for the construction of Inclusionary Units that the City Manager reasonably determines to be of equivalent or greater value than is produced by applying the City's current in-lieu fee to the Developer's inclusionary obligation.

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heightened scrutiny to project-specific conditions because of the increased possibility of the local agency unfairly leveraging its permit approval authority. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994). In contrast, actions that are legislatively adopted and apply equally to a broad class of landowners will receive deferential treatment. *See San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643 (2002). Developer-proposed alternatives often require case-by-case evaluation. However, because the Developer has voluntarily submitted the proposal, judicial scrutiny should remain deferential to local agency actions where the option to take the legislatively adopted conditions remains open. Nevertheless, the law in this area is not fully developed and local agencies that attempt to use the process to leverage additional concessions for Developers may find their actions subject to increased scrutiny.

<sup>30</sup> **OFF-SITE CONSTRUCTION OF UNITS.** The Sample Ordinance favors the development of On-Site Units by granting such projects incentives that are not available to projects that include Off-Site Units. Another option is to require a higher inclusionary percentage for Off-Site Units because such units are usually cheaper to produce. For example, if the on-site requirement is 15 percent, the off-site requirement could be 20 or 25 percent. But local agencies should not rely too heavily on such alternatives. Inclusionary programs may have exclusionary effects in cases when Developers are routinely permitted to develop off-site (and the off-site locations are concentrated in one area), or when a single Developer locates all of the Inclusionary Units in one area of the project. In extreme cases, such practices may be discriminatory. Local land use actions that deny individuals or groups of individuals the enjoyment of residence, landownership, tenancy or any other land use because of the intended occupancy by persons or families of low-, moderate- or middle-income are unlawful. *See* Cal. Gov't Code § 65008(a). Any allowance of Off-Site Units should keep this prohibition in mind.

<sup>31</sup> **LAND DEDICATION.** Land dedication can be a particularly attractive option for a Developer. In many cases, however, such lands are not ideally located to further the goals of inclusionary housing. The Sample Ordinance attempts to address these issues by highlighting the issues most likely to make the deal unattractive from a policy point of view. Local agencies electing to include a land dedication alternative should also consider incorporating an appraisal process to avoid disputes about what constitutes "equivalent or greater value." For example, both the Developer and the City could have the property appraised and if there is more than a 10 percent difference between the valuations, then the two appraisers agree on a third-party appraiser to evaluate the appraisals. Alternatively, the ordinance could reserve to the City the power to determine the value of the property for these purposes, subject to an administrative appeal and, ultimately, judicial review.

- (3) *Combination.* The City Manager may accept any combination of on-site construction, off-site construction, in-lieu fees and land dedication that at least equal the cost of providing Inclusionary Units on-site as would otherwise be required by this Chapter.
- (b) **Discretion.** The City Manager may approve, conditionally approve<sup>32</sup> or reject any alternative proposed by a Developer as part of an Affordable Housing Plan. Any approval or conditional approval must be based on a finding that the purposes of this Chapter would be better served by implementation of the proposed alternative(s). In determining whether the purposes of this Chapter would be better served under the proposed alternative, the City Manager should consider (i) whether implementation of an alternative would overly concentrate Inclusionary Units within any specific area and, if so, must reject the alternative unless the undesirable concentration of Inclusionary Units is offset by other identified benefits that flow from implementation of the alternative in issue; and (ii) the extent to which other factors affect the feasibility of prompt construction of the Inclusionary Units on the property, such as costs and delays, the need for an appraisal, site design, zoning, infrastructure, clear title, grading and environmental review.

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<sup>32</sup> **CONDITIONAL APPROVALS.** In some cases, conditional approvals receive increased judicial scrutiny to the extent that they involve a local agency imposing specialized conditions on a single development. Under the Sample Ordinance, the conditional approval is an alternative to the baseline inclusionary requirement. Thus, the likelihood of such scrutiny is decreased. In any event, local agencies should base conditional approvals on clear regulatory objectives.

