



# MEMORANDUM

DATE: September 27, 2018  
TO: Planning Commission  
FROM: John Swiecki, Community Development Director  
SUBJECT: **Inclusionary Zoning and Density Bonus Ordinance Workshop**

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## Background: Inclusionary Housing and Density Bonus Law

California planning and zoning law authorizes cities and counties to adopt ordinances that require residential developments to include a certain percentage of units affordable to moderate-income, lower income, very low income, or extremely low income households. These types of regulatory requirements are commonly referred to as “inclusionary zoning”. California’s first inclusionary housing ordinances date to the 1970s, resulting in construction of approximately 80,000 affordable housing units to date.<sup>1</sup> California planning law also establishes a mandated “density bonus” program that allows for residential developers to achieve greater residential densities than would otherwise be allowed by the applicable zoning ordinance, and diverge from other zoning requirements such as parking, in exchange for providing affordable housing units or housing dedicated to special needs groups such as seniors and disabled persons. The first State density bonus law was adopted in 1979.

Brisbane adopted its own inclusionary housing and density bonus ordinance in early 2009 to implement two programs in the 1999-2006 Housing Element of the General Plan (BMC Chapter 17.31; attached for reference). However, shortly after the City adopted its ordinance in 2009, a California Supreme Court ruled that jurisdictions could not apply inclusionary housing ordinances to rental residential developments because such requirements violated a State law prohibiting rent control in new rental units. This remained in effect until Governor Brown signed Assembly Bill 1505 into law (attached for reference) in September of 2017 to specifically allow jurisdictions to apply inclusionary housing to rental residential developments.

Program H.B.4.b of the City’s current Housing Element obligates the City to update the now nine-year old inclusionary housing and density bonus ordinance to comply with current State inclusionary housing and density bonus law.

## Workshop Goals and Outline

In tonight’s workshop, staff will review the City’s current inclusionary housing and density bonus ordinance in more detail and identify various topic areas or sections that will require updates to be consistent with current governing State laws. Additionally, staff will discuss the merits of potentially modifying the inclusionary housing percentages applicable to rental residential developments in light of the requirements imposed by Assembly Bill 1505. The Commission’s discussion will inform

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<sup>1</sup> Assembly Bill 1505, Section 3 (2017).

forthcoming inclusionary housing and density bonus ordinance amendments to be considered by the Commission at a future public hearing in late October or early November for recommendation to the City Council.

**Attachments:**

1. Brisbane Municipal Code, Chapter 17.31: Inclusionary Housing and Density Bonuses
2. Assembly Bill 1505 (2017) regarding inclusionary housing law

# ATTACHMENT 1

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## Chapter 17.31 - INCLUSIONARY HOUSING AND DENSITY BONUSES

### 17.31.010 - Basis and purposes.

- A. Rental and owner-occupied housing in the city has become steadily more expensive. Housing costs have gone up faster than incomes for many groups in the community.
- B. Many persons who work in the city, who have grown up or have family ties in the city, who already live in the city but must move, or who wish to live in the city for other reasons, cannot afford housing in the city.
- C. Federal and state government programs do not provide nearly enough affordable housing or subsidies to satisfy the housing needs of moderate, lower or very low income households.
- D. Rising land prices have been a key factor in preventing development of new affordable housing. New housing construction in the city which does not include affordable units aggravates the existing shortage of affordable housing by absorbing the supply of available residential land. This reduces the supply of land for affordable housing and increases the price of remaining residential land. Providing the affordable units required by this chapter will help to ensure that part of the city's remaining developable land is used to provide affordable housing.
- E. The city wishes to retain an economically balanced community, with housing available to very low income, lower income and moderate income households. The city's general plan implements the established policy of the state of California that each community should foster an adequate supply of housing for persons at all economic levels.
- F. An economically balanced community is only possible if part of the new housing built in the city is affordable to households with limited incomes. Requiring builders of new housing to include some housing affordable to households at a range of incomes is fair, not only because new development without affordable units contributes to the shortage of affordable housing, but also because zoning and other ordinances concerning new housing in the city should be consistent with the community's goal to foster an adequate supply of housing for persons at all economic levels.
- G. In enacting this chapter it is also the intent of the city of Brisbane to implement the goals, objectives, and policies of the city's general plan housing element, which includes a goal to encourage the provision of housing affordable to a variety of household income levels (Policy H1); the elderly and persons with disabilities (Policy H2); and identifies a density bonus policy and an inclusionary housing policy as methods to encourage the development of affordable housing (Goals H2f, H6a, H7a, and H11j).
- H. This chapter is also intended to implement Sections 65915, 65915.5, and 65917 of the California Government Code, governing density bonuses, by providing incentives required therein for the production of housing for very low, lower income, and senior households and for the production of housing for moderate income households residing in common interest developments.

### 17.31.020 - Definitions.

- A. Affordable Ownership Cost. Average monthly housing costs, during the first calendar year of a household's occupancy, including mortgage payments, property taxes, homeowners insurance, homeowners association dues, if any, and reasonable allowances for utilities and for maintenance and repair costs, which do not exceed the following:
  1. For moderate income households: One hundred ten percent (110%) of area median income, adjusted for assumed household size based on unit size, multiplied by thirty-five percent (35%), and divided by twelve (12);

