INCLUSIONARY ZONING: LEGAL ISSUES

CALIFORNIA AFFORDABLE HOUSING LAW PROJECT
of the Public Interest Law Project
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California Affordable Housing Law Project — Western Center On Law & Poverty

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I. INTRODUCTION

"Inclusionary Zoning" as it has come to be known is a local zoning ordinance or land use policy which either mandates or encourages developers of housing to include a specified percentage of housing that is affordable to lower and/or moderate income households.[1] With the price of housing continuing to climb in many parts of California, cities and counties increasingly are establishing inclusionary programs to help provide for the needs of fixed and lower income residents who live or work in their communities.[2] More than 100 communities in California now have some form of inclusionary zoning, and the number is growing rapidly.

This memorandum discusses the legal issues and questions that frequently arise when a community considers adopting an inclusionary zoning program. As with any general treatment of legal questions, *this memo should only be used as a starting point for reviewing issues that arise in any particular program or community. It is not a substitute for the advice of a lawyer*. Every program will be different in some way as, of course, is every community.[3] For a comprehensive discussion of the kinds of inclusionary programs in effect in California and a look at many of the policy decisions that must be addressed before a program is adopted or implemented, *see* our companion publication: Inclusionary Zoning– Policy Considerations and Best Practices.[4]

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[1] It is also sometimes referred to as "mixed income zoning" or "inclusionary housing."

[2] California's Housing Element law requires local governments to "make adequate provision" for their share of the regional need for housing for all income levels, including the need for housing affordable to households of very low income (income at 50% or less of the area median) and low income (income at 80% or less of median). *See* Cal. Govt. Code §§65580- 65589.8.

[3] Other helpful articles and publications on the legal aspects of inclusionary requirements are included in a bibliography with your training materials.

[4] The report is included with your training materials and also will be available from Western Center on Law & Poverty and, soon, on the Western Center website: www.wclp.org.

When a locality adopts, either by ordinance, general plan policy or other regulatory mechanism, a program that *requires* new developments to include housing that is affordable to and reserved for households of a certain income, a variety of legal issues may be raised. Those that are raised most often are whether inclusionary zoning constitutes a taking and whether inclusionary requirements as applied to rental housing violates the proscriptions of the Costa-Hawkins Act (entitling owners of rent controlled apartments to set the initial rent.) Cal. Civil Code §1954.50 *et seq*. The former has recently been answered in the negative by the First District Court of Appeals in *Homebuilders of Northern California v. City of Napa*, 90 Cal.App. 4th 188 (1st Dist. 2001); *cert. denied*, 152 L.Ed. 2d 353 (2002) ("*Napa*").[5] And, the authors believe that the answer to the latter is also no, although the outcome of a court challenge based on Costa-Hawkins may depend on the particular provisions of the ordinance. The specific issues addressed in this memo include, along with several others:

- "Takings" questions
- Whether an AB 1600 "nexus study" is required
- Substantive due process and equal protection issues
- Whether Costa-Hawkins applies
- In-lieu fee issues

A program that encourages rather than mandating inclusion of affordable units in developments (usually through a system of regulatory concessions or incentives such as density bonuses or fee waivers) will raise fewer legal questions if only because it is voluntary. However, these programs are becoming the exception precisely because they are voluntary– regardless of the value of the concessions and incentives offered, developers without experience developing affordable housing would just develop market-rate housing, notwithstanding the critical societal need for affordable housing.

II. BASIC AUTHORITY– THE POLICE POWER AND LAND USE (the Power to Exclude– and to Include)

The authority for local governments in California to adopt zoning ordinances and other land use policies and regulations such as inclusionary zoning is the "police power." This power emanates from the Tenth Amendment to the United States Constitution, which reserved to the states their inherent

[5] Napa's Inclusionary Ordinance is described in our Inclusionary Zoning– Policy Considerations and Best Practices.

powers. The police power entitles communities to take actions and adopt laws and policies that protect the public's health, safety and welfare. *See Euclid v. Amber Realty Company*, 272 U.S. 365 (1926).

The California Constitution expressly authorizes cities and counties to exercise the police power, providing that either "may make and enforce within its limits all local, police, sanitary, and other ordinances or regulations not in conflict with the general laws." California Constitution, Article XI, section 7. Even before *Euclid*, the California Supreme Court found that local governments could legitimately employ their police powers to protect the general welfare through enactment of zoning ordinances creating residential zones reserved for single-family housing. *Miller v. Board of Public Works*, 195 Cal. 477 (1925).

Over the years, the courts have held the police power to be quite broad, especially in the context of local land use law. It has been deemed "elastic," expanding to meet ever changing conditions of the modern world. *See Euclid* at 387, *Agins v. City of Tiburon*, 447 U.S. 255, 260-63 (1980), and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). A land use regulation is not unconstitutional unless its provisions "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid* at 395; and *see Miller* at 490. Since *Euclid* and *Miller*, federal and state courts have found that a wide variety of local concerns legitimately fall within the general welfare, including the socio-economic balance (*Village of Belle Terre v. Boraas*, 416 U.S. 1, 4-6 (1974)), controlling rents (*Birkenfeld v. City of Berkeley*, 17 Cal.3d 129 (1976), and growth management when serving the *regional* welfare (*Associated Homebuilders, Inc. v. City of Livermore*, 18 Cal.3d 582 (1976)).

The depth and elasticity of the police power provides local governments with broad discretion to determine use and development of the finite supply of land within their borders. Any controls or regulations that are not unreasonable and bear some relationship to the general welfare of the community are permissible unless proscribed by preemptive state or federal laws or by the federal or California constitutions. Inherent in the police power, then, is the power to exclude or condition development or, viewed from another perspective, the power to mandate inclusion of development with particular characteristics that further the general welfare of the community.

The exclusionary aspect of the power has manifested itself over the years in the form of policies and practices that have excluded affordable housing. "Exclusionary zoning" as it came to be called further exacerbated patterns of racial and economic segregation and contributed to a substantial regional imbalance between the location of jobs and housing. Inclusionary zoning is a direct response to exclusionary land use practices and represents local government's use of the police power to correct past and continuing disparities in furtherance of the general welfare. It is important to keep this context in mind when considering the legal bases for inclusionary zoning.

Though very broad, the discretion afforded by the police power to exclude land uses that facilitate affordable housing has been circumscribed somewhat by constitutional and statutory limitations as discussed above. State courts have taken the lead in the constitutional realm, with the New Jersey Supreme Court holding that the New Jersey Constitution obligated local governments to use their land use powers to affirmatively plan for and make available the reasonable opportunity for low and moderate cost housing to meet the needs of people desiring to live within the community. *See Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (*Mount Laurel I)*. The court dispensed with the strict presumption of validity afforded local zoning ordinances since *Euclid* and recognized a *regional* concept of the general welfare. Striking down a zoning ordinance limiting density, the court found that to survive a constitutional attack, a community must demonstrate that its zoning scheme serves the welfare of the region, not just its own parochial desires.

Following this lead, the California Supreme Court adopted the regional welfare standard in *Associated Homebuilders of the Greater East Bay, Inc., v. City of Livermore*, 18 Cal. 3d 582 (1976):

> [If] a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region.

Id. at 601.

The local power to regulate land use has also been limited by statute. Beginning in the 1960's, Congress and state legislatures started to recognize the disastrous effects that unfettered local discretion can have on racial integration, the environment and the provision of affordable housing. Federal and state laws– especially state mandated local planning laws and fair housing laws– placed significant limitations on local power to exclude housing, balancing the need for affordable housing and equal opportunity with the need for local decision making. Generally, these laws not only restrict exclusionary or discriminatory land use policies, but also require communities to affirmatively plan for inclusion of affordable housing.

California has taken the lead nationally, mandating that all local governments adopt a housing element that "makes adequate provision for the housing needs of all economic segments of the community." Cal. Govt. Code §65580 *et seq*. California's fair housing laws also expressly prohibit discriminatory land use polices (Cal. Govt. Code §12955 *et seq.*) and discrimination against affordable housing (Cal. Govt. Code §65008). And the state's "anti-NIMBY" law requires local government to approve certain affordable housing developments unless certain rigorous findings are made (Cal. Govt. Code §65589.5).

III. JUDICIAL AND STATUTORY AUTHORITY FOR INCLUSIONARY REQUIREMENTS

Almost a decade after *Mt. Laurel I*, the New Jersey Supreme Court revisited its decision in that case and expressly upheld inclusionary requirements as permissible means for local governments to fulfill their obligation to provide housing affordable to lower income households. *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390 (N.J. 1983) (*Mt. Laurel II*). But it was not until 2001 that the California courts addressed inclusionary zoning, upholding the City of Napa's inclusionary zoning ordinance in *Homebuilders of Northern California v. City of Napa*, 90 Cal.App. 4th 188, examined in detail in Section IV.

Statutorily, for many years California has mandated that certain projects or groups of projects include affordable housing.

- Community Redevelopment Law (Cal. Health & Safety Code §§33000 *et seq.*) requires local redevelopment areas to included affordable housing if housing is developed in the area. 30% of all redevelopment agency developed housing and 15% of all non-agency developed housing must be affordable to lower and moderate income households. §33413(b)(1).