<sup>33</sup> **COSTA-HAWKINS RENTAL HOUSING ACT.** One issue that must be considered in connection with rental units is the potential application of the Costa-Hawkins Rental Housing Act, which prohibits local agencies from setting price controls on rental units built after 1995. *See* Cal. Civ. Code §§ 1954.50- 1954.53. (The Act does not apply to “for sale” inclusionary units). The question arises, then, whether the Costa-Hawkins Act limits the authority of local agencies to control subsequent pricing of inclusionary rental units. The better, albeit not certain answer, is that the Act’s legislative history indicates that it places no such limits on inclusionary rental units. Statements made by the sponsors of the bill and in the legislative analysis indicated that the bill would apply only to five cities that had “extreme vacancy control” provisions. Further comments indicated that the 70 cities and counties with “moderate” rent control (including, presumably, inclusionary programs) would not be affected by the Act. While this history seems to bolster the conclusion that inclusionary rental programs are not be affected by the Act, absent a clarifying court opinion or legislative act, there is no way to be certain. For a full discussion of this analysis, and its drawbacks, *see* Nadia I. El Mallakh, *Does the Costa-Hawkins Act Prohibit Local Inclusionary Zoning Programs?* 89 Cal. L. Rev. 1847 (2001).

***Another Way of Looking At the Costa-Hawkins Issue.*** Even if the Costa-Hawkins Act were applicable to rental inclusionary units, the Act provides another potential safe harbor: it does not apply to rental units where “the owner has otherwise agreed by contract with a public entity in consideration for a direct financial contribution or any other forms of assistance specified” by the Density Bonus Law. Cal. Civ. Code § 1954.52(a)(2) (referring to Cal. Gov’t Code § 65915). A reasonable reading of this provision suggests that inclusionary rental units may be exempted from the Act if (1) there is a contract between a Developer and the public entity for the construction of

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**SECTION 10-10-230. INCENTIVES FOR RENTAL<sup>33</sup> AND ON-SITE<sup>34</sup> HOUSING.**

In accord with Chapter [*local density bonus ordinance*], the City may provide one or more of the following incentives to a Developer who elects to satisfy the inclusionary housing requirements of this Chapter by producing rental units or owner-occupied housing units on the site of a Residential or Non-Residential Development.

- (a) **Modified Development Standards to Increase Density.** Modification in development, zoning or architectural design requirements, provided that such modifications exceed the minimum building standards provided in the Uniform Building Code [and similar codes], as incorporated into the Municipal Code in Section \_\_\_\_ that will allow for increased density, including, but not limited to, a reduction in setback, square footage and parking requirements.
- (b) **Mixed Use Zoning.** Approval of mixed use zoning in conjunction with a Development if such uses are compatible with the existing or planned development in the area where the proposed Development will be located.
- (c) **Fee Reductions.**<sup>35</sup> A pro-rata refund of the conditional use or other fees required by Section \_\_\_\_, environmental review fees required by Section \_\_\_\_ and the building permit fee required by Section \_\_\_\_ for the portion of the Development devoted to Inclusionary Units:
- (d) **Expedited Processing.** Eligibility for expedited processing of development and permit applications for the Residential Development. [*describe applicability to local processes*]

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inclusionary units; and (2) the local agency offers a financial contribution or another “form of assistance” specified in the Density Bonus Law. The plain language refers only to the *forms* of assistance specified in the Density Bonus Law, not to projects where assistance was actually provided under the law. Thus, the incentives enumerated in the Sample Ordinance are consistent with the terms of the state Density Bonus Law. When drafting the incentives section, local agencies should be aware that they may not offer incentives in a way that undermines the intent of the state Density Bonus Law. *See* Cal. Gov’t Code § 65917. Thus, drafters should incorporate their density bonus ordinance to ensure consistency between the two ordinances.

<sup>34</sup> **INCENTIVES FOR OWNER-OCCUPIED UNITS.** Limiting incentives for on-site for-sale units (as opposed to Off-Site Units or the payment of in-lieu fees) makes the option of building on site units more attractive.

<sup>35</sup> **FEE REDUCTIONS.** Most planning fees are cost recovery fees. Such fees are limited insofar as the local agency can only charge enough to recoup the cost of processing applications. If there is a break for a particular applicant, then some other source of funds is needed to pay for the services that are provided. Thus, local agencies should identify the source – such as set asides or general funds - that will account for the loss of revenue. Local agencies that try to compensate by setting fees slightly higher on other applications risk having the fee challenged as an unconstitutional tax.