2. For lower income households: Seventy percent (70%) of area median income, adjusted for assumed household size based on unit size, multiplied by thirty percent (30%) and divided by twelve (12);
  3. For very low income households: Fifty percent (50%) of area median income, adjusted for assumed household size based on unit size, multiplied by thirty percent (30%) and divided by twelve (12).
- B. Affordable Rent. Monthly rent, including utilities and all fees for housing services, including parking, which does not exceed the following:
1. For lower income households: Sixty percent (60%) of area median income, adjusted for assumed household size based on unit size, multiplied by thirty percent (30%), and divided by twelve (12);
  2. For very low income households: Fifty percent (50%) of area median income, adjusted for assumed household size based on unit size, multiplied by thirty percent (30%), and divided by twelve (12).
- C. Affordable Units. Inclusionary units or target units.
- D. Area Median Income. Area median income for San Mateo County as published by the state of California pursuant to California Code of Regulations, Title 25, Section 6932, or successor provision.
- E. Assumed Household Size Based on Unit Size. A household of one person in a studio apartment, two (2) persons in a one bedroom unit, three (3) persons in a two bedroom unit and one additional person for each additional bedroom thereafter.
- F. Child Care Center. Child care center has the same meaning as day care center, defined in Section 17.02.190, as an establishment licensed by the state providing group day care services for seven (7) or more children other than those resident on the site. The term includes nurseries, nursery schools, preschools, play groups, and after school group care, but does not include large family day care homes operated in the provider's own home.
- G. Common Interest Development. Any of the following, as defined in Civil Code section 1351(c): a community apartment project; a condominium project; a planned development; or a stock cooperative.
- H. Density Bonus. A density increase over the otherwise allowable maximum residential density, as described in Section 17.31.050 of this chapter.
- I. Density Bonus Units. Those residential units granted pursuant to the provisions of this chapter which exceed the otherwise allowable maximum residential density for the development site.
- J. Developer Affordable Housing Agreement. A recorded agreement between a developer and the city as described in Section 17.31.140 of this chapter to ensure that the inclusionary housing and density bonus requirements of this chapter are satisfied.
- K. Development Standard. Any site or construction condition that applies to a residential project pursuant to any ordinance, general plan, specific plan, or other local condition, law, policy, resolution, or regulation. As used in this paragraph, the term "site and construction conditions" means standards that specify the physical development of a site and buildings on the site in a residential project, but do not include any of the following:
1. The permitted uses of a site;
  2. Any city fees, including dedication fees;
  3. Affordable housing requirements;
  4. Building standards approved by the California Building Standards Commission as provided in California Health and Safety Code Section 18901 et seq.; or

5. The requirements of Brisbane's Green Building Ordinance as set forth in Title 15, Chapter 15.80 of this code.
- L. Dwelling Unit. Shall have the meaning set forth in Section 17.02.235.
- M. Eligible Household. A household whose household income does not exceed the maximum specified in Section 17.31.140 for a given affordable unit.
- N. First Approval. The first of the following approvals to occur with respect to a residential project: subdivision approval, building permit or any permit or approval under the Zoning Ordinance.
- O. For-Sale Project. A residential project, or portion thereof, where the dwelling units are offered to the public for purchase.
- P. Household Income. The combined adjusted gross income for all adult persons living in a dwelling unit as calculated for the purpose of the Section 8 Program under the United States Housing Act of 1937, as amended, or its successor.
- Q. Incentives or Concessions. Regulatory concessions as listed in Section 17.31.060.
- R. Inclusionary Units. Dwelling units within a residential project which are consistent with the zoning district's density standard and which are required by Section 17.31.030 of this chapter to be rented at affordable rents or sold at an affordable ownership cost to specified households.
- S. Lower Income Household. A household whose income does not exceed the lower income limits applicable to San Mateo County, as published by the state of California pursuant to California Code of Regulations, Title 25, Section 6932, or successor provision.
- T. Maximum Residential Density. The maximum number of residential units permitted by the city's zoning ordinance on the date the application is deemed complete.
- U. Moderate Income Household. A household whose income does not exceed the moderate income limits applicable to San Mateo County, as published by the state of California pursuant to California Code of Regulations, Title 25, Section 6932, or successor provision.
- V. Market-Rate Unit. Any unit within a residential project which is not an affordable unit.
- W. Rental Project. A residential project, or portion thereof, comprised of dwelling units which are intended to be rented, or are actually offered for rent, to tenants upon completion, whether or not a condominium or subdivision map is recorded as part of the residential project.
- X. Residential Project. Any parcel map, subdivision map, use permit, building permit, or other city approval which, for purposes of the inclusionary requirement set forth in Section 17.31.030, results in a net increase of at least six (6) or more dwelling units and/or residential lots or parcels or combination thereof, and for purposes of a density bonus as set forth in 17.31.050, results in a net increase of at least five (5) or more dwelling units and/or residential lots or parcels or combination thereof. A residential project may include, but is not limited to, new construction, conversion of existing dwelling units to condominium ownership, creation of residential lots, conversion of an existing nonresidential building to residential use, and the addition of dwelling units to an existing multifamily dwelling.
- Y. Senior Citizen Housing Development. A residential project of thirty-five (35) or more dwelling units as defined in California Civil Code Section 51.3, a mobile home park that limits residency to persons eligible to reside in a senior citizen housing development pursuant to California Civil Code Section 798.76 or 799.5, or a residential project of any number of dwelling units for senior citizens with disabilities provided such project complies with federal and state fair housing laws.
- Z. Target Units. Dwelling units affordable to moderate, low, or very low income households within a residential project that qualify the project for a density bonus if provided as required under Section 17.31.050 of this chapter.
- AA. Very Low Income Household. A household whose income does not exceed the very low income limits applicable to San Mateo County, as published by the state of California pursuant to California Code of Regulations, Title 25, Section 6932, or successor provision.

**17.31.030 - Basic inclusionary requirement.**

- A. This section shall apply to all residential projects with six (6) or more dwelling units, except for the following:
  - 1. Residential projects which are developed pursuant to the terms of a development agreement executed prior to the effective date of this chapter, provided that such residential projects shall comply with any affordable housing requirements included in the development agreement.
  - 2. Residential projects if exempted by Government Code Section 66474.2 or 66498.1, provided that such residential projects shall comply with any predecessor ordinance in effect on the date the application for the development was deemed complete.
- B. In a residential project with six (6) or more dwelling units, units shall be made available exclusively at affordable rents or affordable ownership cost for both rental and for-sale projects as prescribed in the chart in subsection (B)(3) below.
  - 1. For purposes of calculating the number of inclusionary units required by this section, any density bonus units authorized pursuant to this chapter shall not be counted as part of the residential project.
  - 2. In order to prevent evasion of the provisions of this chapter, contemporaneous construction of six (6) or more dwelling units on a lot, or on contiguous lots for which there is evidence of common ownership or control, even though not covered by the same city land use approval, shall also be considered a single residential project. Construction shall be considered contemporaneous if any building permits are issued within five (5) years following the date of completion of any earlier construction.
  - 3. Chart Showing Inclusionary Requirements:

Total # of Units in Project	<i>For-Sale Project</i>		<i>Rental Project</i>	
	Units Required to be Affordable to Low-Income Households	Units Required to be Affordable to Moderate-Income Households	Units to be Affordable to Very-Low Income	Units to be Affordable to Low Income Households
0—5	0	0	0	0
6—10	0	1	0	1
11—15	1	1	1	1
16—20	1	2	1	2
21—25	1	3	1	3
26—30	2	3	2	3
31—40	2	4	2	4
41—50	2	5	2	5
51—60	3	6	3	6

61—70	3	7	3	7
71—80	4	8	4	8
81—90	4	9	4	9
91—100	5	10	5	10
101—110	5	11	5	11
111—120	6	12	6	12
121—130	6	13	6	13
131—140	7	14	7	14
141—150	7	15	7	15
151—160	8	16	8	16
161—170	8	17	8	17
171—180	9	18	9	18
181—190	9	19	9	19
191—200	10	20	10	20

Note: For projects of more than two hundred (200) units, the pattern set in the above chart shall be continued, with the numbers in the second and fourth columns being increased by one for each twenty (20) additional units, and the numbers in the third and fifth columns being increased by one for each ten (10) additional units.

**17.31.040 - Inclusionary housing incentives.**

- A. The following incentives shall apply to all residential projects that provide one or more inclusionary units in accordance with the provisions of this chapter:
1. Single-family detached inclusionary units need not be constructed on lots the same size as the market-rate units in the same residential development, but the lots may be no smaller than the minimum standard for the applicable zoning district, except as provided by Section 17.31.060(B)(1).
  2. Inclusionary units may be smaller in size than market-rate units in the same residential development.
  3. Inclusionary units may consist of different unit types than market-rate units in the same residential development. Secondary dwelling units proposed as inclusionary units shall be required to be rented at affordable rents per Section 17.31.030(B)(3) of this chapter, as specified in a regulatory agreement, covenant, deed of trust, or other document approved by the city council pursuant to Section 17.31.150(B) of this chapter, in addition to being subject to the requirements of Chapter 17.43 of this title.

4. Inclusionary units may have different interior finishes and features than market-rate units in the same residential development, as long as the finishes and features are durable and of good quality.

**17.31.050 - Density bonuses—Calculation of bonus.**

- A. Very Low and Lower Income Housing and Senior Housing. A residential project is eligible for a twenty percent (20%) density bonus if the applicant seeks a density bonus and agrees to provide one of the following:
  1. Ten percent (10%) of the total dwelling units of the residential project as target units affordable to lower income households;
  2. Five percent (5%) of the total dwelling units of the residential project as target units affordable to very low income households; or
  3. A senior citizen housing development.
- B. Moderate Income Housing. A residential project is eligible for a five percent (5%) density bonus if it meets all of the following criteria:
  1. The applicant seeks a density bonus and agrees to provide at least ten percent (10%) of the total dwelling units as target units affordable to moderate income households;
  2. The residential project is a common interest development as defined by Section 1351 of the California Civil Code; and
  3. All of the dwelling units in the residential project are offered to the public for purchase.
- C. Additional Density Bonus. The density bonus for which the residential project is eligible shall increase if the percentage of target units affordable to very low, lower, and moderate income households exceeds the base percentage established in subsections A and B above, as follows:
  1. Very Low Income Units. For each one percent (1%) increase above five percent (5%) in the percentage of target units affordable to very low income households, the density bonus shall be increased by two and one-half percent (2.5%) up to a maximum of thirty-five percent (35%).
  2. Lower Income Units. For each one percent (1%) increase above ten percent (10%) in the percentage of target units affordable to lower income households, the density bonus shall be increased by one and one-half percent (1.5%) up to a maximum of thirty-five percent (35%).
  3. Moderate Income Ownership Units. For each one percent (1%) increase above ten percent (10%) of the percentage of target units reserved for sale at an ownership cost affordable to moderate income households, the density bonus shall be increased by one percent (1%) up to a maximum of thirty-five percent (35%).
- D. When calculating the number of permitted density bonus units, any calculations resulting in fractional units shall be rounded to the next larger integer.
- E. The density bonus units shall not be included when determining the number of target units required to qualify for a density bonus. When calculating the required number of target units, any calculations resulting in fractional units shall be rounded to the next larger integer.
- F. The developer may request a lesser density bonus than the project is entitled to, but no reduction will be permitted in the number of required target units pursuant to subsection A above. Regardless of the number of target units, no residential project may be entitled to a density bonus of more than thirty-five percent (35%).
- G. Inclusionary units will not be counted as target units. Target units qualifying a project for a density bonus must be provided in addition to required inclusionary units. Where a site has no maximum residential density, no density bonus need be granted.

- H. Each residential project is entitled to only one density bonus, which may be selected based on the percentage of either target units affordable to very low income households, target units affordable to lower income households, or target units affordable to moderate income households, or the project's status as a senior citizen housing development. Density bonuses from more than one category may not be combined,

