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Memorandum

To: Pomona City Council
From: Best Best & Krieger LLP, City Attorney
Date: 24 June 2019
Re: Inclusionary Housing Options

File No.: 65318.00303

INTRODUCTION

From time to time, BB&K is asked to provide an overview of inclusionary housing and what a city's options are for adopting an inclusionary-housing ordinance. This memo provides an overview of what inclusionary housing is, what purpose it serves, and what the City's options are in broad strokes, to help facilitate a policy discussion and obtain Council direction.

SUMMARY

To encourage the development of more affordable housing, the City may require housing developers to provide a percentage of their units at affordable levels through an inclusionary-housing ordinance.

In a for-sale project, the City may require affordable units to be constructed on the same site, integrated with market-rate units, though the developer retains the option of making the affordable units available for rent instead of for sale.

In a for-rent project, the City must allow the developer the option of paying an in-lieu fee or dedicating land or constructing or rehabilitating affordable units off-site, but the City may incentivize the developer to actually construct them on-site, including by requiring fewer units.

State law requires the City to provide several other kinds of incentives to encourage the development of affordable housing as well. All affordable units required under an inclusionary-housing ordinance will count toward satisfying the criteria for density bonuses and other incentives and concessions, so an inclusionary-housing ordinance should be considered together with the City's density-bonus ordinance and other affordable-housing incentives.

DISCUSSION

1. What is an inclusionary-housing ordinance?

“Inclusionary housing ordinances adopted by cities and counties require market-rate housing developments or rental housing developments to include a specified percentage of homes affordable to low- and moderate-income households. These ordinances often establish a standard requiring that between 5 and 25 percent of the residential units constructed be available to low- and moderate-income households.”¹

2. Why do cities adopt inclusionary-housing ordinances?

The primary reason for adopting an inclusionary-housing ordinance is to encourage the development of more affordable housing throughout a community. State law does not yet require cities to adopt an inclusionary-housing ordinance, but many cities consider an inclusionary-housing ordinance to be vital to satisfying their state-required housing obligations.²

For over 50 years, statute has required cities like Pomona to “adopt a comprehensive, long-term general plan for the physical development of the ... city.”³ Through its general plan and otherwise, the City must “facilitate the improvement and development of housing to make adequate provision for the housing needs of *all economic segments* of the community,”⁴ including the City’s allocated share of regional housing needs for “extremely low, very low, low-, and moderate-income households.”⁵

The State requires cities “to provide incentives, such as density bonuses, to developers who voluntarily include affordable housing in their proposed development projects.”⁶ These incentives help, but are often not enough to ensure that needed affordable housing gets built, so many cities choose to adopt an inclusionary-housing ordinance. “Currently, more than 170 cities and counties in California have inclusionary housing ordinances.”⁷

3. What are the City’s options for an inclusionary-housing ordinance?

There are several options that the City should consider in contemplating an inclusionary housing ordinance, such as: Should the City focus on affordable *rental* units or *for-sale* units, or both? Should the city prioritize the integration of affordable units into market-rate projects? And how much of a project to require for affordable housing?

¹ California Land Use Practice (Cal CEB 2019), § 6.2.

² See generally *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435 (“CBIA”), 444–446.

³ Cal. Gov. Code § 65300, enacted by Stats. 1965, ch. 1880, § 5, pp. 4334, 4336, operative Jan. 1, 1967.

⁴ Gov. Code § 65580, subd. (d), emphasis added; see also § 65583.

⁵ Gov. Code § 65853, subds. (a)(1) & (c)(2).

⁶ *CBIA, supra*, at 445, citing Gov. Code § 65915.

⁷ California Land Use Practice (Cal CEB 2019), § 6.2; *CBIA, supra*, at 446.


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- A. *Does the city want to require just affordable for-sale units or affordable rental units, too?*

This choice determines some of the city's other options, such as whether it may require affordable units to be provided on-site.

(1) For-Rent Considerations

The City may require that a percentage of rental units be made affordable, but it may not require the developer to provide the units on-site without *including alternative means of compliance*, such as paying an in-lieu fee, making a land donation, off-site construction, or the acquisition or rehabilitation of existing affordable units.⁸ Thus, the City must allow the developer to opt-out of providing the affordable units on-site.

If the Council wishes to consider a new inclusionary housing requirement, it would be useful to analyze how the proposed percentage of affordable units required would dovetail with the qualifying percentages of affordable housing under the density bonus statute (Government Code §65915) and what the ramifications would be.

(2) For-Sale Considerations

The City has more flexibility in imposing inclusionary-housing requirements on for-sale projects: The City does not have to allow the developer to opt out of providing affordable units on-site, though the City must allow the developer the option of providing the on-site affordable units as *rental* units, even though the rest of the project is for-sale.⁹

Whether the affordable units are built on-site merits particular consideration by the Council.