- The Mello Act (Cal. Govt. Code §65590) requires that new housing developed in the Coastal Zone must "provide housing units for persons and families of low or moderate income" where feasible. §65590(d). If including the housing within the development is not feasible, the developer must provide the housing at another location within the community unless it would be unfeasible.

The Legislature has also long recognized that local governments impose local inclusionary obligations.

- Government Code §65913.1– the "Least Cost Zoning" law– requires communities to zone sufficient vacant land with appropriate standards to meet, for all income levels, the housing needs identified in the community's housing element. The section provides that "nothing in this section shall be construed to enlarge or diminish the authority of a city, county, or city and county to require a developer to construct such housing." This provision would be meaningless if such authority did not exist.

- The housing element statutes require that housing elements include an analysis of any affordable units produced through local inclusionary zoning programs if those units are threatened with conversion to market rate units. *See* Cal. Govt. Code §65583(a)(8).

IV. INCLUSIONARY ZONING IS CONSTITUTIONAL– *Homebuilders of Northern California v. Napa*

Constitutional attacks on local land use actions generally allege violation of one or more of three provisions: 1) the prohibition against taking with just compensation in the Fifth Amendment of the United States Constitution and Article I, section 19 of the California Constitution; 2) the substantive and procedural protections of the due process clauses of the 14th Amendment of the U.S. Constitution and Article I, section 7 of the California Constitution; and 3) the equal protection clauses of the 14th Amendment and Article I, section 7. This section of this memorandum considers each of these as well as attacks based on Proposition 218's amendments to the California Constitution and the constitutional issues raised by in-lieu fee and land dedication options in inclusionary zoning ordinances. The California Court of Appeals' recent decision in *Homebuilders of Northern California v. City of Napa, 90 Cal.App. 4th 188* upheld the constitutionality of Napa's inclusionary zoning ordinance and provides significant guidance on all of these issues.

Facial and "As Applied" Challenges. Constitutional analysis of an inclusionary zoning requirement must take into account the two different types of legal attacks. A legal challenge to an ordinance based on the requirement itself, as opposed to an attack based on the application of the requirement to a particular development, is called a "facial" attack– the requirement is attacked on its face, independent of any particular development. The developers' suit in Napa was a facial challenge of the Napa inclusionary ordinance.

Challenges to the application of an inclusionary requirement to a particular development is known as an "as applied" attack. An inclusionary requirement can be constitutional on its face, but nevertheless applied in an unconstitutional manner. This memo addresses both kinds of challenges. Basically, to protect against the unconstitutional application of an otherwise constitutional requirement, inclusionary ordinances should include procedures that provide developers with the opportunity to request alternatives or exemptions from obligations, if the developers can show that the obligations go beyond constitutional limits.

What Kind of Regulation is Inclusionary Zoning? An important issue in a constitutional analysis of an inclusionary requirement is whether the mandate is reviewed as a traditional land use regulation, a generally applicable exaction, a housing price control (e.g. rent control), or as an ad hoc exaction on a particular development. As discussed below, the first three are entitled to the great deference traditionally afforded to the exercise of the police power by local government. But when a community

seeks to impose an ad hoc exaction as a condition of approval of a specific development, the exaction is examined under a heightened scrutiny, with the local government bearing the burden of proving its constitutionality.[6] The *Napa* court was asked to consider the facial validity of the City's inclusionary zoning ordinance, and therefore, viewed it as a traditional, generally applicable land use regulation.

The Napa Ordinance.

Napa adopted an ordinance in 1999 that combined a housing trust fund, a housing impact fee on non-residential development and an inclusionary zoning/in-lieu requirement for residential development. Ordinance O1999/20. Prior to adoption, the City convened a citizens Affordable Housing Task Force and a Jobs-Housing Nexus Study Advisory Committee, and conducted a joint city and county jobs-housing nexus study. The City also amended its housing element to commit the City to establish an inclusionary housing program and industry-housing linkage fee program. The ordinance includes findings describing the need for housing for new employees, the lack of affordable housing for lower income residents, the mandates of the housing element, the dwindling supply of land, and the desire to retain a balanced community with housing available to low and moderate income households.

The City's nexus study focused only on the mitigation fees necessary to accommodate the housing need created by *non*-residential development. The city did not conduct a nexus study for the in-lieu fee option to the inclusionary obligation or the inclusionary housing requirement. The specific housing impact fee and in lieu fee were enacted by separate resolution. Resolution R1999/161.

The inclusionary portion of the ordinance requires that at least 10% of all new dwelling units must be affordable. For rental developments, one half of the affordable units must be affordable to very low income households, and one half affordable to low income households. For ownership developments, one half of the affordable units must be affordable to households with incomes not exceeding 100% of median and one half affordable to households of moderate income (up to !20% of median). If the affordable ownership units are affordable to households with incomes not exceeding 80% of median, the developer is entitled to a 5% density bonus, or, in the discretion of the City, an equivalent incentive. Ownership units must remain affordable by deed restriction for 30 years, and rental units must remain affordable in perpetuity. Affordable units must be comparable in number of bedrooms and construction quality, but may have reduced square footage and interior amenities. They must be dispersed throughout the development, but the City retains discretion to allow clustering.

Developers of a single family residential development may meet the inclusionary obligation through payment of an in lieu fee or through an "alternative equivalent action." Such an action can

[6] *See generally Exactions and Impact Fees in California* (2001 Ed., Solano Press).

include a dedication of land, construction of unit off site, or acquisition of existing units. A developer of a multi-family residential development *may propose* to meet the obligation through payment of an in-lieu fee or alternative equivalent action, but approval is within the discretion of the City. To utilize an alternative equivalent action, both the single family and multi-family developer must demonstrate that the alternative will further the affordable housing opportunities in the city to an "equal or greater extent." To obtain approval of payment of in-lieu fees, a developer of multi-family units must demonstrate that overriding conditions prevent the developer from providing the affordable units and that it is not feasible to construct the units even with incentives and concessions provided in the ordinance.

The City may charge owners of rental units an annual monitoring fee and the owners of ownership units a transfer of ownership fee. In-lieu fees are calculated on a percentage basis of projected construction costs which was initially set at 1% for units costing between $86,700 and $115,250 and 2% for units costing$115,250 or more. Resolution R1999/161. The amount of in-lieu fees are reviewed annually and adjusted by the percentage change in the Department of Housing and Urban Development (HUD) published median income for Napa County.

A developer is entitled to a reduction, adjustment or waiver of the inclusionary requirement if there is "an absence of any reasonable relationship or nexus between the impact of the development and either the amount of the fee charged or the inclusionary requirement." Ordinance O1999/20. This standard for adjustment stems from the judicial decisions examined below which established standards for determining whether land use regulations or exactions exceed constitutional limitations. The possibility of obtaining an adjustment was particularly important to the *Napa* court's upholding the constitutionality of Napa's ordinance.

A. Takings Issues After *Napa*– A Sound Ordinance Is Not A Taking

The Fifth Amendment of the U.S. Constitution includes the proviso: "Nor shall private property be taken for pubic use without just compensation." Article I, section 9 of the California Constitution contains a corresponding mandate, requiring payment of just compensation when a government entity takes private property for public use.

The courts have established a two step analysis for determining whether a local law, regulation or action is a taking. The courts look at: 1) whether it substantially advances a legitimate state interest; *or* 2) whether it denies the property owner all economically viable use of the property. *Agins v. City of Tiburon,* 447 U.S. 255 (1980).[7] Because inclusionary ordinances and policies do not preclude

[7] The "substantially advance" standard is akin to the "substantial relation to" [health, safety and general welfare] standard used by the *Euclid* court's substantive due process analysis, however, they

development, it is not likely that an attack on the latter basis could succeed. (In *Homebuilders of Northern California v. City of Napa*, Homebuilders did not contend that Napa's inclusionary ordinance precluded all economic use. *See Napa* at 193.) Except for a discussion of possible "as applied" challenges to inclusionary zoning, we will not, in this memo, speculate about creative arguments contending that an inclusionary requirement prevents all economically viable use.

Generally, in applying this analysis to local land use regulations, the courts will give great deference to the local government's decision, recognizing that the community adopts these regulations under the broad authority of the police power. *See Euclid* at 387; *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124; *Village of Belle Terre* at 4-6; *Candid Enterprises, Inc. v. Grossmont Union High School Dist*., 39 Cal.3d 878, 885; and *Miller v. Board of Public Works* at 485.

1. Inclusionary Requirements Substantially Advance Legitimate State Interests.

a) Providing Affordable Housing Constitutes a Legitimate State Interest.