- (e) **Financial Assistance.** To the extent budgeted by the City Council and otherwise available, financial assistance for the inclusionary housing component of the Development may be in the form of loans or grants from sources as may be available to the City.<sup>36</sup>

## **SECTION 10-10-240. COMPLIANCE PROCEDURES.**

- (a) **General.** Approval of an Inclusionary Housing Plan and implementation of an approved Inclusionary Housing Agreement is a condition of any tentative map, parcel map or building permit for any Development for which this Chapter applies. This Section does not apply to exempt projects or to projects where the requirements of the Chapter are satisfied by payment of a fee under Sections 10-10-140 or 10-10-210.
- (b) **Inclusionary Housing Plan.** The City Manager must approve, conditionally approve or reject the Inclusionary Housing Plan within 60 days of the date of a complete application for that approval.<sup>37</sup> If the Inclusionary Housing Plan is incomplete, the Inclusionary Housing Plan will be returned to the Developer along with a list of the deficiencies or the information required. No application for a tentative map, parcel map or building permit to which this Chapter applies may be deemed complete until an Inclusionary Housing Plan is submitted to the City Manager.<sup>38</sup> At any time during the review process, the City Manager may require from the Developer additional information reasonably necessary to clarify and supplement the application or determine the consistency of the proposed Inclusionary Housing Plan with the requirements of this Chapter. The Inclusionary Housing Plan must include:
- (1) The location, structure (attached, semi-attached, or detached), proposed tenure<sup>39</sup> (for-sale or rental), and size of the proposed market-rate, commercial space and/or Inclusionary Units and the basis for calculating the number of Inclusionary Units;
  - (2) A floor or site plan depicting the location of the Inclusionary Units;
  - (3) The income levels to which each Inclusionary Unit will be made affordable;

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<sup>36</sup> **FUNDING SOURCES.** Redevelopment set-aside funds may be one such source of funds.

<sup>37</sup> **PERMIT STREAMLINING ACT.** Approval of the Inclusionary Housing Plan and the Inclusionary Housing Agreement should occur within the time lines provided by the Permit Streamlining Act. *See* Cal. Gov't Code § 65950. Generally, this requirement is 180 days. However, there are instances where faster time lines (60 or 90 days) may apply. For example, a 60 day time line applies for certain publicly financed affordable housing projects. *See* Cal. Gov't Code § 65950(a)(2).

<sup>38</sup> **DEVELOPMENT APPLICATIONS.** The requirements of the Inclusionary Housing Plan should be included on any list of requirements. *See generally* Cal. Gov't Code § 65940 and following.

<sup>39</sup> **DEVELOPER CHOICE OF RENTAL VERSUS FOR-SALE UNITS.** Developers may satisfy all or a portion of the inclusionary requirement by constructing rental housing. *See* Cal. Gov't Code § 65589.8.

- (4) The mechanisms that will be used to assure that the units remain affordable for the desired term, such as resale and rental restrictions, deeds of trust, and rights of first refusal and other documents;
  - (5) For phased Development, a phasing plan that provides for the timely development of the number of Inclusionary Units proportionate to each proposed phase of development as required by Section 10-10-200(c) of this Chapter.
  - (6) A description of any incentives as listed in Section 10-10-230 that are requested of City;
  - (7) Any alternative means designated in Section 10-10-220(a) proposed for the Development along with information necessary to support the findings required by Section 10-10-220(b) for approval of such alternatives; and
  - (8) Any other information reasonably requested by the City Manager to assist with evaluation of the Plan under the standards of this Chapter.
- (c) **Inclusionary Housing Agreement.**<sup>40</sup> The forms of the Inclusionary Housing Agreement, resale and rental restrictions, deeds of trust, rights of first refusal and other documents authorized by this subsection, and any change in the form of any such document which materially alters any policy in the document, must be approved by the City Manager or his or her designee prior to being executed with respect to any Residential Development or Affordable Housing Proposals. The form of the Inclusionary Housing Agreement will vary, depending on the manner in which the provisions of this Chapter are satisfied for a particular development. All Inclusionary Housing Agreements must include, at minimum, the following:
- (1) Description of the development, including whether the Inclusionary Units will be rented or owner-occupied;
  - (2) The number, size and location of Very Low-, Low- or Moderate-Income Units;
  - (3) Inclusionary incentives by the City (if any), including the nature and amount of any local public funding;
  - (4) Provisions and/or documents for resale restrictions, deeds of trust, rights of first refusal or rental restrictions;

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<sup>40</sup> **INCLUSIONARY HOUSING AGREEMENT.** This requirement assures that there is a contract between the Developer and public entity for purposes of the Costa-Hawkins Act. *See Costa-Hawkins Rental Housing Act*, Note 33 above. A standard agreement should be produced that can be modified to fit the terms and needs of individual projects.