- B. *Does the city want to require developers to actually provide affordable units on-site or not?*

The choice has significant legal implications. If the city requires affordable units on-site, then the requirement may be imposed as a land-use restriction and price control under the city's police power, since the mandate to provide X percent of the units for lower-income households is a restriction on the use of land.¹⁰ However, if the city does not require affordable units to be provided on-site, but instead requires a developer to pay an in-lieu fee or dedicate land elsewhere, that fee or dedication might be deemed an exaction, subject to all the nexus and proportionality requirements that a city must satisfy to justify a fee and avoid an unconstitutional

⁸ Government Code § 65850 and subd. (g).

⁹ Gov. Code § 65589.8. The statute appears to allow the City to require that rental units be built on-site when the developer elects to provide affordable rental units instead of affordable for-sale units in a for-sale project, as it emphasizes that the city may require "construction" of the units as determined by the city.

¹⁰ *CBLA, supra*, at 444.



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taking. The city shoulders less of a legal burden in justifying the inclusionary-housing requirement if it limits itself to requiring affordable units on-site (at least as to for-sale units) instead of requiring the payment of in-lieu fees — though allowing fees as an *alternative* (instead of requiring fees as the only option) can avoid the exaction problem: If there is at least one non-exaction alternative available to the developer, the City does not have to shoulder the burden of justifying any of the alternatives as an exaction.

This choice of on-site versus opt-out alternatives also has significant policy implications. Federal and state governments recognize that affordable housing is often better implemented in a community when the affordable housing is distributed throughout the community. “This integration of affordable units into market-rate projects creates opportunities for households with diverse socioeconomic backgrounds to live in the same developments and have access to the same types of community services and amenities.”¹¹ Requiring an in-lieu fee or off-site dedication means less diversity within a particular development and often results in less diversity in the community, too, as fees and off-site alternatives are aggregated and used to develop affordable housing in only particular parts of a city.

From conversations with staff, it seems that the City’s interest is in maximizing the development of affordable units within development projects, i.e., on-site. The City can encourage the development of affordable units on-site by directly requiring it for for-sale projects and by incentivizing it in all projects, whether for-sale or for-rent. One of the best ways to incentivize it in a for-rent project is to offer a “discount” if the units are built on-site.

C. How much to require?

As noted in part 1 above, some cities require 25 percent of a new housing project to be affordable units. Pomona may set its own percentage. From a legal perspective, there are few obstacles. To incentivize the production of on-site units integrated into market-rate projects, the City may require a lower percentage of units if provided on-site (e.g., 15 percent), and a higher percentage for off-site alternatives (e.g., 20 or 25 percent).¹²

In certain situations the City will have to justify anything more than 15 percent with specific findings and support those findings with a robust economic feasibility study. If (1) the City adopts an ordinance that requires that more than 15 percent of rental units in a project be made affordable for households with 80 percent or less of the area median income and (2) the City either (a) does not meet at least 75 percent of its regional housing needs allocation, or RHNA, for above-moderate housing, or (b) fails to submit its annual housing element report for two consecutive years, then the State Department of Housing and Community Development (“HCD”) has a right to review the ordinance and require the City to make justifying findings, supported by a study.

¹¹ *CBIA, supra*, at 462.

¹² E.g., *CBIA, supra*, at 450–51.


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If the Council wishes to explore an inclusionary requirement for rentals in an amount greater than 15 percent, it might consider also commissioning an economic feasibility study. This would forestall any surprises in the event of an HCD request for such a study.

The main restraints on how much to require are practical ones based on project economics and market incentives. The more the City insists on, the less appealing the project might be to developers to actually carry out — but this can be offset by providing other compensating incentives, particularly under the City’s state-mandated density-bonus ordinance. Any affordable units that the City might require through its inclusionary-housing ordinance will also count toward the thresholds for density-bonuses and related incentives and concessions under state law, which can be significant.¹³

CONCLUSION

To the extent that the City desires to encourage the development of more affordable housing, adopting a well-thought-out inclusionary-housing ordinance can be instrumental in that effort. The City has substantial flexibility in setting the percentage of units that must be made affordable, and while it may not require that affordable units be built on-site in a for-rent project, the City may nevertheless incentivize the developer to do so by requiring fewer affordable units if constructed on-site and more (or the equivalent of more) if the developer chooses to “opt-out” by paying an in-lieu fee or dedicating land or constructing or rehabilitating units off-site. The City’s density-bonus ordinance will provide additional incentives that will necessarily come into play as well with any inclusionary-housing project.

This memo is intended only as a broad overview. If there are specific legal issues regarding inclusionary housing that you would like us to address in greater detail, please do not hesitate to contact the City Attorney’s office.

¹³ *Latinos Unidos Del Valle De Napa Y Solano v. County of Napa* (2013) 217 Cal.App.4th 1160, 1168–69.