

INCLUSIONARY HOUSING ORDINANCE GUIDELINES

Background and Instructions

These Inclusionary Housing Ordinance guidelines are being provided to help San Gabriel Valley Council of Governments (SGVCOG) member jurisdictions implement inclusionary housing programs. The following does not provide ordinance-ready text; rather it broadly describes the key sections to be included in an ordinance and describes policy decisions a city will need to consider. Not every provision in the following guidelines will be required in every jurisdiction, and jurisdictions may want to add components not addressed below.

Summary of Typical Ordinance Content

These guidelines are organized so that the resulting ordinances follow the best practices laid out by the Local Government Commission.¹

1. Purpose and Intent

This section allows the jurisdiction to articulate the intent of the ordinance and to demonstrate, through a series of “whereas” statements, a reasonable, factual basis for concluding that a mandatory inclusionary housing requirement will serve the public welfare.

Section 1 is where the jurisdiction can restate the legal developments that support inclusionary housing requirements (California Bldg. Indus. Assn. v. City of San Jose (2015) 61 Cal.4th 435 (“BIA”) [upholding inclusionary housing ordinances for owned units] and Assembly Bill 1505 [2017 bill authorizing inclusionary housing ordinances for rental units]).

Inclusionary housing programs may result from Housing Element updates, and some of the findings and purposes, such as those related to geographic distribution of inclusionary housing, are designed to demonstrate compliance with fair housing and anti-discrimination requirements. The “whereas” and purposes provisions of an ordinance should be drafted to reflect the facts and needs of each jurisdiction, such as references to affordability and feasibility studies prepared by the local jurisdiction.

2. Definitions

The definitions in the ordinance support the provisions set out later in the ordinance and are designed to be as clear and concise as possible, while still defining key terms with enough detail to ensure that the inclusionary housing requirements are applied objectively. They should be consistent with terms used elsewhere in the City’s municipal code.

¹ See Meeting California’s Housing Needs: Best Practices for Inclusionary Housing (Nov. 2018) Local Government Commission (lgc.org/advancinginclusionary-housing-policy).

3. Applicability and Requirements

This part is designed to clearly describe the type of residential projects that are covered by the ordinance. The ordinance will need to specify if the inclusionary housing requirements will apply to both ownership and rental housing (or one or the other) in the entire area governed by the jurisdiction. If the jurisdiction desires that different tenures, or different geographical areas be treated differently (such as, within an overlay zone), this section will need to be modified. The “whereas” and purposes provisions should reflect those policy decision to support different treatment for different geographic areas.

a. Threshold Applicability

This subsection will specifically define the project size (i.e., number of units) at which the ordinance applies. There is broad variability in how jurisdictions approach this item. Some jurisdictions specify that the inclusionary requirement applies only to projects of a certain unit count or larger. Others indicate that projects that are not large enough to require a full onsite unit must still comply by paying a fee.

b. Fractional Units

For applicants complying with the requirement by building affordable units onsite, this subsection will describe how fractional required units will be treated and how affordability requirements will be prioritized.

c. Exemptions

This subsection articulates types of projects or types of units that may be exempt. For example, development projects that have already submitted an application or gone through the entitlement process by the adoption date of the ordinance may be exempted from the inclusionary requirement. If the ordinance does not apply jurisdiction-wide (but, rather, within a specific plan area or zoning district), that will be indicated in this section.

4. Onsite Inclusionary Housing Requirements, Standards, and Restrictions

a. Onsite Inclusionary Housing Requirements

This is the critical section of the ordinance and is designed to clearly set out the inclusionary requirements for each tenure of development (e.g., ownership or rental) and for select residential types (e.g., single family, townhome, condo, apartment), as well as the affordability levels required. By reviewing this section of the ordinance, applicants should be able to quickly determine the scope of the inclusionary housing requirements and clearly understand what requirements apply to their projects. A jurisdiction may want to match the residential types specified in the inclusionary ordinance with residential typologies defined elsewhere in their zoning code for consistency and clarity.

The range of possible inclusionary housing requirements is broad, and it is not possible to provide guidelines to include all possible combinations. For example, many jurisdictions allow for alternative plans, such as requiring a specified overall percentage of low-income units *or* a lower overall percentage of very low-income units. Others may blend the target income levels – for example, specifying a portion of the affordable units to be affordable to moderate-income households

and a portion affordable to low-income households. Other jurisdictions may vary the percentage of inclusionary units required by the size or type of development or by geography within the jurisdiction. Each jurisdiction must determine the variables best suited to its jurisdiction, as supported by market and economic analysis. A feasibility study is not legally required but can help ensure that a proposed inclusionary housing requirement is right-sized for local conditions.