**17.31.060 - Development standards modified as density bonus incentive or concession.**

- A. Subject to the findings included in Section 17.31.130, when a developer seeks a density bonus, the city shall grant incentives or concessions as follows:
1. One incentive or concession for projects that include any one of the following:
    - a. At least ten percent (10%) of the total units as target units affordable to lower income households;
    - b. At least five percent (5%) of the total dwelling units as target units affordable to very low income households; or
    - c. At least ten percent (10%) of the total dwelling units in a common interest development as target units affordable to moderate income households.
  2. Two incentives or concessions for projects that include any one of the following:
    - a. At least twenty percent (20%) of the total dwelling units as target units affordable to lower income households;
    - b. At least ten percent (10%) of the total dwelling units as target units affordable to very low income households; or
    - c. At least twenty percent (20%) of the total dwelling units in a common interest development as target units affordable to moderate income households.
  3. Three incentives or concessions for projects that include any one of the following:
    - a. At least thirty percent (30%) of the total dwelling units as target units affordable to lower income households;
    - b. At least fifteen percent (15%) of the total dwelling units as target units affordable to very low income households; or
    - c. At least thirty percent (30%) of the total dwelling units in a common interest development as target units affordable to moderate income households.
- B. Standards for Incentives and Concessions:
1. For purposes of this chapter, concessions and incentives include reductions in site development standards, modifications of zoning code or architectural design requirements, and other incentives or concessions defined in Government Code Section 65915(l) that result in identifiable, financially sufficient, and actual cost reductions, as identified by a financial pro forma submitted by the applicant.
  2. Each proposed structure in a required yard setback shall count as one concession or incentive.
  3. The following concessions and incentives shall require approval by the city council, even though the residential project may otherwise only require approval by the planning commission:
    - a. Deferring collection of impact fees on market-rate units until issuance of certificate of occupancy;
    - b. Any direct financial assistance, including that for purchasers of target units;

- c. Any regulatory incentives or concessions not related to the zoning ordinance's development standards or parking requirements, such as incentives involving infrastructure standards or mixed-use zoning.
- C. Applicants may seek a waiver or modification of development standards that will have the effect of precluding the construction of a residential project meeting the criteria of Section 17.31.050 at the densities or with the incentives or concessions permitted by this section. The applicant shall show that the waiver or modification is necessary to make the residential project economically feasible based upon appropriate financial analysis and documentation as specified in Section 17.31.120.
- D. Nothing in this section requires the city to provide direct financial incentives for the residential project, including but not limited to the provision of publicly owned land or waiver of fees or dedication requirements.

**17.31.070 - Density bonus for land donation.**

A residential project that is eligible for a density bonus shall be eligible for an additional density bonus when an applicant for a residential project chooses to dedicate land to the City for the construction of very low income housing that meets the requirements set forth in California Government Code Section 65915(h).

**17.31.080 - Density bonus for child care facilities.**

A residential project that is eligible for a density bonus and includes a child care facility that will be located on the premises of, as part of, or adjacent to the residential project shall be eligible for an additional density bonus or an additional concession or incentive that contributes significantly to the economic feasibility of the construction of the child care facility if the requirements set forth in Government Code Section 65915(i) are met.

**17.31.090 - Density bonus in condominium conversions.**

A residential project for a conversion of existing rental apartments to condominiums shall be eligible for a density bonus or other incentives of equivalent financial value if the requirements in Government Code Section 65915.5 are met.

**17.31.100 - Summary tables.**

Density Bonus Summary				
Types of Affordable Units Providing Eligibility for a Density Bonus	Minimum %	Bonus Granted	Additional Bonus for Each 1% Increase over the Minimum %	% Target Units Required for Maximum 35% Bonus
A density bonus may be selected from only one category, except that bonuses for land donation may be combined with others, up to a maximum of 35%, and an additional sq. ft. bonus may be granted for a child care center facility.				
Very low income	5%	20%	2.5%	11%

Lower-income	10%	20%	1.5%	20%
Moderate income (ownership units only)	10%	5%	1%	40%
Senior housing project	100% senior	20%	—	—
Land donation for very low income housing	10% of market-rate units	15%	1%	30% of market-rate units
Condominium conversion - moderate income	33%	25% <sup>(A)</sup>	—	—
Condominium conversion - lower income	15%	25% <sup>(A)</sup>	—	—
Child care center	—	Sq. ft. in child care center <sup>(A)</sup>	—	—
Notes: (A) Or an incentive of equal value, at the city's option.				

<b>Incentives and Concessions Summary</b>			
Target Units or Category	% of Target Units		
Pursuant to State Density Bonus			
Very low income	5%	10%	15%
Lower income	10%	20%	30%
Moderate income (ownership units only)	10%	20%	30%
Maximum Incentive(s)/Concession(s) <sup>(A)(B)(C)(D)</sup>	1	2	3
Notes: (A) A concession or incentive may be requested only if an application is also made for a density bonus. (B) Concessions or incentives may be selected from only one category (very low, lower, or moderate). (C) No concessions or incentives are available for land donation. (D) Condominium conversions and child care centers facilities may have one concession or a density bonus at the City's option, but not both.			

**17.31.110 - Time performance required for inclusionary and density bonus compliance.**

- A. No building permit shall be issued for any market-rate unit until the permittee has obtained permits for affordable units sufficient to meet the requirements of Section 17.31.030 and, if a density bonus has been requested, Section 17.31.050. No final inspection for occupancy for any market-rate unit shall be completed until the permittee has constructed the affordable units required by Section 17.31.030 and Section 17.31.050. The time requirements set forth in this subsection for issuance of building permits for market-rate units and for final inspections for occupancy for market-rate units may be modified to accommodate phasing schedules, model variations, or other factors in a residential project, if the city determines this will provide greater public benefit and a developer affordable housing agreement acceptable to the community development director or the community development director's designee pursuant to Section 17.31.140 so provides.
- B. Conditions to carry out the purposes of this chapter shall be imposed on the first approval for a residential project.