- (5) Provisions for monitoring the ongoing affordability of the units, and the process for qualifying prospective resident Households for income eligibility; and

Any additional obligations relevant to the compliance with this Chapter.<sup>41</sup>

- (a) **Recording of Agreement.**<sup>42</sup> Inclusionary Housing Agreements that are acceptable to the City Manager must be recorded against owner-occupied Inclusionary Units and residential projects containing rental Inclusionary Units. Additional rental or resale restrictions, deeds of trust, rights of first refusal and/or other documents acceptable to the City Manager must also be recorded against owner-occupied Inclusionary Units. In cases where the requirements of this Chapter are satisfied through the development of Off-Site Units, the Inclusionary Housing Agreement must simultaneously be recorded against the property where the Off-Site Units are to be developed.

#### **SECTION 10-10-250. ELIGIBILITY FOR INCLUSIONARY UNITS.**

- (a) **General Eligibility.** No Household may occupy an Inclusionary Unit unless the City or its designee<sup>43</sup> has approved the Household's eligibility, or has failed to make a determination of eligibility within the time or other limits provided by an Inclusionary Housing Agreement or resale restriction. If the City or its designee maintains a list or identifies eligible Households, initial and subsequent occupants will be selected first from the list of identified Households, to the maximum extent possible, in accordance with any rules approved by the City Manager. If the City has failed to identify a Household as an eligible buyer for the initial sale of an Inclusionary Unit that is intended for owner-occupancy 90 days after the unit receives a completed final inspection for occupancy, upon 90 additional days' notice to the City and on satisfaction of such further conditions as may be included in City-approved restrictions (which may include a further opportunity to identify an eligible buyer), the owner may sell the unit at a market price, and the unit will not be subject to any requirement of this Chapter thereafter.

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<sup>41</sup> **ADDITIONAL PROVISIONS IN AGREEMENT.** Drafting an agreement to restrict the use of property and placing conditions on title often involves complex issues of property and contract law. The elements of the Sample Ordinance merely provide a starting point for addressing these issues. Local agencies should consult with local agency counsel to determine what additional provisions, if any, should be included here.

<sup>42</sup> **RECORDING.** Because the primary effect of the Inclusionary Housing Agreement is to restrict the use of some of the units on the site, it should be a recordable instrument. Recording requirements vary, however, and it is advisable to consult with the local County Recorder's office in establishing forms for these purposes.

<sup>43</sup> **CITY DESIGNEE.** In some cases, it may be more efficient for the city to delegate such tasks to a local housing authority or nonprofit housing organization.

- (b) **Conflict of Interest.**<sup>44</sup> The following individuals are ineligible to purchase or rent an Inclusionary Unit: (i) City employees and officials (and their immediate family members) who have policy-making authority or influence regarding City housing programs and do not qualify as having a remote interest as provided by California Government Code Section 1091;<sup>45</sup> (ii) the Project Applicant and its officers and employees (and their immediate family members); and (iii) the Project Owner and its officers and employees (and their immediate family members).
- (c) **Occupancy.** Any Household who occupies a rental Inclusionary Unit or purchases an Inclusionary Unit must occupy that unit as a principal residence.

### 10-10-260. OWNER-OCCUPIED UNITS.

- (a) **Initial Sales Price.** The initial sales price of the Inclusionary Unit must be set so that the eligible Household will pay an Affordable Ownership Cost.
- (b) **Transfer.**<sup>46</sup> Renewed restrictions will be entered into on each change of ownership, with a 45-year renewal term, upon transfer of an owner-occupied Inclusionary Unit prior to the expiration of the 45-year affordability period.

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<sup>44</sup> **CONFLICT OF INTEREST.** The conflict of interest provision is inserted into the Sample Ordinance to promote public confidence in the program. Such provisions, however, are not necessarily common in inclusionary housing programs. Indeed, there may be several reasons not to include such a provision. For example, it may unfairly affect the ability of individuals (either for themselves or family members) from lower income backgrounds to run for elected office or apply for certain positions. Some local agencies actually build in a preference for eligible local agency staff to increase the likelihood that city staff resides within the community. Local agencies including this provision should make a record of the rationale for this restriction, such as promoting public confidence in affordable housing programs, discouraging fraud and abuse, and noting that the burden to the affected individuals is small given the relatively small portion of the market affected by the regulation. Moreover, local agencies that have adopted local conflict of interest codes should check this provision for consistency.

<sup>45</sup> **REMOTE INTERESTS.** Cal. Gov't Code § 1091(b)(12) includes in the definition of “remote interest” that of an elected officer in any Section 8 housing assistance payment contract under specified conditions.

