



## **Inclusionary Housing in Santa Clara County:**

### **Aligning Local Policies toward a Countywide Affordable Housing Strategy (August 2019)**

#### **Inclusionary Housing: An Introduction**

Inclusionary housing policies require or encourage developers to set aside a certain percentage of housing units in newly constructed or rehabilitated projects for low- and moderate-income residents. By creating mixed-income developments, people from different socio-economic backgrounds are given the opportunity to access the same services and amenities, furthering equity and inclusion, and addressing federal fair housing obligations.

For a number of years, inclusionary housing was only legal for for-sale housing in California due to the [Palmer Sixth Street Properties v Los Angeles](#) court case. This changed effective January 1, 2018 when new law created by AB 1505 went into effect. AB 1505 expressly supersedes the *Palmer* decision by authorizing the legislative body of any city or county to adopt ordinances requiring that, as a condition of developing rental housing units, the development include a certain percentage of rental units affordable to moderate- income, lower-income, very low-income, or extremely low-income households.

In February 2016, the US Supreme Court declined to review a challenge brought by the California Building Industry Association, which questioned the validity of local inclusionary ordinances for for-sale housing. This decision removed any questions over the ability for local government to adopt and implement inclusionary ordinances for for-sale housing.

#### **Legal and Legislative Requirements**

AB 1505 authorizes communities to adopt rental inclusionary requirements by *ordinance*. An ordinance should be adopted to implement inclusionary requirements contained in general plans, housing elements, or other policy documents.

Existing rental inclusionary ordinances that were not amended after *Palmer* can be implemented after January 1, 2018 as long as they include provisions for alternative means of compliance.

No nexus study is required to justify a rental inclusionary requirement. In the 2015 California Supreme Court decision *California Building Industry Ass'n v. City of San Jose (CBIA)*, it determined that inclusionary requirements were “land use provisions similar to rent and price controls and met constitutional requirements so long as not ‘confiscatory’ and designed to further the public health, safety, and welfare.”<sup>1</sup>

If a rental inclusionary ordinance was adopted prior to September 15, 2017, no economic feasibility study is required to justify a rental inclusionary requirement, regardless of the required set-aside percentage. If the ordinance was adopted or amended after September 15, 2017 to require affordable rental housing, a feasibility study would not be required if the set-aside percentage required is 15 percent or less. However, if the ordinance requires a higher inclusionary requirement, or if affordability

---

<sup>1</sup> Goldfarb and Lipman

restrictions are deeper (targeting extremely low- income or very low-income households), a jurisdiction may choose to prepare a feasibility study.

The State Department of Housing and Community Development has the authority to require that an economic feasibility study be provided for any inclusionary ordinance that was adopted after September 15, 2017 if the ordinance requires that more than 15% of the homes be affordable, but only in two circumstances: (1) if the jurisdiction has failed to meet at least 75% of its RHNA need in the above moderate income category for five or more years, or (2) if the jurisdiction has not submitted its annual housing element report for two consecutive years. If HCD should find that the study is insufficient, the jurisdiction would only be able to require 15% affordability until it could prove through an economic feasibility study that additional affordability was feasible.

On November 5, 2019, the San Jose Housing Department presented a staff report and set of recommendations to update the inclusionary housing ordinance and encourage the construction of moderate-income affordable apartments and payment of in-lieu fees for the construction of low-income apartments. The goal is to provide a broader range of housing options for City residents. City Council will consider these changes in 2020.

**SV@Home’s Recommendations:**

Local jurisdictions must make many choices when designing an inclusionary housing ordinance. As these choices are made, it is important to ensure that the inclusionary requirements are both feasible for developers and support achievement of affordable housing goals. To the extent that all 16 Santa Clara County jurisdictions adopt similar requirements, it will provide more certainty to the development community working in the South Bay.

SV@Home encourages all Santa Clara County jurisdictions to consider SV@Home’s recommendations as a way to align local policy goals with a broader countywide inclusionary housing strategy.