The *Homebuilders of Northern California v. City of Napa* court had no doubt that the City had a legitimate interest in requiring the provision of affordable housing. The court cited the California Supreme Court's statement in *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4th 952 that the "assistance of moderate-income households with their housing needs is recognized in this state as a legitimate governmental purpose." 90 Cal. 4th 188 at 195, *quoting Santa Monica Beach* at 970. The court also referred to "the repeated pronouncements from the state Legislature" that development of sufficient housing for all Californians is a matter of statewide concern and that local governments have

> 'a responsibility to use powers vested in them to facilitate improvement and development of housing to make adequate provision for the housing needs of *all economic segments of the community.*'

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are somewhat different (although often blurred together). The substantially advance test is stricter, yet still conceding significant deference to local government. Due process focuses on whether the government regulation is related to the government interest, while the takings analysis looks at whether the regulation substantially advances the interest. *See Erhlich v. City of Culver City*, 12 Cal.4th 854, and fn 7 (1996), *Longtin's California Land Use*, §1.30[1] (2002 Update, pp. 7-9) and the discussion of substantive due process in Section IV. B of this memorandum.

Id., quoting Cal. Govt. Code §65580(d), part of California's Housing Element law.

Beyond the direct interest of providing affordable housing needed by the community in question, there are at least two other important interests advanced by inclusionary requirements. As discussed, under California's housing element law each community has the obligation to accommodate its share of the *regional* as well as the local need for affordable housing. (Cal. Govt. Code §§65580-65589.7). And, mandating the inclusion of affordable housing can help counteract the effect of past exclusionary zoning practices and further the integration goals of state and federal fair housing laws.[8]

b) Requiring Production of Some Affordable Housing Substantially Advances the Interest.

The *Napa* court found it "beyond question" that the City's inclusionary ordinance will substantially advance these important interests. "By requiring developers in [the] City to create a modest amount of affordable housing (or to comply with one of the alternatives) the ordinance will necessarily increase the supply of affordable housing." *Napa* at 195-196. *See also Commercial Builders of Northern California v. City of Sacramento,* 941 F.2d 872 (9th Cir. 1991) holding that a fee imposed on nonresidential development to address the need for affordable housing substantially advanced an important interest.

c) *Nollan/Dolan* Heightened Scrutiny Does Not Apply.

When determining whether a land use requirement, condition or fee substantially advances a legitimate state interest, a court is essentially deciding whether there is a "nexus" between the interest advanced and the requirement. The court considers whether there is a sufficient relationship between the two. Generally a court will defer to the local government's assessment of the relationship and will not second guess the locality. *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4th 952.

Recently, however, the U. S. and California Supreme Courts have applied a "heightened scrutiny" when reviewing land dedication requirements or exaction fees imposed on an ad hoc basis as a condition for approval of particular developments (as opposed to exactions and conditions that are legislatively imposed and generally applicable to all developments). First, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the U. S. Supreme Court held that there must be an "essential nexus" between an ad hoc dedication imposed as a condition of development and the impacts

[8] *See* discussion of inclusionary housing as one remedy for racial segregation in Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. New Eng. L. Rev. 65.

of the development. *Id.* at 837. Then in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) the Court found that the degree of the nexus between the impact and the dedication must be one of "rough proportionality" as assessed by an "individualized determination" with some "quantification." *Id.* at 391. The California Supreme Court considered the *Nollan/Dolan* heightened scrutiny test in *Erhlich v. City of Culver City*, 12 Cal.4th 854 (1996) and held that the test applies to fees as well as to dedications, but only to those imposed "on an individual and discretionary basis."

Relying on the analysis of the *Nollan/Dolan* heightened scrutiny test in *Erhlich* and *Santa Monica Beach*, the *Napa court* found that the test did not apply to review of Napa's inclusionary zoning ordinance. *Napa* at 196. Like *Erhlich*, *Santa Monica Beach* held that "generally applicable development fees warrant the more deferential review that the *Dolan* court recognized is generally accorded to legislative determinations." *Santa Monica Beach* at 966-67. Napa's inclusionary zoning ordinance is analogous, the *Napa* court explained:

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

Id. at 197.

2. An Inclusionary Zoning Ordinance Should Also Survive "As Applied" Takings Challenges.

A local ordinance or regulation that substantially advances a legitimate state interest in concept can still violate the takings clause if it is applied to a particular development in a way that fails to advance the interest. If not complimented by clear implementation standards and procedures, an inclusionary requirement could conceivably be applied in an arbitrary or discriminatory manner to a particular development and consequently be found to lack the essential nexus to the interest. Carefully drafted ordinances will ensure against this possibility and will minimize the chances for unconstitutional application.

a) Facial Challenges.

Napa involved a facial challenge to the City's inclusionary zoning ordinance– the application of the ordinance to a specific project was not at issue. As the court emphasized, facial challenges to local regulations face an "uphill battle." 90 Cal.4th at 194. "'A claim that a regulation is *facially* invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional *application* to the complaining parties. (Citations omitted)'" *Id*. Thus, the court held

that the City's inclusionary ordinance provides significant benefits to the developer which balance the regulatory burden. Those benefits include expedited permit processing, fee deferrals, loans or grants and density bonuses.

> More critically, the ordinance permits a developer to appeal for a reduction, adjustment, or *complete waiver* of the ordinance's requirements. Since the City has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking.

Napa at 194 (emphasis in original).

Napa, then, teaches that to ensure an inclusionary ordinance can avoid unconstitutional implementation, the ordinance should provide standards and procedures for reducing, waiving or mitigating the requirements. Clearly, what was most important to the court was the possibility of complete waiver of the requirements. However, the court also emphasized that an ordinance that provides significant benefits to developers may offset the impact of the inclusionary obligations. Accordingly, the appeals process provided in an ordinance should first require a developer to show that the benefits afforded by the ordinance do not fully compensate for the alleged impermissible hardship, before making reductions, alternative compliance or waiver available.

b) Challenges to the Application of An Inclusionary Ordinance.

A carefully drafted inclusionary ordinance can avoid improper application by including the safeguards described previously. To reiterate, an ordinance should provide developers with 1) regulatory concessions and incentives such as density bonuses to counter the ordinances financial restrictions, and 2) provide clear standards and a fair process by which a developer can request full or partial relief from the inclusionary requirement. Relief can take the form of a reduction in the requirement, alternatives to the requirement or a waiver of the requirement.

An "as applied" takings challenge would most likely be mounted on the theory that application of the inclusionary requirement to a particular development should be viewed as an exaction that does not bear a reasonable relationship to or an essential nexus with the government interest in providing affordable housing. Although, *Nollan/Dolan* heightened scrutiny would not apply, the specific impact of the particular requirement must have a reasonable relationship to the purpose of the inclusionary zoning ordinance. *San Remo v. City and County of San Francisco*, 27 Cal.4th 643 (2002). Because mandatory fees or land dedications are generally considered to be exactions, it would nonetheless be expected that a developer might argue that the application of an "in lieu" fee or land dedication *option* was not sufficiently related to the provision of the foregone housing units.

The California Supreme Court recently confronted a somewhat similar situation in *San Remo Hotel*. There the court considered both facial and as-applied takings attacks on San Francisco's residential hotel conversion ordinance, which requires hotel owners converting residential hotel rooms to either replace the rooms or pay an in-lieu fee equal to the cost of replacing the rooms. The City had levied a fee of $567,000 for the conversion of 67 rooms. The court upheld the ordinance and the specific fee, finding that: 1) the *Nollan/Dolan* rough proportionality test did not apply (because the ordinance was generally applicable to all residential hotel conversion), and 2) the specific fee bore a reasonable relationship to the purpose of the conversion ordinance. *Id.* at 669, 673.[9]

A similar result should occur in a challenge of the application of inclusionary zoning alternatives such as in-lieu fees or land dedications, provided the ordinance has an adequate method for ensuring that the amount of the required alternative is reasonably related to that necessary to facilitate production of the affordable units elsewhere. *See* discussion of in-lieu fees later in this memo.

Another, but very unlikely challenge to the application of an inclusionary zoning requirement could come in the form of a claim asserting that the financial impact of the regulation on a particular development was so drastic that the effect should be deemed a taking under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Penn Central* established a three factor analysis for evaluating takings claims in which a court considers 1) the economic impact on the plaintiff, 2) the degree of interference with "investment-backed" expectations, and 3) the character of the action. *Id*. at 124. The Court upheld New York's landmark preservation law, explaining that land use controls that had diminished property values by up to 87.5% have been found permissible. It is doubtful that an inclusionary requirement would have so substantial an impact.[10]

3. Other Takings Issues Addressed in *Napa*.

Homebuilders posed two other takings issues in *Napa*. First it contended that the ordinance was invalid under pre-*Dolan* cases which found that an ad hoc condition imposed on an individual developer was improper. *Napa* at 197-198. The court held that those cases were inapplicable because none "involved a facial challenge to a generally applicable zoning ordinance that imposed obligations on all development in a given area." *Id*.

[9] *See* discussion of *San Remo* in Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing* [forthcoming Comment, USF Law Review, September 2002] (hereafter, *In Defense of Inclusionary Zoning*).

[10] *See* discussion in *In Defense of Inclusionary Zoning, Id.*

Homebuilders also contended the ordinance was a taking because the problem addressed by the ordinance– the lack of affordable housing– was allegedly a product of Napa's restrictive land use policies. *Id.* The court pointed out that no case has held that a local government may not enact a zoning ordinance to solve problems created by other zoning ordinances. The court cited *Penn Central's* approval of New York's landmark preservation law which was intended to mitigate the effects of prior land use decisions permitting the destruction of historic resources:

> If New York can enact a landmark preservation law to remedy a shortage of historic buildings created by its prior policies, [the] City can enact an inclusionary zoning ordinance even if its prior policies contributed to the scarcity of available land and a shortage of affordable housing.