<sup>46</sup> **MANAGEMENT OF OWNER-OCCUPIED UNITS.** It is probably impossible to draft an ordinance that would address every possible contingency when it comes to transferring property. Indeed, managing the resale of property often involves unique, time-intensive transactions that underscore the need for the local agency to remain committed to the implementation of an inclusionary policy in order for it to retain effectiveness.

- (c) **Resale.**<sup>47</sup> The maximum sales price permitted on resale<sup>47</sup> of an Inclusionary Unit designated for owner-occupancy shall be the lower of: (1) fair market value or (2) the seller's lawful purchase price, increased by the lesser of (i) the rate of increase of Area Median Income during the seller's ownership or (ii) the rate at which the consumer price index increased during the seller's ownership. To the extent authorized in any resale restrictions or operative Inclusionary Housing Agreement, sellers may recover at time of sale the market value of capital improvements made by the seller and the seller's necessary and usual costs of sale, and may authorize an increase in the maximum allowable sales price to achieve such recovery.<sup>48</sup>
- (d) **Changes in Title.** Title in the Inclusionary Unit may change due to changes in circumstance, including death, marriage and divorce. Except as otherwise provided by this Subsection, if a change in title is occasioned by events that changes the financial situation of the Household so that it is no longer income-eligible, then the property must be sold to an income-eligible Household within 180 days. Upon the death of one of the owners, title in the property may transfer to the surviving joint tenant without respect to the income-eligibility of the Household. Upon the death of a sole owner or all owners and inheritance of the Inclusionary Unit by a non-income-eligible child or stepchild of one or more owners, there will be a one year compassion period between the time when the estate is settled and the time when the property must be sold to an income-eligible Household. Inheritance of an Inclusionary Unit by any other person whose Household is not income-eligible shall require resale of the unit to an income-eligible Household as soon as is feasible but not more than 180 days.

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<sup>47</sup> **RESALE PRICE.** Typically, the resale price will be the original sales price plus the percentage increase in the construction cost index (or other type of index). Some local agencies may add an equity sharing or maintenance credit. However, such pricing assumes that prices will always increase. There have been instances when a decline in a real estate market has been so severe that the fair market value of a home dropped below the inclusionary program price. The Sample Ordinance introduces a degree of flexibility so that the ordinance need not be amended in cases where the affordable price exceeds fair market value.

<sup>48</sup> **EQUITY SHARING.** One issue that often arises is the extent to which owner-occupants can capture any appreciation or equity in their units above the set indexed resale price. Many occupants believe that they, like any other homeowner, should be able to capture the equity gains associated with their home. However, such a policy would limit the ability of the local agency to retain its stock of affordable housing. Some local agencies have developed policies that allow owners to capture a portion of the equity (for example, capped at 10 percent) provided that they properly maintain their homes. The drawback to such programs, however, is that the units become less affordable to moderate-, low- and very low-income households with each new sale.

**SECTION 10-10-270. RENTAL UNITS.**

Rental units will be offered to eligible Households at an Affordable Rent. The owner of rental Inclusionary Units shall certify each tenant Household's income to the City or City's designee at the time of initial rental and annually thereafter. The owner must obtain and review documents that demonstrate the prospective renter's total income, such as income tax returns or W-2s for the previous calendar year, and submit such information on a form approved by the City.

- (a) **Selection of Tenants.** The owners of rental Inclusionary Units may fill vacant units by selecting income-eligible Households from the Section 8 Housing Choice Voucher Waiting List maintained by the City or City's designee. Alternatively, owners may fill vacant units through their own selection process, provided that they publish notices of the availability of Inclusionary Units according to guidelines established by the City Manager.<sup>49</sup>
- (b) **Annual Report.** The owner shall submit an annual report summarizing the occupancy of each Inclusionary Unit for the year, demonstrating the continuing income-eligibility of the tenant. The City Manager may require additional information if he or she deems it necessary.<sup>50</sup>
- (c) **Subsequent Rental to Income-Eligible Tenant.** The owner shall apply the same rental terms and conditions to tenants of Inclusionary Units as are applied to all other tenants, except as required to comply with this Chapter (for example, rent levels, occupancy restrictions and income requirements) or with other applicable government subsidy programs. Discrimination against persons receiving housing assistance is prohibited.
- (d) **Changes in Tenant Income.** If, after moving into an Inclusionary Unit, a tenant's Household income exceeds the limit for that unit, the tenant Household may remain in the unit as long as his or her Household income does not exceed 140 percent of the income limit. Once the tenant's income exceeds 140 percent of the income limit, the following shall apply:

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<sup>49</sup> **PUBLISHING GUIDELINES.** Usually, guidelines require the owner to identify the available unit, state income requirements, indicate where applications are available, state when the application period opens and closes and provide a telephone number for inquiries. The guidelines can also designate specific newspapers and other media in which a unit's availability may be advertised. Some local agencies require that at least one notice be published in a Spanish (or other language) newspaper of general circulation. Care must be taken in selecting which non-English publications will be required to avoid claims of ethnic or national origin discrimination. It is typically sufficient if publication(s) are selected on the basis of Census data reflecting the languages spoken by non-English speakers in or near the jurisdiction.

<sup>50</sup> **REPORTING.** Local agencies can require reporting semi-annually, quarterly or even monthly. Some ordinances require that the local agency be notified each time a vacancy occurs. An annual report provides a way of obtaining rental information in a way that is less burdensome on the property owner and, perhaps, City staff.

- (1) If the tenant's income does not exceed the income limits of other Inclusionary Units in the Residential Development, the owner may, at the owner's option, allow the tenant to remain in the original unit and redesignate the unit as affordable to Households of a higher income level, as long as the next vacant unit is re-designated for the income category previously applicable to the tenant's Household. Otherwise, the tenant shall be given one year's notice to vacate the unit. If during the year, an Inclusionary Unit becomes available and the tenant meets the income eligibility for that unit, the owner shall allow the tenant to apply for that unit.
- (2) If there are no units designated for a higher income category within the Development that may be substituted for the original unit, the tenant shall be given one year's notice to vacate the unit. If within that year, another unit in the Residential Development is vacated, the owner may, at the owner's option, allow the tenant to remain in the original unit and raise the tenant's rent to market-rate and designate the newly vacated unit as an Inclusionary Unit affordable at the income-level previously applicable to the unit converted to market rate. The newly vacated unit must be comparable in size (for example, number of bedrooms, bathrooms, square footage, etc.) as the original unit.

### **SECTION 10-10-300. ADJUSTMENTS, WAIVERS.<sup>51</sup>**

The requirements of this Chapter may be adjusted or waived if the Developer demonstrates to the City Manager that there is not a reasonable relationship between the impact of a proposed Residential Development and the requirements of this Chapter, or that applying the requirement of this Chapter would take property in violation of the United States or California Constitutions.

- (a) **Timing.** To receive an adjustment or waiver, the Developer must make a showing when applying for a first approval for the Residential Development, and/or as part of any appeal that the City provides as part of the process for the first approval.

### **DRAFTING NOTES**

<sup>51</sup> **TAKINGS DETERMINATION.** Local agencies should include an adjustment provision as part of an inclusionary housing ordinance. As a general rule, landowners must exhaust their administrative remedies, if one is offered, before going to court. The adjustment procedure allows for exceptions in cases of extreme economic hardship, thereby ensuring that the agency has the opportunity to modify its policies to avoid unfair results. Indeed, the inclusion of a waiver provision was important to the *Napa* court's finding that the inclusionary ordinance did not constitute a taking on its face. See *Homebuilders Association of Northern California v. City of Napa*, 90 Cal. App. 4th 188 (2001). While the process should be clear and easy to use, the burden should be on the developer to demonstrate that a reduction or waiver is essential. The variance or waiver provision should set standards for the extent of the reduction if it is determined that the terms of the ordinance should be modified. For example, many agencies permit a reduction or waiver only to the extent that the developer can show that the inclusionary requirement would violate the state or federal constitutions.

- (b) **Considerations.** In making a determination on an application to adjust or waive the requirements of this Chapter, the City Manager may assume each of the following when applicable: (i) that the Developer is subject to the inclusionary housing requirement or in-lieu fee; (ii) the extent to which the Developer will benefit from inclusionary incentives under Section 10-10-230; (iii) that the Developer will be obligated to provide the most economical Inclusionary Units feasible in terms of construction, design, location and tenure; and (iv) that the Developer is likely to obtain other housing subsidies where such funds are reasonably available.
- (c) **Decision and Further Appeal.** The City Manager, upon legal advice provided by or at the behest of the City Attorney,<sup>52</sup> will determine the application and issue a written decision. The City Manager’s decision may be appealed to the City Council in the manner and within the time set forth in Section [*insert section for standard appeals*].
- (d) **Modification of Plan.** If the City Manager, upon legal advice provided by or at the behest of the City Attorney, determines that the application of the provisions of this Chapter lacks a reasonable relationship between the impact of a proposed residential project and the requirements of this Chapter, or that applying the requirement of this Chapter would take property in violation of the United States or California Constitutions, the Inclusionary Housing Plan shall be modified, adjusted or waived to reduce the obligations under this Chapter to the extent necessary to avoid an unconstitutional result. If the City Manager determines no violation of the United States or California Constitutions would occur through application of this Chapter, the requirements of this Chapter remain applicable.