**17.31.120 - Affordable housing plan submittal.**

- A. An affordable housing plan shall be submitted as part of the application for first approval of any residential project. The affordable housing plan shall include the following information:
  - 1. For each construction phase, the affordable housing plan shall specify, at the same level of detail as the application for the residential project: the number, unit type, tenure, number of bedrooms and baths, approximate location, size, and design, construction and completion schedule of all affordable units, phasing of affordable units in relation to market-rate units, and marketing plan. The affordable housing plan shall specify the methods to be used to verify incomes of renters or purchasers, and specify a financing mechanism for the on-going administration and monitoring of the affordable units. The rent or sale price shall be calculated by the city.
  - 2. Number and location of all inclusionary units and level of affordability.
  - 3. Where any density bonuses, incentives, concessions, waivers or modifications of development standards, or modified parking standards are being requested, the affordable housing plan shall include the following:
    - a. A description of any requested density bonuses, incentives, concessions, waivers or modifications of development standards, or modified parking standards.
    - b. Identification of the base project without the density bonus, number and location of all target units qualifying the project for a density bonus, level of affordability of the target units, and identification of the bonus units.
    - c. For all incentives and concessions except those listed in Section 17.31.040, a pro forma demonstrating that the requested incentives and concessions result in identifiable, financially sufficient, and actual cost reductions.
    - d. For waivers or modifications of development standards: (i) a pro forma demonstrating that the waiver or modification is necessary to make the residential project economically feasible based upon appropriate financial analysis and documentation; and (ii) evidence that the development standards for which a waiver is requested will have the effect of precluding the construction of the residential project at the densities or with the incentives or concessions permitted by this chapter.
    - e. The pro formas required in subsection (A)(3)(c) and (A)(3)(d) shall also include: (i) the actual cost reduction achieved through the incentive, concession, waiver, or modification; and (ii) evidence that the cost reduction allows the developer to provide affordable rents or affordable sales prices. The cost of reviewing any required pro forma data submitted in support of a request for a concession, incentive, waiver or modification, including but not

limited to the cost to the city of hiring a consultant to review the pro forma, shall be borne by the applicant.

- f. If a density bonus or concession is requested for a senior housing project, the application shall provide evidence that units in the residential project shall be occupied by a senior citizen or other person eligible to reside in a senior housing project.
  - g. If a density bonus or concession is requested for a land donation, the application shall show the location of the land to be dedicated and provide evidence that each of the findings in Government Code Section 65915(h) can be made.
  - h. If a density bonus or concession is requested for a child care facility, the application shall show the location and square footage of the child care facility and provide evidence that the findings included in Government Code Section 65915(i) can be made.
  - i. If a mixed use building or development is proposed, the application shall provide evidence that the required findings listed in Section 17.31.130(C) can be made.
4. If the applicant is proposing a modification of the requirement set forth in Section 17.31.110 that the target and/or inclusionary units be constructed concurrently with the market-rate units, the affordable housing plan shall describe the proposed phasing at the same level of detail as required in the application for the residential project, specify the security to be provided to the city to ensure that the target units and inclusionary units will be constructed, and explain how the proposed phasing would provide greater public benefit than providing the target units and/or inclusionary units concurrently with the market-rate units.
- B. Upon submittal, the community development director shall determine if the affordable housing plan conforms to the provisions of this chapter. No application for a first approval for a residential project subject to the inclusionary housing requirements or requesting a density bonus, incentives, concessions, or waivers may be deemed complete unless an affordable housing plan is submitted conforming to the provisions of this chapter.

#### **17.31.130 - City review of affordable housing plan.**

- A. An affordable housing plan shall be reviewed as part of the first approval of the residential project. Any decision regarding an affordable housing plan may be appealed in accordance with the applicable procedure set forth in Chapter 17.52 of this title. For incentives and concessions requested under Section 17.31.060(B)(3), the city council shall be the approving authority for the affordable housing plan, even though the approving authority for the residential project might otherwise be the planning commission. In accordance with state law, neither the granting of a concession or incentive, nor the granting of a density bonus, shall be interpreted, in and of itself, to require a general plan amendment, zoning change, or other discretionary approval.
- B. The plan for the inclusionary units shall be approved if it is in conformance with Section 17.31.030 of this chapter.
- C. Before approving a request for a density bonus, incentive, concession, waiver, or modification, the approving authority shall make the following findings:
  1. The residential project is eligible for a density bonus and any concessions, incentives, waivers, modifications, or reduced parking standards requested; conforms to all standards for affordability included in this chapter; and includes a financing mechanism for all implementation and monitoring costs.
  2. Any requested incentive or concession will result in identifiable, financially sufficient, and actual cost reductions based upon appropriate financial analysis and documentation.
  3. If the density bonus is based all or in part on dedication of land, the approval body has made the findings included in Government Code Section 65915(h).

4. If the density bonus, incentive, or concession is based all or in part on the inclusion of a child care facility, the approval body has made the finding included in Government Code Section 65915(i).
  5. If the incentive or concession includes mixed use buildings or developments, the approving authority has made the finding included in Government Code Section 65915(k)(2).
  6. If a waiver or modification is requested, the waiver or modification is necessary to make the housing units economically feasible by providing appropriate financial analysis and documentation as described in Section 17.31.120, and the development standards will have the effect of precluding the construction of the residential project at the densities or with the incentives or concessions permitted by this section.
- D. The approving authority may deny a request for an incentive or concession for which the findings set forth in Section 17.31.130(C) can be made only if it makes a written finding, based upon substantial evidence, of either of the following:
1. The incentive or concession is not required to provide for affordable rents or affordable ownership costs; or
  2. The incentive or concession would have a specific adverse impact upon public health or safety, or the physical environment, or on any real property that is listed in the California Register of Historic Resources, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to lower, very low and moderate income households. For the purpose of this subsection, "specific adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, written public health or safety standards, policies, or conditions, as they existed on the date that the application was deemed complete.
- E. The approving authority may deny a requested waiver or modification for which the findings set forth in Section 17.31.130(C) can be made only if it makes a written finding, based upon substantial evidence, of either of the following:
1. The modification would have a specific adverse impact upon health, safety, or the physical environment, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to lower, very low and moderate income households. For the purpose of this subsection, "specific adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, written public health or safety standards, policies, or conditions as they existed on the date that the application was deemed complete; or
  2. The modification would have an adverse impact on any real property that is listed in the California Register of Historic Resources.
- F. The approval body may deny a density bonus or concession that is based on the provision of child care facilities and for which the required findings can be made only if it makes a written finding, based on substantial evidence, that the city already has adequate child care facilities.
- G. A request for a minor modification of an approved affordable housing plan may be granted by the community development director or designee if the modification is substantially in compliance with the original affordable housing plan and conditions of approval. A minor modification is technical in nature, as opposed to substantive or material. Substantive or material changes to the affordable housing plan shall be processed in the same manner as the original plan.