Id.

4. An Impact Fee "AB 1600 Nexus Study" is Not Required, But a Relationship Analysis is Essential.

Under both a takings analysis and California's Mitigation Fee Act (Cal. Govt. Code §§66000-66022 (AB 1600)), the imposition of fees to mitigate the impacts of a development must be based on facts establishing the requisite relationship or nexus between the need for and amount of the fee and the stated impacts. Hence, local governments generally must produce a "nexus study" assessing the impacts of development and the costs of effective mitigation before enacting an ordinance that imposes such an impact fee.

The Mitigation Fee Act sets out procedures for establishing the nexus of certain types of fees defined as a monetary exactions charged "for the purpose of defraying all or a portion of the cost of public facilities related to the development project."[11] §66000(b). These nexus study provisions only apply to fees imposed to cover the cost of "public facilities" related to a project, and public facilities are defined as public improvements, public services and community amenities.[12] The basic requirement of an inclusionary ordinance– the imposition of affordability requirements on housing development– is neither a fee based on the impact of the development, nor a fee for the provision of public facilities. It is a production obligation based on the community's need for affordable housing and need to ensure that the use of an ever scarcer supply of land includes housing affordable to lower income households.

[11] It was amended after *Erhlich* to expressly apply to fees imposed both on an ad hoc, individual project basis and as legislation of general applicability.

[12] Although its procedures for challenging an exaction appear to apply to a broader category of exactions. *See* Cal. Govt. Code §66021.

Consequently, an inclusionary requirement should not require the particular type of impact fee nexus study described in the Mitigation Fee Act.. (*See* Section IV. D for a discussion of the research needed to develop an effective and legally supportable in-lieu fee.)

Ultimately, although the Act's template for conducting an impact fee study can serve as a useful starting point, the analysis needed to establish a nexus between an inclusionary requirement and the interest in providing affordable housing is fundamentally different than that needed to justify a housing impact fee based on the impact on housing of non-residential development. Accordingly, an ordinance should be based on sufficient facts and analysis to establish the importance of the need for affordable housing in the community and the relationship of inclusionary obligation to accommodation of that need. Napa followed this course, conducting only a Mitigation Fee Act study to support its Housing Impact Fee (or "linkage fee") on commercial development.

5. Particular Provisions to Consider In Light of *Napa* and Other Takings Cases.

a) Adopt an Ordinance!

Some jurisdictions have imposed inclusionary requirements on the basis of general statements of policy in their housing element or other housing strategy documents. This leads directly to the kind of individualized ad hoc application that the *Nollan/Dolan* cases warned against. It invites a takings challenge. Far better to adopt an ordinance (or resolution) that applies across the board and that provides the basis for the requirement and clear standards and procedures for implementation of the requirement**.** Some communities also adopt regulations or guidelines that spell out step by step procedures and standards related to things such as permit applications, calculation of in lieu fees and reporting requirements.

It is probably possible that the requisite specificity could be included in a lengthy housing element program, however, that approach is unwieldy and really not contemplated by the housing element statutes. The housing element sets forth a program of actions that prescribes the parameters for program implementation. These actions are then implemented according to the timetable established in the housing element. *See* Cal. Govt. Code §65583(c). Including a full-blown inclusionary zoning scheme in a general plan element will also make it more difficult to amend the program because of the requirements related to amending the general plan, especially the housing element.

b) Factual Record and Findings

The ordinance must be based on facts and findings sufficient to surmount a takings challenge. Therefore, the ordinance should contain findings that demonstrate both the need for affordable housing

in the community and the ways in which the ordinance will substantially further provision for those needs.

Documentation of Housing Needs (and Other Concerns). There are many sources of data that demonstrate the need for affordable housing in a community, so it should not be necessary to produce an independent study (although some jurisdictions have done so). The first place to look are the locality's housing element and, for HUD entitlement jurisdictions, the local Consolidated Plan. The housing element should include the community's share of the regional need for housing affordable to lower income households as allocated by the regional coalition of governments (COG). These figures establish that the need for affordable housing extends beyond the need in the community itself. Both the housing element and the Consolidated Plan's Analysis of Impediments to Fair Housing Choice (AI) can provide data supporting inclusionary zoning as a means of combating housing segregation. There are many other sources of information, of course, including the local public housing authority, social services offices and homeless services providers.

Establish a Relationship – Demonstrate that the Ordinance Addresses the Need for Housing. On one level, this is not difficult. An ordinance that requires production of affordable housing (or related alternatives) directly and concretely advances the goal of providing affordable housing. However, developers will argue that inclusionary zoning generally discourages residential development and thus actually reduces the supply of all housing. And the department of Housing and Community Development (HCD) will require communities with inclusionary programs to analyze the requirement in their housing elements as a possible constraint on housing development. Consequently, background for the ordinance should encompass an analysis of the potential effect of the ordinance on housing production and affordability.

It will be helpful to contact localities that have already done such analyses, and to refer to state and national studies demonstrating the effectiveness of inclusionary zoning. Sacramento produced a report showing that a proposed inclusionary ordinance's effect on developer profit margins would be relatively minimal while the need for affordable housing was great. A perhaps easier method of establishing the requisite relationship is to rely on an analysis of the finite supply of land in the jurisdiction. This fairly straightforward analysis will show that the supply of land is necessarily dwindling and that without an inclusionary requirement, as the community builds out, the opportunity to provide sufficient affordable housing will be lost.

c) Hardship Reductions & Waivers

Most important to the *Napa* court's finding that Napa's inclusionary ordinance did not constitute a taking on its face was the availability of a waiver or reduction of the requirements. The

ability of the local government to avoid unconstitutional application through reduction or waiver of the inclusionary requirements protected the ordinance from facial invalidity.

An ordinance should contain both procedures for claiming a reduction or waiver, and standards for determining the extent of a reduction if necessary at all. 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 standard provided should 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. The Napa ordinance requires developers to demonstrate the absence of any reasonable relationship or nexus between the impact of the development and the inclusionary requirement. To justify a reduction or waiver based on financial hardship, an ordinance could require that the developer show the deprivation of all economically viable use or the degree of economic hardship set forth in the *Penn Central* case.

In the context of in-lieu fees or land dedication alternatives, an ordinance should provide an opportunity for a developer to attempt to show that the alternatives as applied to the particular development are not "reasonably related" to the purpose of the ordinance. (The standard specified in *San Remo Hotel*.) However, the ordinance could also provide that the alternatives to the inclusionary requirement will only be reduced or waived to the extent they would cause an impermissible taking or other constitutional violation.

d) In-Lieu Fees and Other Alternatives to On-Site Compliance– Required?

Many jurisdictions that have or are in the process of adopting an inclusionary ordinance are considering dispensing with traditional alternatives to on-site compliance such as payment of in-lieu fees, land donation or off-site development. The availability of alternatives often lead to election of the alternative over provision of the on-site units, and except in the case of units off-site, the alternatives seldom facilitate production of an equivalent amount of affordable units and rarely result in the production of units contemporaneous with the original development. Must an ordinance provide for alternatives to on-site compliance to avoid a takings? *Napa* indicates that the answer is <u>not necessarily</u>.

As discussed above, the key concern of the *Napa* court was the ability of the City to adjust the requirement if necessary to avoid unconstitutional applications. Although the Napa ordinance permits developers to satisfy the inclusionary requirement with "alternative equivalent action," the court did not address this aspect. Therefore, as long as an ordinance contains a procedure for obtaining a hardship exemption, it is probably not essential that it include alternatives like in-lieu fees. And keep in mind that providing for in-lieu fees or land dedications could increase the chances that a court would review those aspects of the ordinance as exactions.

Jurisdictions desiring to include alternatives to on-site compliance, but seeking more control, could provide a limited option of in-lieu fee payments, land dedications or other alternatives. One way of doing this would be to craft an ordinance that allows developers to elect alternatives only if the developer qualifies for a reduction or waiver of the requirement.

e) Providing Incentives and Concessions.

The *Napa* court relied in part on the fact that the City's ordinance provided incentives and regulatory concessions to uphold the ordinance. Although the ordinance's provision for reduction and waiver of the inclusionary requirement was more significant to the court's decision, the mitigating effect of incentives and concessions was also important. Therefore, including significant incentives and regulatory concessions over and above those required by state law is advisable. As mentioned, the court noted expedited processing, fee deferrals, loans or grants and density bonuses. Besides bolstering an ordinance's legal basis, except for grants, these things are relatively inexpensive for a jurisdiction to offer. And their effect can be quite significant. One study has shown that a substantial density bonus can completely off-set any loss of profit to a developer by facilitating the development of a substantially greater number of market priced units.[13]

B. Substantive Due Process Issues After *Napa*– Availability of Appeal, Waiver and Alternatives Important.

The 14th Amendment to the federal Constitution provides that no state shall "deprive any person of life, liberty, or property without due process of law. Article I, sections 7 of the California Constitution contains similar due process guarantees. This guarantee has been interpreted to prevent governments from "enacting legislation that is 'arbitrary' or 'discriminatory' or lacks 'a reasonable relation to a proper legislative purpose.'" *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal.4th 761, 771 (1997) (*citing Nebbia v. New York* (1934) 291 U.S. 502, 537). This is known as the "reasonable relationship test."

