

Inclusionary Zoning: Legal Framework and Considerations

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Inclusionary Zoning: Brief Overview

- ▶ Over 170 local governments in California have adopted inclusionary policies.
- ▶ Valuable tool for creating affordable housing and inclusive communities.
- ▶ Helps create diverse communities with a range of housing types.
- ▶ Market rate construction helps drive production of affordable housing.



Inclusionary Zoning: Brief Overview

- ▶ Policies have withstood various legal attacks.
- ▶ Following recent legal and policy developments, inclusionary policies are on firm legal footing.
- ▶ Today's presentation will provide overview of recent legal challenges and explain current state of the law.

Legal Framework: Constitutional Issues

California Bldg. Indus. Assn. v. City of San Jose, 61 Cal. 4th 435, 474 (2015)

Major issues:

- ▶ Does an inclusionary zoning ordinance constitute an exaction?
 - ▶ No.
 - ▶ An exaction would “require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process.”
 - ▶ Court reasoned that the ordinance is like other land use restrictions or price controls (i.e. rent control) that have been upheld against takings challenges.
- ▶ Should inclusionary ordinances be limited to “those that are reasonably related to the adverse impacts that are caused by or attributable to the proposed developments that are subject to the ordinance”?
 - ▶ No.
 - ▶ Standard remains that “the restrictions must be reasonably related to the broad general welfare purposes for which the ordinance was enacted.”

Legal Framework: The *Palmer* Decision

Palmer/Sixth Street Properties, et. al. v. City of Los Angeles, 175 Cal.App.4th 1396 (2009)

- ▶ Geoffrey Palmer proposed a 350 residential unit mixed-use project near downtown Los Angeles.
- ▶ Specific plan for the area required new construction to either include a minimum number of affordable units or pay an in-lieu fee.
- ▶ Palmer argued, and the courts agreed, that the Costa-Hawkins Rental Housing Act, Civ. Code § 1954.50 et seq., preempted the local rental inclusionary requirement.
- ▶ Costa-Hawkins provides that “an owner of residential real property may establish the initial rental rate for a dwelling or unit” unless they have contracted that right away in exchange for things like government subsidy or concessions (i.e. subsidies, density bonus, etc.)
- ▶ So, *Palmer* resulted in the prohibition of local mandatory inclusionary policies for rental housing.

The *Palmer Fix*: AB 1505 (Bloom, 2017)

- ▶ Clarified authority of local governments to apply inclusionary policies to rental housing. Cities and counties may:
 - “Require, as a condition of the development of residential rental units, that the development include a certain percentage of residential rental units affordable to, and occupied by [low- and moderate-income households].”
- ▶ Not an unlimited grant of authority
 - ▶ Ordinance must include alternative means of compliance.
 - ▶ Adds limited HCD review of feasibility determination.

Palmer Fix: Feasibility Issue

What it does not do:

- ▶ AB 1505 does NOT require a feasibility analysis or establish standards as to what constitutes a feasible inclusionary policy.

What it does do:

- ▶ Allows HCD to review, under very limited circumstances, whether:
 - ▶ A feasibility analysis was conducted by a “qualified entity with demonstrated expertise.”
 - ▶ The analysis was sufficiently rigorous and followed “best professional practices.”
 - ▶ If the study was produced after Sept. 15, 2017, the study was made public for 30 days.

Not a review of feasibility. HCD does not have authority to do feasibility review.

Palmer Fix: Feasibility Issue

- ▶ HCD review triggered only rarely.
- ▶ Applies only where ALL of the following are true:
 - ▶ Ordinance was adopted or amended after September 15, 2017.
 - ▶ Ordinance requires more than 15% of the units be rented to those at 80% of median income or below.
 - ▶ The jurisdiction has not submitted its annual housing element progress report for two years, or the report shows that the jurisdictions failed to meet at least 75 percent of its share of its RHNA for above-moderate income category, prorated based on the length of time within the planning period over at least a five-year period.
- ▶ If all of those are met, HCD may invoke its review and jurisdiction may prepare a feasibility study at the time if it hasn't done so already.
- ▶ If HCD reviews and jurisdiction does not meet the test, ordinance is still valid but cannot require more than 15% of units at 80% of median or below.

Conclusion

- ▶ Local governments once again have clear authority to enact these policies for both rental and for-sale housing. Inclusionary zoning policies remain an important local tool for increasing the supply of affordable housing.