### **10-10-310. AFFORDABLE HOUSING TRUST FUND.<sup>53</sup>**

- (a) **Trust Fund.** There is hereby established a separate Affordable Housing Trust Fund (“Fund”). This Fund shall receive all fees contributed under Sections 10-10-140, 10-10-210 and 10-10-220 and may also receive monies from other sources.

### **DRAFTING NOTES**

<sup>52</sup> **LEGAL ADVICE.** Some ordinances merely require that the City Manager consult with legal counsel. However, the ordinance should specify that the agency counsel is providing legal advice in the capacity of the agency’s attorney in order to minimize the risk that the attorney may have to testify (which could infringe on attorney-client communication) in any subsequent procedure if the challenger elects to file suit.

<sup>53</sup> **AFFORDABLE HOUSING TRUST FUND.** This section should specify the purpose of the fund, the department or official responsible for the fund, the use of the fees and any limitations that will be imposed on the fund. Local agencies that plan to collaborate with a nonprofit housing authority should designate the degree to which the authority can use the funds (for example, whether the funds can be used for the authority’s administrative costs).

- (b) **Purpose and Limitations.** Monies deposited in the Fund must be used to increase and improve the supply of housing affordable to Moderate-, Low-, and Very Low-Income Households in the City. Monies may also be used to cover reasonable administrative or related expenses associated with the administration of this Section.
- (c) **Administration.** The fund shall be administered by the City Manager, who may develop procedures to implement the purposes of the Fund consistent with the requirements of this Chapter and any adopted budget of the City.
- (d) **Expenditures.** Fund monies shall be used in accordance with City's Housing Element, Redevelopment Plan, or subsequent plan adopted by the City Council to construct, rehabilitate or subsidize affordable housing or assist other governmental entities, private organizations or individuals to do so. Permissible uses include, but are not limited to, assistance to housing development corporations, equity participation loans, grants, pre-home ownership co-investment, pre-development loan funds, participation leases or other public-private partnership arrangements. The Fund may be used for the benefit of both rental and owner-occupied housing.
- (e) **City Manager's Annual Report.**<sup>54</sup> The City Manager shall report to the City Council and Planning Commission on the status of activities undertaken with the Fund as provided by Section 66006(b) of the California Government Code. The report shall include a statement of income, expenses, disbursements and other uses of the Fund. The report should also state the number and type of Inclusionary Units constructed or assisted during that year and the amount of such assistance. The report will evaluate the efficiency of this Chapter in mitigating City's shortage of affordable housing and recommend any changes to this Chapter necessary to carry out its purposes, including any adjustments to the number of units to be required.

#### **10-10-320. ENFORCEMENT.**<sup>55</sup>

- (a) **Penalty for Violation.** It shall be a misdemeanor to violate any provision of this Chapter. Without limiting the generality of the foregoing, it shall also be a misdemeanor for any

### **DRAFTING NOTES**

<sup>54</sup> **CITY MANAGER'S ANNUAL REPORT.** The annual report acts as a reporting and compliance monitoring mechanism that can facilitate compilation of an organized, readily accessible source of data that can be used to demonstrate the effectiveness of the inclusionary ordinance in future housing elements. However, the provision in the Sample Ordinance that the report evaluate the efficiency of the inclusionary housing ordinance is not required by the Mitigation Fee Act. *See* Cal. Gov't Code § 66006(b)

<sup>55</sup> **ENFORCEMENT.** This section sets objective standards for monitoring compliance and imposes penalties for noncompliance. *See* Cal. Gov't Code § 36900 (all violations of city ordinances are misdemeanors unless by ordinance they are made infractions).

person to sell or rent to another person an affordable unit under this Chapter at a price or rent exceeding the maximum allowed under this Chapter or to sell or rent an affordable unit to a Household not qualified under this Chapter. It shall further be a misdemeanor for any person to provide false or materially incomplete information to the City or to a seller or lessor of an Inclusionary Unit to obtain occupancy of housing for which he or she is not eligible.