Opponents argue that inclusionary zoning laws fail the reasonable relationship test because they are price or rent controls that lack procedures to ensure that developers will receive a "fair return" on their investments. This argument relies on cases where courts have determined that rent control ordinances may violate the due process clause if they prevent investors from receiving a fair return on

[13] Dietderich, *An Egalitarian Market: The Economics of Inclusionary Zoning Reclaimed*, 24 Fordham Urb. L.J. 23 (1996).

their investments. *See* discussion in *Home Builders Assn. v. City of Napa*, 90 Cal.App.4th 188 at 198.

1. Inclusionary Zoning Does Not Infringe on Substantive Due Process Guarantees.

The first hurdle advocates of the "fair return" standard would have to overcome is convincing the courts that due process is applicable to a developer fighting an inclusionary zoning ordinance. Courts have mainly restricted substantive due process to "'personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,' as well as with an individual's bodily integrity." *Armendariz v. Penman* 75 F.3d 1331, 1318-1319 (9th Cir. 1996). In *Armendariz*, the 9th circuit recognized that "the use of substantive due process to extend constitutional protection to economic and property rights have been largely discredited." *Id.* at p. 1318-1319.

Furthermore, the United States Supreme Court has held that "[w]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" *Albright v. Oliver* 114 S.Ct. 807, 813 (1994) (quoting *Graham* 490 U.S. at 395, 109 S.Ct at 1871). Following *Graham*, the *Armendariz* court held that when the Takings Clause provides constitutional protection, a substantive due process claim is precluded. *Armendariz* 75 F.3d at p.1324. As discussed in the previous section, the Takings Clause has been found to relate more directly to land use regulation than substantive due process. *See e.g. Agins v. Tiburon* (1980) 447 U.S. 225. Because the Takings Clause applies to inclusionary zoning ordinances, a substantive due process claim should be precluded.

2. Fair Return Analysis May Not Apply to Inclusionary Zoning.

Nevertheless, inclusionary requirements have been attacked as price controls that violate the due process clause. The plaintiffs in *Napa* challenged the City's ordinance on these grounds, but the court indicated that it is unlikely that a developer is entitled to a "fair return" under the due process clause. *Napa* at 198. The *Napa* court noted that the "fair return" standard developed in evaluating restrictions placed on regulated industries such as railroads and public utilities. Although it has since been used in assessing rent control ordinances, the *Napa* court doubted that it would apply to inclusionary zoning ordinances. *Id.*

The court in *Napa* stopped short of holding that the "fair return" standard did not apply in inclusionary zoning cases because it could find the Napa ordinance facially valid on other grounds. Because the opponents of inclusionary zoning ordinances base their arguments on rent control cases, in order to convince the courts that it is applicable in the zoning context, they would have to show that

inclusionary zoning is similar to rent control. However, land use regulations such as inclusionary zoning ordinances are viewed differently from price control regulations.[14] As the California Supreme Court indicated, "it could be argued that rent control is essentially a species of price control rather than a land use regulation . . . ." *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4th at 967. As the U. S. Supreme Court noted in a recent decision that "[l]and-use regulations are ubiquitous and most of them impact property values in some tangential way - often in completely unanticipated ways." *Tahoe-Sierra Preserv. v. Tahoe Reg. Planning* 122 S.Ct. 1465, 1479 (2002). Although the Court recognized the impact on property values, the Court found that regulatory restrictions were not per se unconstitutional.

The notion that land use regulations require a developer to earn a "fair return" runs counter to other land use programs which require sale or rental restrictions. *See e.g.* Cal. Health & Safety Code §§ 33334.3, 33413 (redevelopment statute) and Cal. Govt. Code § 65590 (Mello Act requiring developers to provide low and moderate income housing).

3. Provisions Allowing for Administrative Relief are Vital in an Inclusionary Zoning Ordinance.

a) Protects Against Both Facial and "As Applied" Attacks.

A constitutionally defendable inclusionary zoning ordinance should contain provisions which allow a developer to seek administrative relief and provide an administrative agency or the city or county the flexibility to provide that relief. "A claim that a regulation is facially invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional application to the complaining parties. . . ." *Napa* at 199 citing *San Mateo County Coastal Landowners' Assn. v. County of San Mateo*, 38 Cal.App.4th at 547. When an ordinance contains provisions which allow for administrative relief, the court reviewing the ordinance must presume that the administrative body or the city or county will exercise their authority in conformity with the Constitution. *Napa* 90 Cal.App.4th at p. 199 (citing *Fisher v. City of Berkeley*, 37 Cal.3d 644, 684 (1984)). Even in a rent control situation where fair rent analysis applies, a court should only find a regulation facially invalid "when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties." *Fisher* at 679 (citing *Birkenfeld* 17 Cal.3d 129, 165).

Adequate administrative standards and procedures for relief also protect against application of inclusionary requirements in arbitrary or discriminatory ways to individual developers. Fair application

[14] *See* discussion in *In Defense of Inclusionary Zoning*, *supra*, note 9 at 39-44.

of clear standards will lessen the likelihood that the requirement *as applied* to a particular developer will be found to be arbitrary or a denial of a fair return.

b) Lessons from *Napa*.

In the *Napa* case, the court found that the Napa inclusionary zoning ordinance was not facially invalid under the due process clause because the ordinance contained administrative relief and alternative choices if a person did not want to restrict the sale or rental of any of his/her units as affordable. The court specifically mentioned the developers' option to donate land or pay an in-lieu fee instead of building affordable units.

In terms of administrative flexibility, the Napa court noted that the ordinance allowed city officials to reduce, modify or waive the requirements contained in the ordinance "based upon the absence of any reasonable relationship or nexus between the impact of the development and . . . the inclusionary requirement." The administrative ability to completely waive a developer's obligation made a facial challenge under the due process clause futile. *Napa* at 199. The court also noted that although the ordinance may not have specifically given the administrative agency or city or county authority to make adjustments to guarantee a fair return, this ability was "present by implication." *Id., citing City of Berkeley v. City of Berkeley Rent Stabilization Bd.* 27 Cal.App.4th 951, 962 (1994).

c) Additional Provisions.

Although the court in *Napa* mentioned a number of provisions which gave the reviewing agency the flexibility to modify or waive the inclusionary zoning requirements, the Napa ordinance contains additional provisions which were not mentioned by the court. Instead of building affordable housing, developers of single-family projects, as a matter of right, have the option to provide an "alternative equivalent action" which" will further affordable housing opportunities in the City to an equal or greater extent than compliance." This option is also available to developers of multi-family projects when they show "overriding conditions" and financial "infeasibility." These generally stated standards must be precisely defined in the ordinance to avoid establishing an ambiguous loophole. ("Infeasibility" could be limited to situations that cross constitutional boundaries.)

The Napa ordinance also provides incentives to developing affordable housing including an additional density bonus, deferral of City fees, waiver or modification of standards to reduce project costs, and financial assistance in the form of loans and grants. Even though these provisions were not mentioned by the court, they contribute to the overall flexibility of the ordinance. Similar types of incentives and waivers should be considered in creating any inclusionary zoning ordinance.

C. Equal Protection Issues– A Sound Ordinance Will Avoid Problems

The equal protection clauses of the state and federal constitutions prohibit state and local governments from depriving persons of equal protection of the laws. U.S. Const., 14th Amendment and Cal. Const., Article 1, §7. On the surface, all land use and planning laws and practices would seem to violate this principle because their purpose is to treat property owners differently, permitting uses on some property and prohibiting them on other property. However, courts will generally uphold a local land use regulation as a lawful exercise of the police power if it bears a rational relationship to a legitimate governmental interest.[15] *See Construction Industry Association of Sonoma County v. City of Petaluma*, 522 F.2d 897, 906 (9th Cir. 1975), *cert. denied*, 424 U.S. 934.

Like the test under the due process clause, this standard of review is called the "rational relationship test" and is virtually identical to that employed in substantive due process cases. It is also akin to the furtherance of a legitimate government purpose test for takings claims.[16] Consequently, an inclusionary requirement that satisfies the takings and due process mandates, will also pass muster under the equal protection strictures. Accordingly, as discussed previously, inclusionary requirements should be based on established facts and sound analysis of the need for affordable housing and adopted and implemented so as to apply uniformly and across the board to all similarly situated developers. All exemptions or categories of alternative performance should likewise have a clear basis and clear standards for eligibility.

