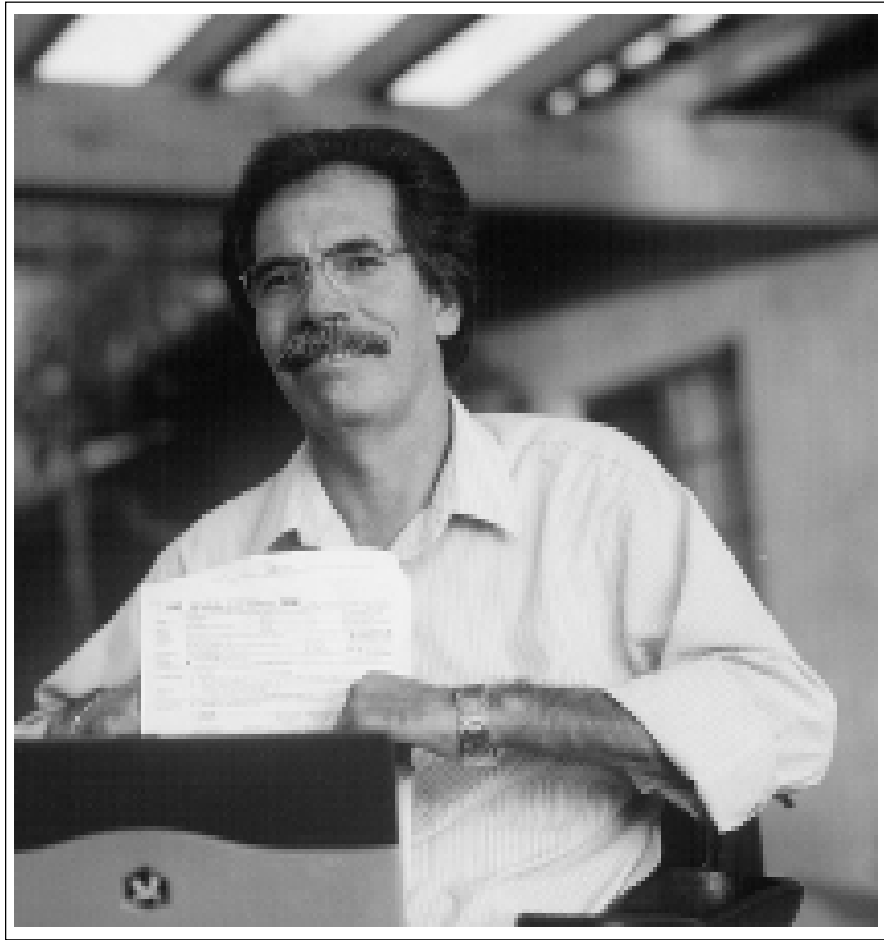


Part VI

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 ORDINANCE¹

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.²

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

¹ **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.

² **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*,]³ 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

³ **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 Force⁴ 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

⁴ **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.⁵ 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.⁶

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

⁵ **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.

⁶ **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**⁷ 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,⁸ 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

⁷ **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.

⁸ **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.⁹
- (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*].¹⁰
- (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

⁹ **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.

¹⁰ **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.

¹¹ **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.¹¹

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.¹² 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.**¹³ 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.

¹² **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.¹⁴ 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

¹³ **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.

¹⁴ **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.¹⁵

- (a) Approval of a tentative map or building permit for Commercial Development requires the payment of a fee¹⁶ 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

¹⁵ **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.

¹⁶ **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.¹⁷ 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.¹⁸

- (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.¹⁹

DRAFTING NOTES

¹⁷ **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.

¹⁸ **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.

¹⁹ **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 churches²⁰ or schools*].

SECTION 10-10-200. AFFORDABLE HOUSING STANDARDS.

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

- (a) **Design.**²¹ 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.²²
- (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

²⁰ **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.

²¹ **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.

²² **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.²³

SECTION 10-10-210. IN-LIEU FEES.²⁴

For Residential Developments of 14 or fewer units,²⁵ 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 constructing²⁶ 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.²⁷ For phased developments,

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²³ **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.

²⁴ **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.

²⁵ **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.²⁸

- (a) **Developer Proposal.**²⁹ 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.

²⁶ **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.

²⁷ **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.

²⁸ **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).

²⁹ **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.*³⁰ 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.*³¹ 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.

³⁰ **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.

³¹ **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 approve³² 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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³² **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.

³³ **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 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 RENTAL³³ AND ON-SITE³⁴ 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.**³⁵ 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.

³⁴ **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.

³⁵ **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.³⁶

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.³⁷ 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.³⁸ 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 tenure³⁹ (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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³⁶ **FUNDING SOURCES.** Redevelopment set-aside funds may be one such source of funds.

³⁷ **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).

³⁸ **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.

³⁹ **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.**⁴⁰ 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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⁴⁰ **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.⁴¹

- (a) **Recording of Agreement.**⁴² 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 designee⁴³ 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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⁴¹ **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.

⁴² **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.

⁴³ **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.**⁴⁴ 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;⁴⁵ (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.**⁴⁶ 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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⁴⁴ **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.

⁴⁵ **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.

⁴⁶ **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.**⁴⁷ The maximum sales price permitted on resale⁴⁷ 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.⁴⁸
- (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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⁴⁷ **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.

⁴⁸ **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.⁴⁹
- (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.⁵⁰
- (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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⁴⁹ **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.

⁵⁰ **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.⁵¹

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.

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⁵¹ **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,⁵² 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.⁵³

- (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.

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⁵² **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.

⁵³ **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.**⁵⁴ 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.⁵⁵

- (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

⁵⁴ **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)

⁵⁵ **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.⁵⁶

DRAFTING NOTES

⁵⁶ **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.