The requirements in most inclusionary policies adopted in California so far have generally fallen within the 10-20% range, with 15% being the most common.² However, as development costs are rising, the overall adopted percentages are decreasing.³ It is important not to set an inclusionary housing requirement so high that it stops development, and equally important not to set it too low and miss out on affordable units.⁴

b. Timing of Construction of Inclusionary Units

The timing of construction of the onsite units is addressed in this section and typically requires concurrent development.

c. Inclusionary Housing Standards

This subsection describes the standards that the affordable units must meet relative to the market-rate units, including unit size, number of bedrooms, dispersion throughout the project, quality of fixtures and finishes, etc.

d. Ongoing Affordability Restrictions

This subsection contains provisions to ensure that the inclusionary units continue to be provided to qualified households for the duration of a required affordability period (e.g., 55 years is a common affordability period for inclusionary rental units). While some cities may choose to defer these compliance issues to administrators and rely upon development agreements and similar documents to address the issue, most ordinances attempt to set out non-controversial terms that would be consistent with a jurisdiction's goals in achieving continuing affordability, while leaving flexibility for administrative supervision.

5. Inclusionary Housing Plan Requirements.

This section is designed to set out typical processes for implementation of inclusionary housing ordinances, such as application procedures, creation of housing plans and agreements, and similar items. Applicants will be required to submit a plan that details

² With respect to rental development, inclusionary housing ordinances that require more than 15% of the units to be affordable to occupants at or below 80% of average median income (i.e., lower income households) may be subjected to review by the California Department of Housing. (Government Code § 65850.01.)

³ See Meeting California's Housing Needs: Best Practices for Inclusionary Housing (Nov. 2018) Local Government Commission (lgc.org/advancing-inclusionary-housing-policy)

⁴ See Meeting California's Housing Needs: Best Practices for Inclusionary Housing (Nov. 2018) Local Government Commission (lgc.org/advancing-inclusionary-housing-policy)

how the applicant will meet the inclusionary requirements. The Plan will need to be approved by the City Manager prior to project approval.

6. Alternative Means of Compliance

State law requires that, for rental developments, inclusionary housing requirements must provide alternative means of compliance.⁵ The law does not require any particular alternative, but states that alternatives may include in-lieu fees, land dedication, off-site construction, and/or acquisition and rehabilitation of existing units. The law requires a minimum of one alternative, and a local jurisdiction may choose preferred alternatives.

State law does not require that compliance alternatives be offered for ownership developments. However, review of existing inclusionary housing ordinances shows that the usual practice is to at least allow for an in-lieu fee alternative for ownership projects, and it is advisable to include an in-lieu fee alternative to required on-site construction of affordable units in an ownership development to avoid takings claims. Common alternatives include:

- a. In-lieu Fees
- b. Offsite Construction
- c. Land Dedication
- d. Acquisition and Rehabilitation
- e. Preservation
- f. Combination of Methods to Provide Inclusionary Housing.

7. Alignment with State Density Bonus

The State of California Density Bonus Law mandates that cities provide an increase in the maximum density allowed by local zoning regulations for developments that include certain proportions of affordable housing units. Simply by complying with a city's existing inclusionary requirements, however, new rental housing developments do not necessarily qualify for the State's density bonus and associated development concessions. For example, for rental projects, only units affordable at or below lower-income levels (60% AMI) qualify for the State Density Bonus, while many local inclusionary requirements are for units affordable at low-income levels (80% AMI). As a contrasting example, ownership projects that meet a city's inclusionary standard by providing units at moderate-low-income (at 120% AMI) could qualify for a 10 percent density bonus under State law. Note that the inclusionary requirement is applied to the "base" density, or number of units in the project before accounting for density bonus, rather than applied to the total number of units; thus, bonus units can all be offered at market rate.

With respect to the interplay between inclusionary housing ordinances and the State Density Bonus Law (Government Code, §§ 65915 - 65918), case law is clear that inclusionary housing units qualify as affordable units for purposes of the Density Bonus Law (*Latinos Unidos de Valle de Napa v. County of Napa* (2013) 217 Cal.App.4th 1160).

⁵ A.B. 1505; see Government Code s 65850.

8. Inclusionary Fee Fund

In-lieu fees are generally paid into a housing trust fund and used (often along with other local funding sources) to finance affordable housing units developed elsewhere in the City. This section specifies the name of the fund and may also describe the allowed uses of the in-lieu fee revenue.

9. Monitoring, Compliance, Waivers, and Enforcement

This section is designed to set out typical processes for monitoring, compliance, waivers, and enforcement. The enforcement provisions tend to reflect standard language for ordinances.

10. Effective and Operative Dates

Most ordinances provide for an effective and operative date 30 days after adoption by the jurisdiction's governing board. The operative date for the ordinance can be set for any time on or after the effective date, and the ordinance can be modified to provide a longer time for the operative date if desired.