Inclusionary requirements are more likely to be challenged as unconstitutional under the takings clause or the substantive due process clause. Both of those relate more directly to the specific offenses usually raised by challengers– lack of sufficient nexus (takings) and arbitrary price control (due process).[17] The plaintiffs in *Napa* attacked the constitutionality of the City's ordinance on takings, substantive due process and Proposition 218 (*see* below) grounds, not equal protection. Almost all successful equal protection challenges of land use actions have been when the local government *applies*

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[15] Only if a land use regulation intentionally discriminates against a "suspect class" of persons (*e.g.* racial or ethnic minorities) or denies someone a "fundamental right" (*e.g.* the right to live as a family) will it be held to the much tougher "strict scrutiny" test. Under that test, the local government would have to show that the regulation serves a "compelling governmental interest."

[16] *See Longtin's California Land Use*, §§1.30[1], 1.32[1] (2002 Update, pp. 7-9, 20-21).

[17] *See* the discussion of this point in the previous section on due process.

local regulations to landowners in an unequal, discriminatory manner.[18] Therefore, if an inclusionary requirement is attacked on equal protections grounds it will probably be in a case where challengers allege unequal application of the requirement to a specific development.

V. UNLIKELY, BUT UNCERTAIN THAT "COSTA-HAWKINS" APPLIES TO INCLUSIONARY *RENTAL* UNITS

In California, opponents to inclusionary zoning may seek to expand the preemptive and prohibitive effect of the Costa-Hawkins Rental Housing Act to apply to inclusionary rental units with affordability mandates. The Costa-Hawkins Act, codified at Cal. Civil Code §1954.50 *et seq*., preempts and invalidates "strict" local rent control ordinances that do not, among other things, permit owners of residential real property to set initial rents at a certain level or to establish subsequent rents when the unit is later vacated.[19] Thus, inclusionary units with both initial and long term affordability covenants may be subject to a legal challenge under Costa-Hawkins.

The California courts have yet to determine whether the statewide rent control statute applies to local inclusionary zoning ordinances. As a result, it is necessary to analyze, on a case by case basis, how the statutory language may be applied to the specific provisions of a local ordinance. However, even in the unlikely event that the Costa-Hawkins Act is deemed to apply in certain circumstances, there can be *no* preemptive effect on ordinances that either provide for affordable units at the discretion of the developer or allow the payment of in-lieu fees or other alternatives instead of the development of actual units.[20] Unfortunately, by including these weakened inclusionary provisions, the local jurisdiction may not realize its need for affordable housing. Accordingly, municipalities may choose to adopt stronger mandatory ordinances with creative provisions, or with an intent to adopt future modifications if necessary, to avoid or moot a potential Costa-Hawkins challenge.

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[18] *See Longtin's California Land Use, 2002 Update* at §1.32[3], pp. 27-29.

[19] Residential care facilities for the elderly are exempted from "controls on rent" imposed by local governments. Cal. Health & Safety Code §1569.147. However, this section was intended to exempt these facilities from local rent control ordinances, and it is an open question whether it would apply to units with rent restrictions under inclusionary programs. Under inclusionary programs, the facility would likely be able to pay an in lieu fee or subject to regulatory agreement or development agreement and entitled to certain regulatory concessions and incentives in exchange for regulated rents. *See* discussion of these issues in this section in the context of Costa-Hawkins.

[20] Moreover, since it applies only to rental units, Costa-Hawkins cannot be applied to inclusionary homeownership units — even if such units are subject to lifetime affordability covenants.

A. Vacancy Decontrol Under Costa-Hawkins.

Some California jurisdictions have elected to adopt local rent control ordinances to maintain affordability within their rental stock. The Costa-Hawkins Act was enacted in 1995 to "establish a comprehensive statewide scheme to regulate local residential rent control." *Cobb v. City and County of San Francisco Residential Rent Stabilization and Arbitration Board*, 98 Cal.App.4th 345 (2002.) Prior to the Act, the terms and requirements of local rent control ordinances were at the complete discretion of local governments. For the most part, these ordinances governed in either a "strict"manner, requiring that the rent for a vacant housing unit remain regulated ensuring that a new tenant would continue paying the same rental amount as the previous tenant, or "moderately" by permitting landlord's to raise the rent on a unit to market rate when it was voluntarily vacated and a new tenant moved in. Moderate rent control practices are also often referred to as "vacancy decontrol." *Id.*

The statewide scheme establishes "vacancy decontrol" for dwelling units with initial or subsequent rental rates that are controlled by local ordinance or charter in effect as of January 1, 1995, or by certificates of occupancy issued after February 1, 1995. Cal. Civil Code §1954.52(a) (West, 2002). With "vacancy decontrol" imposed by Costa-Hawkins, the property owner is permitted to set the rental rate almost every time the unit is vacant. Accordingly, vacancy decontrol is invoked when a rental unit is newly developed and offered into the rental market or when a tenant voluntarily vacates an existing rent-controlled unit. *Id*. §1954.52(a). The amount of the new rent is discretionary and can be increased to the level of the prevailing market rent. Under the terms of the statute, however, a landlord does not have the discretion to raise the rent if the unit is vacated due to a notice terminating the tenancy or as a result of a change in the terms of the tenancy. *Id.* §1954.53(a)(1).

B. The Statutory Exception Probably Applies to Inclusionary Zoning.

As a general rule, the Costa-Hawkins Act mandates that a municipality loses any control established by ordinance to determine the rent for a vacant unit in its jurisdiction. There are, however, exceptions to the rule. One of these exceptions involves agreements between property owners and municipalities for the development of affordable housing. It is reasonable to conclude that this exception also applies to inclusionary zoning policies with mandatory affordability requirements.

The Act expressly provides that a property owner may *not* establish the initial rental rate of a unit if:

> 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 in Chapter 4.3

(commencing with Section 65915) of Division 1 of Title 7 of the Cal. Govt. Code). §1954.53(a)(2) [*emphasis added]*.

Chapter 4.3 (Cal. Govt. Code §65915 *et seq*.– the "Density Bonus Law") provides for density bonuses and other incentives under state planning and zoning law. The Density Bonus Law establishes affordability standards that are imposed on new housing development in exchange for government incentives or concessions (referred to as "incentives"). Generally, developers can build affordable housing at a lower cost by using these incentives. Such incentives can include, among other things, allowing an increased number of units beyond that ordinarily permitted in that certain zoning designation (i.e., "density bonuses"), relaxing development or architectural design standards, approving mixed development, providing infrastructure, "writing down" land costs or subsidizing the cost of construction. Cal. Govt. Code §65916.

The Costa-Hawkins Act exception clearly attempts to exclude new incentive-driven affordable housing development from the mandates of vacancy decontrol. It is reasonable to conclude that inclusionary requirements linked with government incentives or concessions should also be excluded from the rent control statute. It is unclear, however, whether a mandatory inclusionary zoning ordinance *without* an incentive or concession provision would also be excepted from the statewide scheme.

Several commentators have recently weighed the different applications of the Costa-Hawkins Act and its exception. One commentator agrees that the exception could be applied to any inclusionary housing that was given a public financial contribution or other assistance "whether or not the incentive was actually given pursuant to the Density Bonus law."[21] Public contribution or assistance could take the form of relaxed development standards, such as property setback requirements, or design standards — in exchange for the production of units with long term affordability covenants.

Another option is to rely on the apparent plain language of the statutory exception– developments for which the public entity has provided a financial contribution "*or* any other forms of assistance specified" in the Density Bonus statute. In her analysis of how the word "or" is used, one author concludes that if the "or" in the exception is interpreted to distinguish between direct contribution and any density bonus assistance, it is clear that Costa-Hawkins does not apply to any inclusionary zoning agreement between public entities and property owners that receive financial assistance.[22] On the other hand, the author surmises that if "or" means both financial assistance and other assistance must

[21] *In Defense of Inclusionary Zoning, supra*, note 9 at 45.

[22] Nadia El Mallakh, *Does the Costa-Hawkins Act Prohibit Local Inclusionary Zoning Programs?*, 89 California Law Review 1847, 1866 (2001).

be provided pursuant to the Density Bonus Law, Costa-Hawkins may apply to any development not approved under the Density Bonus Law.

But the statutory exemption is clearer than that. If the local government provides direct financial assistance *or* "other forms of assistance" specified in the Density Bonus law, the development should be exempt from Costa-Hawkins. The plain language of the exception refers only to the *forms* of assistance mentioned in the Density Bonus statute, not assistance provided pursuant to the statute.

C. The Legislative History Supports Excepting Inclusionary Zoning from the Rent Control Act.

If the applicability of a statute is ambiguous or unclear on its face, the legislative history may provide some insight into the true intent of the Legislature when adopting the law. A review of statements made in the State Assembly at the time Costa-Hawkins was being considered clearly suggests that the legislative intent was not focused on land use and planning policies, but rather was designed to mitigate strict rent control measures enforced on landlords by local governments.[23] As declared by one of the Assembly Bill (AB 1164) cosponsors, the bill was focused on "extreme rent control" and therefore, only five communities in California would be affected by the vacancy decontrol provisions of Costa-Hawkins if enacted.[24] However, at the time the Act was adopted, at least 64 jurisdictions in California had adopted inclusionary zoning programs.[25]

Moreover, the legislative record reveals that jurisdictions already employing vacancy decontrol or moderate rent control practices, such as Los Angeles, San Francisco, San Jose and Oakland, would *not* be affected by the rent control act.[26] It is noteworthy that these jurisdictions had already adopted inclusionary zoning ordinances at the time Costa-Hawkins was enacted. Most notably, however, is the complete legislative focus on vacancy *control* — and the absence of *any* reference to inclusionary zoning or similar ordinances imposed to ensure new affordable housing development. Further, if successfully applied to inclusionary zoning practices, the Costa-Hawkins Act would directly interfere

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[23] *See id.* at 1869.

