



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Inclusionary Housing

DATE: December 5, 2007

The purpose of this memorandum is to respond to the following inquiries by the City Council relating to potential inclusionary housing requirements on new development in the City of San Jose:

1. Do the restrictions of Proposition 218 regarding taxes, assessments and property related fees apply to inclusionary housing ordinances? *No.*
2. Do inclusionary housing ordinances constitute a taking of private property without just compensation in violation of the federal and state Constitutions? *No; not when such ordinances include relevant findings to support the exaction, alternative means of compliance, and appropriate safeguards to prevent the occurrence of a taking.*
3. May inclusionary housing ordinances be repealed by referendum? *Yes; all legislative acts including all ordinances adopted by the Council are subject to referendum.*

BACKGROUND

Council has asked the City Attorney to provide responses to the above inquiries in anticipation of the Council Study Session on inclusionary housing on December 11, 2007.

Inclusionary housing is one of the means used to address the problem of providing safe, integrated and affordable housing to persons of limited means and their families. It is currently used in 170 California cities. In high housing cost jurisdictions, inclusionary housing has also been used by some local agencies to provide housing for average income earners who are priced out of the housing market.

Inclusionary housing ordinances are often an attempt to comply with legal requirements and further the goals of the State Planning and Zoning Law which requires localities to include their regional share of housing needs for persons of all income levels in their housing elements and to reduce regulatory barriers to the provision of affordable housing. These requirements of state law are reflected in the general plan and its housing element by providing the opportunity for a mix of housing types and

prices for all economic segments of the population. In these plans, the housing needs for each jurisdiction are determined from statistics derived from the U.S. Census Bureau and agencies such as the Association of Bay Area Governments. To the extent that a jurisdiction does not sufficiently plan to meet its housing needs, its housing element might not be in substantial compliance with the housing element law as determined by the State Department of Housing and Community Development (HCD), where a substantial compliance finding by HCD would provide the City with a rebuttable presumption of validity of its Housing Element. A non-complying housing element may also be challenged and invalidated as a result of legal action by a member of the public, such as a low income housing advocacy group. One of the basic findings made by many jurisdictions to support their inclusionary housing ordinances is that market rate development is consuming the available residentially-zoned property to the exclusion of lower income housing production. To remedy that situation and provide the mix of housing required by law, some cities have mandated the provision of inclusionary housing by new development in various forms.

Inclusionary Housing Ordinances can take many varied forms, depending on the needs of the specific jurisdiction. They may vary from requiring 'like-for-like' development of affordable housing – meaning that a certain percentage of the housing in a development is restricted as affordable housing and that the affordable housing be of the same housing type as the market rate housing – where single family detached provides affordable single family detached housing, condominium projects provide affordable condominium housing, and rental housing provides like affordable rental units. While other ordinances may require construction of housing of different types than market rate, construction of affordable units at a different location, an "in-lieu" fee rather than actual construction, or some combination of compliance methods.

Inclusionary housing ordinances have generally been unchallenged in California, with only one reported case in California. Such ordinances when adopted with appropriate supporting findings are not subject to the provisions of Proposition 218, nor do they constitute a taking of private property without just compensation.

ANALYSIS

1. Proposition 218 Does Not Apply to Inclusionary Programs

In November 1996, California voters approved Proposition 218, which made changes to Article XIII of the California Constitution to require cities and counties to undertake certain procedural requirements, including elections, in order to charge taxes, assessments and property related fees and charges to property owners. However, inclusionary housing requirements do not fall within the definition of property related fees subject to Proposition 218. Furthermore, Proposition 218 specifically excludes development related charges and fees from its application. An inclusionary requirement on new development, even if purely monetary in nature as would be the case with an in lieu fee, is not subject to Proposition 218.

2. **Inclusionary Housing Ordinances Do Not Constitute A Taking Without Just Compensation When Drafted Appropriately**

Takings challenges arise when the regulation of private property leaves the property owner with little or no viable economic use of the owner's property. In California, inclusionary housing ordinances have not been challenged, with one exception where the challenged ordinance was held to be valid against a takings claim because it included relevant findings to support the exaction, alternative means of compliance, and appropriate safeguards to prevent the occurrence of a taking. This single case is discussed in more detail below.

In order to avoid claims by property owners and developers that a fee or exaction by the City on private development constitutes a taking of private property without just compensation, it is generally advised that the City adopt findings to support the need for exactions and fees on new development. When the exaction or fee is City- or area-wide, the exaction or fee should be justified based upon applicable findings with the exaction or fee charged equitably to all new development in the relevant area. When the exaction or fee is related to a specific project, the findings should be more narrowly tailored to the specific project. In this instance, City staff would likely be recommending either a City- or area- wide inclusionary housing policy, so we suggest that specific findings be made to support the needs for affordable housing within the relevant area. Additionally, the case law highlighted below suggests other mechanisms such as a waiver provision be included in any such ordinance to avoid any potential legitimate takings claims by affected property owners at the time the ordinance is applied to specific development proposals.

a. **No Taking Under California Case Law**

The only reported case in California challenging an inclusionary housing ordinance is *Home Builders Ass'n of Northern California v. City of Napa* (2001) 90 Cal.App.4th 188, 108 Cal Rptr.2d 60, as modified (July 2, 2001), where the City of Napa required that 10% of all newly constructed units must be affordable. The court rejected the contention by the builders' association that the ordinance was facially invalid because it violated the Due Process and Takings Clauses of the federal and state Constitutions. Central to the decision in favor of the City of Napa were the inclusion in the ordinance of alternatives to actual construction of units such as donation of vacant land to the City or the payment of an in lieu fee. And, more importantly, the ordinance provided for administrative relief where City officials had the authority to reduce or waive the requirements when a complaining developer proved that the ordinance would constitute a hardship and an unconstitutional application as to the particular development project.

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3. Referendum

All legislative acts of the City Council are subject to referendum by San Jose voters in accordance with the authority granted to the electorate by the California Constitution. Because inclusionary housing programs are implemented through adoption of an ordinance, which is a legislative act of the Council, the ordinance could be repealed through the referendum process. Examples of legislative acts that have been recently considered by the Council that are subject to the power of referendum are the City's periodic general plan and zoning amendments, ordinances naming areas or districts of the City, ordinances establishing regulations for nightclubs, and ordinances regulating signs in the City – all legislative acts by the Council are subject to referendum.

CONCLUSION

Inclusionary housing ordinances have not been effectively challenged in California, with only one reported case in California supporting a thoughtfully and carefully drafted ordinance. Such ordinances are not subject to the provisions of Proposition 218, nor do they constitute a taking of private property without just compensation when properly drafted with appropriate supporting findings. Council in its discretion may consider the adoption of an ordinance requiring inclusionary affordable housing which includes appropriate findings for the exaction, and also provides for consideration of alternative compliance mechanisms and a waiver of compliance as discussed above.

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By


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