#### **17.31.140 - Developer affordable housing agreement.**

- A. Developers subject to the inclusionary housing requirements set forth in this chapter and developers requesting a density bonus, incentive, concession, waiver, modification, or revised parking standard pursuant to this chapter shall enter into a developer affordable housing agreement with the city. A developer affordable housing agreement shall be made a condition of the discretionary planning

permits for all residential projects pursuant to this chapter and shall be recorded as a restriction on any parcels on which the target or inclusionary units will be constructed.

- B. The developer affordable housing agreement shall be recorded prior to, or concurrently with, the final or parcel map, or, where the residential project does not include a map, prior to issuance of a building permit for any structure in the residential projects. The developer affordable housing agreement shall run with the land and bind all future owners and successors in interest.
- C. The developer affordable housing agreement shall be in a form provided by the city and shall include, without limitation, the following:
  1. The total number of units approved for the residential project, the number, location, and level of affordability of the target units and the inclusionary units.
  2. Standards for determining affordable rent or affordable ownership cost for the target units and any inclusionary units.
  3. The location, unit size in square feet, and number of bedrooms of target units and any inclusionary units.
  4. Provisions to ensure initial and continuing affordability in accordance with the requirements of this chapter, including the execution and recordation of subsequent agreements ensuring continued affordability pursuant to Section 17.31.150.
  5. If applicable, a schedule for completion and occupancy of target units and inclusionary units in relation to construction of market-rate units and specification of the security provided to the city to ensure that the target and/or inclusionary units will be constructed.
  6. A description of any incentives, concessions, waivers, or reductions being provided by the city.
  7. A description of remedies for breach of the agreement by either party. The city may identify tenants or qualified purchasers as third party beneficiaries under the agreement.
  8. Procedures for qualifying tenants and prospective purchasers of target units, including any preferences.
  9. Provisions requiring maintenance of records to demonstrate compliance with this chapter.
  10. Other provisions to ensure implementation and compliance with this chapter.
  11. In the case of senior citizen housing developments, the developer affordable housing agreement shall provide that units in the residential development shall be occupied by senior citizens or other persons eligible to reside in such a project.
  12. Developer affordable housing agreements for land dedication, child care facilities, and condominium conversion shall ensure continued compliance with all conditions included in Sections 17.31.070, 17.31.080, and 17.31.090 respectively.

**17.31.150 - Continued affordability and initial occupancy.**

- A. Definitions. The following definitions shall be applicable to such terms as used in this section:
  1. "Resale restriction agreement" means an agreement, covenant, deed of trust, or other document, approved as to form by the city council, which is executed by the property owner and recorded against each affordable unit to insure that such unit remains affordable for the applicable term. The city manager is hereby granted the authority to execute the resale restriction agreement and any related documents following approval of form documents by the city council.
  2. "Transfer" means any sale, conveyance, assignment, or other change of ownership, whether voluntary or involuntary, of any legal or equitable interest in an affordable unit. Where the affordable unit is owned by a corporation, limited liability company, general or limited partnership, or other form of business entity, a transfer of the unit shall be deemed to have

occurred upon transfer of fifty percent (50%) or more of the ownership interest in such entity. Notwithstanding the foregoing, the following transfers shall be exempt from the requirement that the transferee qualify as an eligible household:

- a. Any transfer to a spouse or domestic partner of the transferor, where the spouse or domestic partner becomes a co-owner of the affordable unit with the transferor;
- b. Any transfer by devise or inheritance to a spouse or domestic partner of the transferor upon the transferor's death, where the spouse or domestic partner continues to occupy the unit as his or her principal place of residence;
- c. Any transfer between spouses as part of a marriage dissolution proceeding;
- d. Any transfer to an inter vivos revocable trust in which the transferor is the beneficiary;
- e. The granting of the lien or other security interest in the unit as security for a loan and such loan complies with any applicable requirements of the resale restriction agreement.

The exemptions listed above shall apply only during the period in which the affordable unit is owned by the exempted person and shall not apply to any subsequent transfer by that person, which shall be subject to all of the terms and provisions of the resale restriction agreement.

3. Domestic partner means two (2) persons who have filed a declaration of domestic partnership with the California Secretary of State pursuant to Division 2.5, beginning with Section 297, of the California Family Code and such registration was in full force and effect at the time of the transfer or on the date of the transferor's death. A copy of the domestic partnership registration shall be provided to the city upon request.
- B. Owner-Occupied Target Units and Inclusionary Units. A resale restriction, agreement shall be recorded against each for-sale target unit and for-sale inclusionary unit to ensure that the unit remains affordable for a term of forty-five (45) years. Upon any transfer of the unit (as defined in Section 17.31.150(A)(2) during the term of the resale restriction agreement, the transferee shall execute and record a new resale restriction agreement for a term of forty-five (45) years, commencing from the date of such transfer. If a unit is inherited and such transfer is not exempt under Section 17.31.150(A)(2), the beneficiaries may live in the unit and assume the obligations in the homeowner documents if he/she income qualifies; if he/she does not income qualify, he/she must sell the unit according to the resale restriction agreement, following a grace period not to exceed one year. Owner-occupied inclusionary units that are later rented shall be rented at a rent affordable to the corresponding income level as designated in Section 17.31.030(C).
  - C. Rental Target Units and Inclusionary Units. A resale restriction agreement or regulatory agreement shall be recorded against each residential project containing rental target units and inclusionary rental units to ensure that the rental target units and inclusionary rental units remain affordable for a minimum term of fifty-five (55) years. Upon any transfer of the project (as defined in Section 17.31.150(A)(2) during the term of the resale restriction agreement or regulatory agreement, the transferee shall execute and record a new resale restriction agreement or regulatory agreement for a term of fifty-five (55) years, commencing from the date of such transfer. A longer period of time may be specified if required by any construction or mortgage financing assistance program, mortgage insurance program, or rental subsidy program. Rental inclusionary units that are later sold shall be affordable upon sale to the corresponding income level as designated in Section 17.31.030(C).
  - D. Eligibility Requirements. No household shall be permitted to begin occupancy of a target or inclusionary unit unless the city or its designee has approved the household's eligibility, unless the household has been exempted under Section 17.31.150(A)(2). If the city or its designee maintains a list of, or otherwise identifies, eligible households, initial and subsequent occupants of target and inclusionary units shall be selected first from the list of identified households, to the maximum extent possible, in accordance with guidelines approved by the city council or its designee.