[24] *Id.*

[25] *Creating Affordable Communities: Inclusionary Housing Programs in California*, California Coalition for Rural Housing Project (November 1994).

[26] *Does the Costa-Hawkins Act Prohibit Inclusionary Zoning Programs?, supra*, note 19 at 1869.

with a jurisdiction using inclusionary zoning to address its obligation to accommodate their affordable housing needs under state housing element law. *See* Cal. Govt. Code §65583 *et seq*.

D. California Courts Have Yet to Address The Applicability of Costa-Hawkins.

Whether the Costa-Hawkins Act limits a municipality's power to impose inclusionary units with affordability requirements remains unaddressed by the California courts. Undisputably, the rationale underlying inclusionary housing policies — to create and maintain much-needed affordable housing in our communities — should carry great weight for any court of law asked to address this issue. Further, controlling rents to remain affordable for households of certain income standards is a necessary component of an effective inclusionary housing program.

To date, only one California court has been asked to decide this issue but that case was dismissed before the court could make a determination. The lawsuit involved the Santa Monica Inclusionary Zoning Program which was adopted by ordinance in March, 1992. (Santa Monica, Cal. Mun. Code Chapter 9.28.) Several years after its adoption, the inclusionary program was challenged as impermissible due to the preemptive mandates of the Costa-Hawkins Act. El Mallakh, *supra* at 1851. In response to the lawsuit, the City amended its ordinance and the court case was dismissed as moot. *Id.* Accordingly, the Superior Court did not have the opportunity to consider the issue.[27] (Some communities in Colorado have also amended their inclusionary ordinances when faced with challenges based on the state's rent control preemption statute.[28])

[27] Santa Monica's reaction to the litigation was probably unnecessary. Instead of attempting to distinguish its ordinance from the Costa-Hawkins Act, the City of Santa Monica simply amended its ordinance to fit the provisions of the state rent control statute. As a result, the City's ordinance now provides that developers are permitted to meet their mandatory affordable housing obligations by providing an in-lieu fee or, *in the alternative*, developing affordable units onsite that qualify for a density bonus under state law. Santa Monica, Cal. Mun. Code §9.56.050. (Under the Ordinance, the City Council controls the rent, by determining, on an annual basis, the maximum rental amount to ensure that the units are affordable for low and moderate income residents. *Id*. at 9.28.100. Affordability is ensured by deed restrictions that remain effective for the life of the project. *Id*. at 9.28.130.) In practice, most developers choose the in lieu fee because it is so low– unable to base the fee on the cost of developing forgone inclusionary units (because they are not mandatory), the fee was based on a study that analyzed the impact of new market rate housing on the need for affordable housing.

[28] For example, the municipality of Boulder, Colorado took advantage of an exception to the statewide rent control statute that exempted all properties in which a city had "an interest through a housing authority or similar agency." Kautz, *supra*, note 9, at 46. The Boulder ordinance was

E. Conclusion– Application of Costa-Hawkins can be Avoided.

Despite the attempts of opponents to apply rent control provisions to inclusionary housing policies, there is no clear prohibitive effect of Costa-Hawkins on local inclusionary zoning ordinances. Unfortunately, until its applicability is determined in a published court opinion, there isn't any *definitive* guidance that municipalities may impose initial and subsequent affordability mandates on inclusionary units without violating Costa-Hawkins. However, it is apparent that, if challenged as a violation of the Costa-Hawkins, mandatory inclusionary zoning ordinances can be easily modified to require density bonuses, or provide local incentives, to negate these claims. Such modifications should survive a Costa-Hawkins challenge and would continue to promote the laudable goal of providing affordable housing in California communities.

VI. DOES AN IN-LIEU FEE OPTION TRIGGER AB 1600 REQUIREMENTS OR VIOLATE PROPOSITION 218?

As discussed in Section IV.A.2.b, an optional in-lieu fee provision that is part of an across the board legislative measure is not subject to heightened scrutiny under a constitutional takings analysis. But an in-lieu fee must still have a reasonable relationship to the purposes of an inclusionary zoning ordinance, and the extent and amount of fees that can be imposed will depend, in part, on establishing this relationship. It has long been resolved that cities can impose fees as a condition of development. Development is a privilege, not an absolute right, and a City has broad police powers to impose fees. *Associated Home Builders, 4 Cal.3d at 633*. The more important issue for municipalities is to what extent, if any, in-lieu fee provisions of an inclusionary zoning ordinance are subject to the statutory or constitutional restrictions pursuant to California's Mitigation Fee Act (also referred to as AB 1600) and Proposition 218.

Strong arguments support that *optional* fee provisions are not 'fees' or 'exactions' within the meaning of the Mitigation Fee Act. Rather, they provide *alternatives* to complying with a non-monetary land use regulation which requires development of affordable housing units, not public

amended to provide that the housing authority or similar agency must have an interest in all affordable inclusionary rental units. *Id*. The amendment to the Boulder ordinance was a result of a previous determination by the Colorado Supreme Court that an inclusionary ordinance for employees in the Town of Telluride violated the Colorado statute prohibiting rent control. *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30, 35 (Colo., 2000).

facilities. Likewise, optional in-lieu fee provisions are not fees imposed on a property owner "as an incident of property ownership", and therefore, are not subject to Proposition 218.

Absent heightened scrutiny or a statutory requirement, the extent and amount of an in-lieu fee should be determined on the same basis as the inclusionary requirement itself. Specifically, there must be a reasonable relationship between the amount of the in-lieu fee and the affordable units the fee is intended to produce. And, of course, the fees must be used for the intended purpose. In this regard, the Mitigation Fee Act may provide a helpful guide to formulating an nexus analysis, but following its specific requirements is not mandated.

A. The Mitigation Fee Act Should Not Apply To "Optional" In-Lieu Fees.

The Mitigation Fee Act (Govt. C. §§66000-66025) provides that a fee or exaction imposed as a mandatory condition for approval of a development project cannot exceed the estimated reasonable cost of providing the public facility for which the fee is imposed. Govt. C. §66005. The Act further requires any city which imposes mandatory development fees to identify the purpose of the fee and the use to which the fee will be put; determine the reasonable relationship between the fee's use and the type of development project on which the fee is imposed; determine the reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed. (Govt. C. §66001(a).) The city also must determine whether there is a reasonable relationship between the specific amount of the fee imposed and the proportionate cost of the public facility attributable to that project. (Govt. C. §66001(b).) These determinations are commonly referred to as an AB 1600 'nexus study'.

In *Homebuilders Association of Northern California v. City of Napa*, the plaintiffs also challenged the in-lieu fee provision of the ordinance as a violation of the Mitigation Fee Act. *Homebuilders Association*, 90 Cal.App.4th 188, 193. The Court of Appeal did not address the merits of Homebuilders' claim that the in-lieu fee option contained in the ordinance violated the Mitigation Fee Act. (That claim was deemed waived in an unpublished portion of the court's opinion. *Homebuilders Association of Northern California v. City of Napa*, Court of Appeal, First Appellate District, Case No. AO90437, Slip Op. at 10.) Nonetheless, as the City of Napa and amicus argued in *Homebuilders*, the Mitigation Fee Act should not apply to in-lieu fee options.

The Mitigation Fee Act does not apply to optional fees which are within the developer's control. It applies to fees which are "imposed" as a mandatory condition of development. Govt. C. §§66001(a), 66005(a); *see also Ehrlich v. City of Culver City*, 12 Cal.4th 854, 864 (1996). An inclusionary ordinance that imposes a mandatory requirement *to produce affordable housing units* does just that. It requires a developer, as a privilege for developing within that community, to produce affordable units to assist the municipality in meeting state-mandated housing needs of all economic

segments of the community (the housing element obligation– Cal. Govt. Code §65580 *et seq.*) When the ordinance contains an in-lieu fee option, the developer can *elect* to pay the fee as an alternative to producing the units. Thus, it is not the in-lieu fee which is imposed as a mandatory condition of development, but the obligation to produce units. Accordingly, Napa conducted an AB 1600 study for the Housing Impact Fee it placed on commercial development, but did not conduct such a study for the in-lieu fee option of its inclusionary program.

The Mitigation Fee Act also does not apply to in-lieu fee provisions of inclusionary zoning ordinances where, as with the Napa ordinance, the fees are *not* committed to 'public facilities'. Govt. C. §66000(b); *see also* Govt. C. §§6601(a)(4), 66001(b), 66002(c). These provisions of the Mitigation Fee Act are plainly intended to prevent municipalities from raising 'fees' for *public* spending. In-lieu fees are not paid for such purposes. Rather, they are part of an inclusionary program which mandates the development of affordable housing units largely in *private* developments – not for 'public' facilities.

