

# Boon for Affordable Housing



## Ways in which developers can prepare for new mandates

by Chuck Reed

A recent U.S. Supreme Court decision not to review a ruling from the California Supreme Court in *Building Industry Association v. City of San Jose* gives cities across the country a road map to use zoning to impose affordable housing requirements on new housing developments.

This U.S. Supreme Court decision has opened the door for a new way of requiring more private developers to subsidize affordable housing. It is only a matter of time until local governments use this inclusionary zoning tool as a way to help fund the high demand for lower cost housing.

In urban areas, providing housing that is affordable for low and moderate-income families is a big challenge. Many cities may try to shift their responsibility for funding

affordable housing to private developers by requiring new projects to include between 10 and 20 percent of their new units as affordable. This “inclusionary” mandate is an exercise of zoning power, not a fee or a tax.

### Cushioning the Impact

As these affordable housing zoning ordinances move forward, landowners and developers should take the opportunity to lessen the impact of their cost. Engaging

in the political process to help shape the ordinance will give owners and developers the flexibility to make their investment profitable. Unfortunately, they cannot wait until the ordinance is on a council agenda for approval.

Here are some of the things that should be included in an inclusionary zoning ordinance.

**Ability to Build Off-Site.** Developers should be able to fund construction of affordable housing projects on a different site as part of an unrelated development. The developer gets credit for the mandated number of affordable-housing units yet does not have the added complexity of building them in projects targeted at higher-income buyers, who may not want to pay top dollar when others are spending much less.

**Find a Specialist.** Developers should be able to build their big project in sections or phases and arrange for an affordable-housing developer to take on the affordable-housing component. Builders of affordable housing

are often nonprofit entities and can receive government support through tax credits and financing. They know how to make money.

As a result, a for-profit builder can often make a deal that allows the affordable-housing piece to move forward. This can be more cost-effective and efficient than learning the tricks of building affordable housing.

**In-lieu Fees.** Local governments often accept cash instead of affordable-housing units. The sum is typically calculated using a formula set by ordinance. It can be a percentage of a variable, such as the market-rate housing cost or a fluid metric.

In-lieu fees can be the best option for developers because they have the least physical impact on the project. Developers don't have to change their plans or their housing mix. It's a cost that can be determined and netted out up front, so if the project pencils out there are fewer surprises to the project's bottom line.

This option often appeals to politicians because they can decide how to spend it for

the greatest public good, which is an almost universal impulse for elected officials. Also, having cash can generate leverage through gap-financing, which allows other projects to move ahead.

A city can apply a developer's in-lieu fee to the financing of a much bigger project, perhaps one being handled by an affordable-housing developer. The result can be more affordable-housing units that could not have been funded without an infusion of cash at the right time.

As the Mayor of San Jose for eight years, I've seen it happen. For example, the San Jose Redevelopment Agency built or rehabbed about 20,000 affordable housing units, mostly using gap-financing techniques.

**Embrace the negotiation process.** Everything is negotiable. Perhaps the units can be built on-site by a different developer or builder. Maybe they can be constructed elsewhere. Or another builder or developer can take on that piece of the project. These various options can be valuable bargaining

chips while hammering out a deal with the government leaders in a city or county.

## Partnership with Leaders

When developers and their attorneys are discussing options for building affordable housing, commercial real estate brokers can benefit by placing themselves in the shoes of their local leaders and planners. These leaders are eager to create more affordable housing, and commercial real estate developers and brokers can help them achieve this goal. By serving as a partner, an effective problem-solver, and a team player in the process, a project can be built that provides more affordable housing for the community.

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