**17.31.160 - Implementation and enforcement.**

- A. The city council may adopt guidelines, by resolution, to assist in the implementation of all aspects of this chapter.
- B. No permit, license, subdivision map, or other approval or entitlement for a residential project shall be issued, including without limitation a final inspection for occupancy or certificate of occupancy, until all requirements applicable to the residential project at such time pursuant to this chapter have been satisfied.
- C. The city attorney shall be authorized to enforce the provisions of this chapter and all affordable housing agreements, regulatory agreements, resale controls, deeds of trust, or similar documents placed on target units, by civil action and any other proceeding or method permitted by law.
- D. Failure of any official or agency to fulfill the requirements of this chapter shall not excuse any applicant or owner from the requirements of this chapter.
- E. The remedies provided for herein shall be cumulative and not exclusive and shall not preclude the city from any other remedy or relief to which it otherwise would be entitled under law or equity.

**17.31.170 - Waivers of inclusionary housing requirement.**

- A. Notwithstanding any other provision of this chapter, the inclusionary housing requirements of Section 17.31.030 of this chapter may be waived, adjusted, or reduced if an applicant shows, based on substantial evidence, that there is no reasonable relationship between the impact of a proposed residential development and the requirements of this chapter, or that applying the requirements of this chapter would take property in violation of the United States or California Constitutions, or that it would otherwise have an unconstitutional application to the property.
- B. Any request for a waiver, adjustment, or reduction under this section shall be submitted concurrently with the affordable housing plan required by Section 17.31.120. The request for a waiver, reduction, or adjustment shall set forth in detail the factual and legal basis for the claim.
- C. The request for a waiver, adjustment, or reduction shall be reviewed and considered in the same manner and at the same time as the affordable housing plan. In making a determination on an application for waiver, adjustment, or reduction, the applicant shall bear the burden of presenting substantial evidence to support the claim. The city may assume each of the following when applicable:
  - 1. That the applicant will provide the most economical inclusionary units feasible meeting the requirements of this chapter.
  - 2. That the applicant is likely to obtain housing subsidies when such funds are reasonably available.
- D. The waiver, adjustment, or reduction may be approved only to the extent necessary to avoid an unconstitutional result, after adoption of written findings, based on substantial evidence, supporting the determinations required by this section.

Ref.: Ord. No. 537, 2-17-09

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# ATTACHMENT 2

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**AB-1505 Land use: zoning regulations.** (2017-2018)

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Date Published: 09/29/2017 09:00 PM

**Assembly Bill No. 1505**

CHAPTER 376

An act to amend Section 65850 of, and to add Section 65850.01 to, the Government Code, relating to land use.

[ Approved by Governor September 29, 2017. Filed with Secretary of State September 29, 2017. ]

LEGISLATIVE COUNSEL'S DIGEST

AB 1505, Bloom. Land use: zoning regulations.

The Planning and Zoning Law authorizes the legislative body of any county or city to adopt ordinances regulating zoning within its jurisdiction, as specified.

This bill would additionally authorize the legislative body of any county or city to adopt ordinances to require, as a condition of development of residential rental units, that the development include a certain percentage of residential rental units affordable to, and occupied by, moderate-income, lower income, very low income, or extremely low income households or by persons and families of low or moderate income, as specified, and would declare the intent of the Legislature in adding this provision.

This bill would also authorize the Department of Housing and Community Development, within 10 years of the adoption or amendment of an ordinance by a county or city after September 15, 2017, that requires as a condition of the development of residential rental units that more than 15% of the total number of units rented in the development be affordable to, and occupied by, households at 80% or less of the area median income, to review that ordinance if the county or city meets specified conditions. The bill would authorize the department to request, and require that the county or city provide, evidence that the ordinance does not unduly constrain the production of housing by submitting an economic feasibility study that meets specified standards. If the department finds that economic feasibility study does not meet these standards, or if the county or city fails to submit the study within 180 days, the bill would require the county or city to limit any requirement to provide rental units in a development affordable to households at 80% or less of the area median income to no more than 15% of the total number of units in the development. The bill would require the department to report any findings made pursuant to these provisions to the Legislature. The bill would also declare that these provisions regarding department review of certain land use ordinances address a matter of statewide concern.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.** Section 65850 of the Government Code is amended to read:

**65850.** The legislative body of any county or city may, pursuant to this chapter, adopt ordinances that do any of the following:

- (a) Regulate the use of buildings, structures, and land as between industry, business, residences, open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes.
- (b) Regulate signs and billboards.
- (c) Regulate all of the following:
  - (1) The location, height, bulk, number of stories, and size of buildings and structures.
  - (2) The size and use of lots, yards, courts, and other open spaces.
  - (3) The percentage of a lot which may be occupied by a building or structure.
  - (4) The intensity of land use.
- (d) Establish requirements for offstreet parking and loading.
- (e) Establish and maintain building setback lines.
- (f) Create civic districts around civic centers, public parks, public buildings, or public grounds, and establish regulations for those civic districts.
- (g) 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, households with incomes that do not exceed the limits for moderate-income, lower income, very low income, or extremely low income households specified in Sections 50079.5, 50093, 50105, and 50106 of the Health and Safety Code. The ordinance shall provide alternative means of compliance that may include, but are not limited to, in-lieu fees, land dedication, off-site construction, or acquisition and rehabilitation of existing units.