- (b) **Legal Action.** The City may institute any appropriate legal actions or proceedings necessary to ensure compliance with this Chapter, including: (i) actions to revoke, deny or suspend any permit, including a Building Permit, certificate of occupancy, or discretionary approval; (ii) actions to recover from any violator of this Chapter civil fines, restitution to prevent unjust enrichment from a violation of this Chapter, and/or enforcement costs, including attorneys fees; (iii) eviction or foreclosure; and (iv) any other appropriate action for injunctive relief or damages. Failure of any official or agency to fulfill the requirements of this Chapter shall not excuse any person, owner, Household or other party from the requirements of this Chapter.

### **10-10-330. MINIMUM REQUIREMENTS.**

The requirements of this Chapter are minimum and maximum requirements, although nothing in this Section limits the ability of a private person to waive his or her rights or voluntarily undertake greater obligations than those imposed by this Chapter.<sup>56</sup>

### **DRAFTING NOTES**

<sup>56</sup> **MINIMUM AND MAXIMUM REQUIREMENT.** This provision underscores the uniform application of this ordinance. A local agency is most vulnerable to a takings challenge if it has imposed inclusionary requirements on an individualized or ad hoc basis. A developer can always volunteer to go beyond the minimum application of the ordinance, but the local agency should probably not require it without specific findings that justify the action. Thus, in defining the conditions of the ordinance as both a minimum and a maximum, the local agency reduces the risk that conditions will be specially imposed on individual developments.

# SAMPLE HEARING NOTICE

## PUBLIC NOTICE: INCLUSIONARY HOUSING ORDINANCE

***About Inclusionary Housing Requirements.*** The subject of the public hearing is a land use planning device known as inclusionary housing requirements. Inclusionary housing requirements can take many forms, but the basic concept is that development proposals include affordable housing. State law requires that every local jurisdiction provide for its fair share of affordable housing.

Most inclusionary housing ordinances apply to residential development proposals and involve developers including a certain percentage of affordable housing units in their overall proposal to produce market-rate units. Some inclusionary housing ordinances also apply to non-residential development proposals, on the theory that non-residential development generates additional demand for affordable housing stock. Inclusionary ordinances can be voluntary or mandatory.

***Who Lives in Affordable Housing?*** There are a number of misconceptions about who benefits from affordable housing in a community. Affordable housing helps teachers, firefighters, police officers . . . live near where they work in a community . . . Moreover, studies show that a lack of affordable housing can constrain economic growth in an area, causing potential new businesses to look elsewhere to locate.

Issues for Discussion. Some of the issues that are likely to be discussed at a public hearing on inclusionary housing requirements include:

- *What role can an inclusionary housing ordinance play in helping our community provide affordable housing?*
- *Should the ordinance be voluntary or mandatory (and if voluntary, what kinds of incentives should the local agency use to encourage participation)?*
- *What percentage of a proposed development should be set aside for affordable housing?*
- *Under what circumstances should a developer be allowed to provide affordable housing off-site from a proposed development?*

Public input on these issues will be most helpful at the public hearing. You can also provide input in writing prior to the hearing.



**THE SIX PARTS OF THE  
CALIFORNIA INCLUSIONARY HOUSING READER**

**I STATE OF THE STATE**

What are the trends driving the push to adopt or strengthen inclusionary programs? This section provides information and data collected by the California Budget Project about the state of the housing crisis in California.

**Page 1**

**IV IMPLEMENTATION**

Inclusionary programs are adopted with the goal of building more affordable housing units. What has been the experience of other agencies? Much can be learned from the experiences of others.

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**II A SIMPLE EXPLANATION**

Inclusionary housing policies explained in a straight-forward, easy-to-understand style. What are the main elements of a program? How can they be explained in a way that makes sense to the public ?

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**V LEGAL ISSUES**

The Redevelopment and Housing Element Laws are just two laws that affect local agency policy choices in this area. Understanding the context in which inclusionary programs are developed is helpful in avoiding pitfalls down the road.

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**III THE PROS AND CONS**

What are the benefits or inclusionary housing? What are the drawbacks? Experts and interest organizations share their perspectives.

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**VI A SAMPLE ORDINANCE**

A sample, annotated ordinance is offered as a starting point for any local agency considering adopting or revising its ordinance.

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**SUPPORT FOR THIS PUBLICATION PROVIDED BY**

**MCDONOUGH, HOLLAND & ALLEN**

*Attorneys at Law*

and the

**League of California Cities**