Thus, to the extent the in-lieu fee provisions are *optional* and are collected and used for the purpose intended in the ordinance -- the development of the affordable housing units the ordinance was designed to produce -- the Mitigation Fee Act should not apply.

B. The 'Nexus' Required for an In-Lieu Fee Provision Is A Reasonable Relationship Between The Fee and the Public Interest to Be Served.

As a general rule, the focus of California courts in reviewing whether a fee 'goes too far' is whether a *reasonable relationship* exists between the burden imposed (*e.g.*, the amount of the in-lieu fee) and the broad public interest to be served (*e.g*., the development of affordable housing). Great deference is afforded to legislative enactments, including development fee programs, generally applicable to a broad class of property owners. *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 876. In *Associated Home Builders*, the California Supreme Court rejected the notion that the dedication required for development of a subdivision was invalid unless the subdivision *itself* creates the need for dedication. 4 Cal.3d at 633. This principle continues to be followed by California courts. "A purely financial exaction . . . will not constitute a taking if it is made for the purpose of paying a social cost that is reasonably related to the activity against which the fee is assessed." *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 876 (1991) [upholding linkage fee on nonresidential developers to assist in developing affordable housing]; *see also Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996).

In *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 463 (2002), the California Supreme Court recently upheld a $567,000 "in-lieu" hotel conversion fee against a facial and as applied takings challenge. There, the hotel conversion ordinance requires residential hotel owners to obtain a conditional use permit prior to converting to non-residential use. The purpose of the ordinance is to "benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion or demolition." *Id*. at 650. As a condition of receiving the permit, hotel owners are required to replace the lost residential units. Alternatively, as with an inclusionary in-lieu fee, the owners can choose a number of options, including payment of an in-lieu fee equal to the cost of replacement. *Id*. at 651. The amount of the fee is determined according to a set formula based on replacement cost which was determined through two independent appraisals.

Applying the "reasonable relationship" test, the court rejected the hotel owner's facial challenge, holding that the housing replacement fees bore a reasonable relationship to the loss of housing. *Id*. at 672-673. The court further found that the ordinance, as applied, was valid. In determining the amount of the fee, the city determined the number of units that would be lost based on plaintiff's report of residential units and two independent appraisals determining the cost of replacing the units. "A mitigation fee measured by the resulting loss of housing units was thus reasonably related to the impacts of plaintiffs' proposed change in use." *Id*. at 679.

An inclusionary in-lieu fee, measured by the estimated loss of 'foregone' affordable housing units and the actual cost of producing the requisite number of units, also should withstand an "as applied" challenge. The basis for determining the amount of the inclusionary in-lieu fee should, as in *San Remo*, be set forth in the ordinance, supported by factual findings in the ordinance, and be substantiated with evidence that demonstrates a reasonable relationship between the purpose of the ordinance and the amount of the in-lieu fee:

> [Development mitigation] fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development. . . . While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees . . . the *arbitrary and extortionate use* of purported mitigation fees . . . will not pass constitutional muster. *San Remo*, 27 Cal.4th at 671.

To ensure that the in-lieu fee formula is not considered arbitrary or extortionate, a study that fully assesses the land values, construction costs, maintenance and management, and long-term affordability costs of producing affordable housing units for all income categories targeted in the ordinance is recommended.

C. Proposition 218 Does Not Apply to In-Lieu Fee Provisions.

Proposition 218 added D to Article XIII of the California Constitution, significantly changing the procedure for establishing special assessment districts and special assessments. The proposition prohibits a local government from imposing a fee on property owners for services that are available to the public in general. A fee may not be assessed "as an incident of property ownership" except as provided by the article.

In *Napa*, the plaintiffs also challenged the in-lieu fee option of Napa's ordinance, claiming it imposed a fee on property owners as an incident of property ownership. The appellate court rejected plaintiff's argument, holding that the in-lieu fee did not violate Proposition 218, observing that the fees only come into play when an owner acts to develop property and not "'solely by virtue of property ownership'". *Homebuilders Association of Northern California v. City of Napa*, Court of Appeal, First Appellate District, Case No. AO90437, Slip Op. at 12-13 [citing Apartment Assn. of Los Angeles County, Inc., 24 Cal.4th 830 (2001)]. *See also Richmond v. Shasta Community Services District*, 95 Cal.App.4th 1227, 1235 (2002) (upholding a water connection fee attacked on Proposition 218 grounds, finding that the fee was voluntary, being triggered by the owner electing to develop, not by the simple ownership of property).

Thus, an optional in-lieu fee provision that is reasonably related to the cost of producing the inclusionary units and is imposed at the time a property owner elects to develop the property should survive any challenges under the Mitigation Fee Act or Proposition 218.

VII. SUMMARY OF ELEMENTS OF A LEGALLY SOUND ORDINANCE[29]

A. Analysis and Findings.

To accommodate the requirements of the takings, due process and equal protection clauses of the state and federal Constitutions, the ordinance must substantially advance a legitimate government interest and its requirements should bear a reasonable relationship to these interests.

Analyze Housing Need. To document a legitimate government interest, the community should conduct an analysis of its housing needs (local and regional) and describe the results of this analysis in

[29] These recommendations are based on our assessment of the legal requirements. For an analysis of recommended provisions based on policy and practical grounds, see the companion memorandum– *Inclusionary Zoning– Policy Considerations and Best Practices.*

the findings of the ordinance. The analysis should review the dwindling supply of land, the need for measures to reduce racial and ethnic segregation and the social and environmental bases for achieving a balance of jobs and housing. It should also reference the needs described in the housing element and demonstrate that the inclusionary ordinance will assist in accommodation of those needs and will not constrain residential development.

Establish a Relationship. To demonstrate that the ordinance will advance and is related to the provision of affordable housing, the findings should show that the inclusionary requirement will address the need. While an impact fee type "nexus" study is not required, the community should analyze the effect the production of inclusionary units will have on the need and delineate this in the findings. The findings should also link the need to require affordable units to the shrinking land supply.

B. Provide Clear Definitions and Requirements.

Avoid misinterpretation and arbitrary application by defining all terms precisely and making all provisions of the ordinance clear– exceptions, level of affordability, term of affordability and alternative means of compliance, etc. Wherever appropriate, use similar state or federal definitions (i.e., moderate, low income, etc.).

C. Provide Standards and Procedures Addressing Hardship.

Based on the *Napa* case, the availability of a procedure and clear cut standards for claiming and obtaining a waiver or reduction of the inclusionary requirement or a means of alternative compliance in cases where the developer can establish a reasonable relationship or other constitutional violation will provide substantial protection for the ordinance from facial challenges based on takings or substantive due process grounds. They will also help to ensure that the ordinance's requirements will not be unconstitutionally applied.

D. Providing For Alternative Compliance (In-Lieu Fees, Land Dedication, Off-Site Production)

1. Optional.

As long as an ordinance contains a procedure for obtaining a hardship exemption, it is probably not essential that it include alternatives like in-lieu fees (although the *Napa* court considered the availability of alternative compliance). And keep in mind that providing for in-lieu fees or land dedications could increase the chances that a court would review the ordinance as an exaction, held to the "reasonable relationship" standard.

2. Establish Clear Standards and a Reasonable Relationship of Alternatives to the Purpose of the Ordinance.

The standards and procedures for obtaining and complying with alternatives to producing units on site should be clear and simple to use, and the alternatives must have a reasonable relationship to and substantially further the purpose of the ordinance. This is especially true of in-lieu fees which could be attacked as an exaction. To demonstrate a sufficient nexus between the alternative and the on-site production obligation, the ordinance should contain a precise formula for determining the amount of the alternative. And the amount should bear a relationship to the resources necessary to develop the foregone units elsewhere. For example, in-lieu fees should be based on a formula derived from an analysis of the cost of developing the affordable units.

E. Provide Incentives and Concessions.

1. Increases Legal Viability of Ordinance.

If a hardship exemption is included, it is probably not critical from a constitutional standpoint to include incentives and concessions for developers. However, the *Napa* court considered the availability of these benefits as an indication that the ordinance attempted to balance the burdens of the ordinance with benefits. Most existing ordinances provide some incentives/concessions such as density bonuses, and the more that can be provided the easier it will be to find willing developers. Incentives can go beyond regulatory concessions and include provision of direct financial assistance.

2. Undermines Viability of Costa-Hawkins Attacks.

Many ordinances apply both to for-sale and rental housing, and many allow production of rental units to satisfy the inclusionary requirement created by for-sale units. The restrictions on rents of these units, although incorporated in agreements with developers and deed restrictions, have drawn legal challenges based on the Costa- Hawkins Act's provision that landlords in jurisdictions with rent control may set the initial rent. Providing for substantial incentives, especially direct financial assistance, furnishes a basis for avoiding any application of Costa-Hawkins.

As discussed, the Act expressly excepts affordable developments subject to contracts with the local government that provide financial assistance or that receive incentives or concessions like those required for housing developed under California's Density Bonus law. If the ordinance does not provide for direct financial assistance, it should at least afford no less than the minimum density bonus, incentive and concessions required by the Density Bonus statute (Cal. Govt. Code §65915).

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