**SEC. 2.** Section 65850.01 is added to the Government Code, to read:

**65850.01.** (a) The Department of Housing and Community Development, hereafter referred to as "the department" in this section, shall have the authority to review an ordinance adopted or amended by a county or city after September 15, 2017, that requires as a condition of the development of residential rental units that more than 15 percent of the total number of units rented in a development be affordable to, and occupied by, households at 80 percent or less of the area median income if either of the following apply:

(1) The county or city has failed to meet at least 75 percent of its share of the regional housing need allocated pursuant to Sections 65584.04, 65584.05, and 65584.06, as applicable for the above-moderate income category specified in Section 50093 of the Health and Safety Code, prorated based on the length of time within the planning period pursuant to paragraph (1) of subdivision (f) of Section 65588, over at least a five-year period. This determination shall be made based on the annual housing element report submitted to the department pursuant to paragraph (2) of subdivision (a) of Section 65400.

(2) The department finds that the jurisdiction has not submitted the annual housing element report as required by paragraph (2) of subdivision (a) of Section 65400 for at least two consecutive years.

(b) Based on a finding pursuant to subdivision (a), the department may request, and the county or city shall provide, evidence that the ordinance does not unduly constrain the production of housing by submitting an economic feasibility study. The county or city shall submit the study within 180 days from receipt of the department's request. The department's review of the feasibility study shall be limited to determining whether or not the study meets the following standards:

(1) A qualified entity with demonstrated expertise preparing economic feasibility studies prepared the study.

(2) If the economic feasibility study is prepared after September 15, 2017, the county or city has made the economic feasibility study available for at least 30 days on its Internet Web site. After 30 days, the county or city shall include consideration of the economic feasibility study on the agenda for a regularly scheduled meeting of the legislative body of the county or city prior to consideration and approval. This paragraph applies when an economic feasibility study is completed at the request of the department or prepared in connection with the ordinance.

(3) The study methodology followed best professional practices and was sufficiently rigorous to allow an assessment of whether the rental inclusionary requirement, in combination with other factors that influence feasibility, is economically feasible.

(c) If the economic feasibility study requested pursuant to subdivision (b) has not been submitted to the department within 180 days, the jurisdiction shall limit any requirement to provide rental units in a development affordable to households at 80 percent of the area median income to no more than 15 percent of the total number of units in a development until an economic feasibility study has been submitted to the department and the department makes a finding that the study meets the standards specified in paragraphs (1), (3), and, if applicable, (2), of subdivision (b).

(d) (1) Within 90 days of submission, the department shall make a finding as to whether or not the economic feasibility study meets the standards specified in paragraphs (1), (3), and, if applicable, (2), of subdivision (b).

(2) If the department finds that the jurisdiction's economic feasibility study does not meet the standards in paragraphs (1), (3), and, if applicable, (2), of subdivision (b), the jurisdiction shall have the right to appeal the decision to the Director of Housing and Community Development or his or her designee. The director or his or her designee shall issue a final decision within 90 days of the department's receipt of the appeal unless extended by mutual agreement of the jurisdiction and the department.

(3) If in its final decision the department finds that jurisdiction's economic feasibility study does not meet the standards in paragraphs (1), (3), and, if applicable, (2), of subdivision (b), the jurisdiction shall limit any requirement to provide rental units in a development affordable to households at 80 percent of the area median income to no more than 15 percent of the total number of units in a development until such time as the jurisdiction submits an economic feasibility study that supports the ordinance under review and the department issues a finding that the study meets the standards in paragraphs (1), (3), and, if applicable, (2), of subdivision (b).

(e) The department shall not request to review an economic feasibility study for an ordinance more than 10 years from the date of adoption or amendment of the ordinance, whichever is later.

(f) The department shall annually report any findings made pursuant to this section to the Legislature. The report required by this subdivision shall be submitted in compliance with Section 9795.

(g) The Legislature finds and declares that ensuring access to affordable housing is a matter of statewide concern and not a municipal affair, as that term is used in Section 5 of Article XI of the California Constitution. Therefore, this section shall apply to an ordinance proposed or adopted by any city, including a charter city.

**SEC. 3.** The Legislature finds and declares all of the following:

(a) Inclusionary housing ordinances have provided quality affordable housing to over 80,000 Californians, including the production of an estimated 30,000 units of affordable housing in the last decade alone.

(b) Since the 1970s, over 170 jurisdictions have enacted inclusionary housing ordinances to meet their affordable housing needs.

(c) While many of these local programs have been in place for decades, a 2009 appellate court decision has created uncertainty and confusion for local governments regarding the use of this tool to ensure the inclusion of affordable rental units in residential developments.

(d) It is the intent of the Legislature to reaffirm the authority of local jurisdictions to include within these inclusionary housing ordinances requirements related to the provision of rental units.

(e) The Legislature declares its intent in adding subdivision (g) to Section 65850 of the Government Code, pursuant to Section 1 of this act, to supersede the holding and dicta in the court decision of *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396 to the extent that the decision conflicts with a local jurisdiction's authority to impose inclusionary housing ordinances pursuant to subdivision (g) of Section 65850 of the Government Code, as added pursuant to Section 1 of this act.

(f) In no case is it the intent of the Legislature in adding subdivision (g) to Section 65850 of the Government Code, pursuant to Section 1 of this act, to enlarge, diminish, or modify in any way the existing authority of local jurisdictions to establish, as a condition of development, inclusionary housing requirements, beyond reaffirming their applicability to rental units.

(g) This act does not modify or in any way change or affect the authority of local jurisdictions to require, as a condition of the development of residential units, that the development include a certain percentage of residential for-sale units affordable to, and occupied by, households with incomes that do not exceed the limits for moderate-income, lower income, very low income, or extremely low income households.

(h) It is the intent of the Legislature to reaffirm that existing law requires that the action of any legislative body of any city, county, or city and county to adopt a new inclusionary housing ordinance be taken openly and that their deliberations be conducted openly consistent with the requirements of the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code).

(i) Except as provided in subdivision (e), in no case is it the intent of the Legislature in adding subdivision (g) to Section 65850 of the Government Code, pursuant to Section 1 of this act, to enlarge, diminish, or modify in any way the existing rights of an owner of residential real property under Sections 1954.50 to 1954.535, inclusive, of the Civil Code and Sections 7060 to 7060.7, inclusive, of the Government Code.