Criterion	Recommendation	Rationale
Set-Aside Percentage	Adopt a minimum 15% onsite inclusionary housing onsite requirement for both for-sale and rental housing. If an Alternative compliance option is selected (see below) then this percentage should be increased to a minimum of 20%	<p>Creating a consistent 15% requirement across the county provides predictability for developers as well as a level playing field for cities. The cities of Campbell, Cupertino, Palo Alto, Santa Clara, and San Jose have set 15% affordability as their inclusionary requirement.</p> <p>The recommended set-aside percentage is increased to 20% to incentivize the development of integrated on-site affordable units.</p>
Project Size Threshold	<p>Apply the inclusionary requirements to projects of ten or more units.</p> <p>Do not apply to ADUs.</p> <p>For projects that are smaller than ten units, require that developers pay a fee if the units exceed 1,200 square feet. The fee can increase for larger units.</p>	<p>It is important to offer “missing middle” opportunities, and requiring inclusionary percentages for smaller developments can discourage developers from pursuing small infill development like row houses, stacked flats, duplexes and fourplexes which tend to be more naturally affordable, and therefore affordable to teachers, nurses, construction workers, and others.</p> <p>At the same time, it is recognized that some developments that are small are offered at luxury prices and not naturally affordable. Santa Cruz and San Mateo Counties have</p>

Criterion	Recommendation	Rationale
		adopted inclusionary ordinances that tier fees according to unit size.
Income Restrictions— Rental	Average 60% of Area Median Income (AMI) with at least two different income targets  Example—50% of the homes at 30% AMI and 50% at 80% AMI = average of 55% of AMI	This allows a developer to provide units for a variety of income levels.  Requiring two different income targets ensures that not all units are provided for the same population.
Income Restrictions— Owner	Average 100% of Area Median Income (AMI) with at least two different income targets  Example—50% of the homes at 120% AMI and 50% at 80% AMI = average of 100% AMI	This allows a developer to provide units for a variety of income levels.  Requiring two different income targets ensures that not all units are provided for the same population.
Term of Affordability -- Rental	Place affordability restrictions on rental homes for a minimum of 55 years	This ensures that the homes are available for an extended period, and is consistent with other State and federal affordable housing programs.
Term of Affordability -- Owner	Place affordability restrictions on for sale homes for a minimum of 45 years	This ensures that the homes are available for an extended period, and is consistent with other State and federal affordable housing programs. (Note: these restrictions can be removed upon an equity share sale)
Resale Restrictions— Owner	Implement an equity share provision that allows the original buyer of an affordable unit to sell the unit at market rate and share in the equity appreciation	This allows homeowners to acquire equity, making it possible for them to purchase a new home when they need to move. It also allows the local agency to re-invest its share in a new first-time homebuyer family who can purchase a new home anywhere in the jurisdiction.
Home Amenities	Affordable homes are indistinguishable from market rate homes and are integrated into the development	This is a best practice that ensures that lower- and moderate-income households have access to the same amenities as market-rate households.
Alternative Compliance Options	Provide a variety of alternative options for compliance: - Build Onsite - Offsite construction - Credit trading/transfer - Housing Preservation credits - In lieu fee - Land dedication - Acquisition/Rehabilitation - Combination	Recognizes that not all developments are the same, and provides both the developer and the City with flexibility to respond, particularly when a different option would result in more affordability. Additionally, in some circumstances, payment of an in-lieu fee or another compliance option may be preferable, as in the case of a multi-million-dollar home subdivision.  According to AB 1505, all rental inclusionary ordinances must include alternative means of compliance, however jurisdictions have broad discretion over the alternative means provided.

Criterion	Recommendation	Rationale
Incentives	Provide a robust suite of incentives to developers that should include: <ul style="list-style-type: none"> <li>- Density bonus</li> <li>- Reduction in parking spaces</li> <li>- Changes to setbacks, height requirements, and other zoning variances</li> <li>- Expedited review</li> <li>- Fee or tax exemptions</li> <li>- Financial support</li> </ul>	Provides developers the opportunity to achieve cost savings that can offset the cost of providing the affordable units.
Timeframe and Grandfathering	<p>While an ordinance should go into effect in 30 days, it should provide an adequate timeframe for developers to adjust to new inclusionary requirements. Our recommendation is to grandfather those projects that have applications that have been “deemed complete” by city staff prior to the ordinance becoming effective.</p> <p>Establish requirements that ensure that any project that is grandfathered continues to move forward through the development process.</p>	<p>This is a best practice that recognizes that the development process is long, and that many developers have invested time and resources into projects that are already in the development pipeline.</p> <p>Requiring that the developments that receive grandfather status meet key requirements for progress ensures that those requesting an exemption are verifiably in the development process.</p>