

**DISCLAIMER:** This guide is intended solely as a technical overview of state housing laws that require affordability restrictions, overview of inclusionary housing policy considerations, and considerations of provisions to include in affordable housing regulatory agreements. It is not intended to serve as legal advice regarding any jurisdiction's specific policies or any proposed housing development project. Local staff should consult with their city attorney or county counsel when determining the affordable housing considerations or negotiating regulatory agreements and affordable homebuyer documents for any proposed housing development project in their jurisdiction. Throughout this paper the term "city" is used, but this document applies equally to counties.

# Inclusionary Affordable Housing Program Considerations and Agreements

## Introduction

Many cities and counties have implemented inclusionary housing requirements and are also tasked with enforcing affordability requirements of various state programs, such as density bonus law and SB 35. This guidance paper is intended to present policy considerations for creating or updating an inclusionary housing program, to implement certain state program requirements as of 2022, and to identify major items that are typically addressed in developer agreements, rent regulatory agreements, and affordable homebuyer agreements.

## Summary of Program Requirements for Affordable Housing Under Various State Laws

The following table identifies the affordability requirements of several state programs, as of 2022. This is not an exhaustive list, but rather the most commonly encountered. Note that the requirements applicable to state programs may vary widely and may also be different from a local inclusionary housing policy. A city or county will need to reflect differences in program requirements when drafting its affordable housing agreements and apply the strictest of the applicable requirements to the units in the project (the lowest income, longest term, lowest rent calculation, etc.).

### Table 1: Summary of Program Requirements for Affordable Units

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **Density Bonus****§ 65915** | **SB 35****§ 65913.4** | **‘By Right’ Zoning** **§ 65583.2(h), (i)** | **HAA Affordable Housing Provisions****§65589.5(h)(3)** | **Inclusionary****(Local municipal code)** |
| **Affordability Requirement** | Minimum 5% very low, 10% lower, 10% moderate; or senior housing(§ 65915(b)) | 10% or 50% lower[[1]](#footnote-1)(§65913.4(a)(4)(B)) | 20% lower(§ 65583.2(h)) | 20% low or 100% moderate or middle income(§65589.5(h)(3)) | Varies; typically 15 – 20% |
| **How % Is Calculated** | On base density only[[2]](#footnote-2)(§ 65915(b), (o)(6)) | Statute: on “total units” ((§65913.4(a)(4)(B)); HCD[[3]](#footnote-3) Guidelines: on base density only (§ 402) | Not specified; HCD Site Inventory Guidebook says “total units”(page 38)[[4]](#footnote-4) | On “total units”(§65589.5(h)(3)) | Commonly on base density only |
| **Maximum Income for Household** | HCD’s income table by household size for each income level(65915(b); Health & Safety Code §§ 50079.5, 50093, 50105; 25 CCR § 6932) | 80% of median in HCD’s income table by household size(§65913.4(a)(4)(B); 25 CCR § 6932) | Not specified | HCD’s income table by household size for lower and moderate; 150% of median for middle income(§65589.5(h)(3));HSC §§ 50079.5, 50093; §65008(c); 25 CCR § 6932 | Often use either HCD or HUD income tables |
| **Affordable Sales Price[[5]](#footnote-5)** | Very low: 1/12 of 30% of 50% of median Low: 1/12 of 30% of 70% of medianModerate: 1/12 of 35% of 100% of median (§65915(c)(20(A)(i); HSC § 50052.5; 25 CCR § 6920) | 1/12 of 30% of 70% of median(§65913.4(k)(1); HSC § 50052.5; 25 CCR § 6920) | To be eligible for ‘by right’ approval, subdivision cannot be required; only rental housing qualifies(§ 65583.2(i)) | Low: 1/12 of 30% of 60% of medianModerate: 1/12 of 30% of 100% of medianMiddle: not specified(§65589.5(h)(3); 25 CCR § 6920) | Often use either HCD or HUD price calculations |
| **Term of Rental Restrictions** | 55 years(§ 65915(c)(1)(A)) | 55 years(§65913.4(a)(3)(A)) | Not specified | Not specified | Typically 55 years or perpetuity |
| **Term of Ownership Restrictions** | Equity-sharing at first sale unless local ordinance requires longer term(§ 65915(c)(2)(C)) | 45 years(§65913.4(a)(3)(A)) | Not specified | Not specified | Typically 45 years or perpetuity |

## Inclusionary Housing Policy Considerations Checklist

In order to create an effective inclusionary housing program, a city or county will need to take several policy objectives into consideration. The following table identifies certain issues and questions to assist local agencies in crafting or updating an inclusionary policy. A particular jurisdiction may have additional policy objectives not identified in this table.

### Table 2. Inclusionary Housing Policy Considerations Checklist

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| --- | --- |
| Issue | **Factors to Consider** |
| 1. **Inclusionary Percentage and Affordability Level**
 | 1. What percentage of a housing development project does the city want to be affordable?
2. What income levels does the city want to use?
3. Does the city want to establish fixed percentages between the income levels? Typically for-sale units are moderate income and for-rent units are lower income. (A fixed percentage or a standard is commonly used to mitigate against the city's decision being perceived as arbitrary.)
4. For rental housing: Gov Code §65850.01 effectively provides a 'safe harbor' of 15% low income. Above that, HCD can require an economic study if the city is not meeting above-moderate production goals (Gov Code. §65850.01).
 |
| 1. **Term of Affordability Restrictions**
 | What should the term of affordability restrictions be? 55 years is a common time period (this is what is required for rental projects in density bonus and SB 35, and inclusionary units can also be used to meet these state program requirements). Some jurisdictions require affordability in perpetuity, which is permitted under the rule against perpetuity as a "nondonative transfer" (Prob. Code § 21225(a)). |
| 1. **Size of Projects Subject to Inclusionary Ordinance**
 | How many units in a project to trigger inclusionary requirements?  |
| 1. **Alternatives**
 | 1. Government Code §65850 can conservatively be interpreted to require that the city provide at least 2 alternatives for rental projects. Examples of common alternatives are in lieu fees (see No. 7 below), land dedication, etc.
2. Providing alternative methods of complying is not required for for-sale units.
 |
| 1. **Calculation of Affordable Housing Cost and Rent**
 | The inclusionary program should specify what will be considered affordable housing cost for rental and ownership units. State law and regulations have set standards that can be used to determine affordable housing cost and rent, which are commonly used (see Health & Safety §§ 50053 (affordable rent); 50052.5 (affordable housing cost).  |
| 1. **Treatment of Inclusionary Units at Resale**
 | The inclusionary program should specify what happens to an ownership unit at resale if the resale is prior to the expiration of the term of affordability. Some things to consider are how the sales proceeds are divided between the city and seller and whether a new affordable term begins upon sale to the new owner. |
| 1. **In Lieu Fee? Commercial Linkage Fee?**
 | If an in-lieu fee is permitted or require, a fee study to support the in lieu fee or commercial linkage fee will be needed and will assist in setting the fee amount.  |
| 1. **Program Administration**
 | Does the City administer the affordable units (marketing, income-qualifying buyers, etc.) or the developer? Is the city interested in establishing a monitoring fee for rentals? |

## Affordable Housing Master Developer Agreement Checklist

Unless a housing development project is 100% affordable, it will contain market rate units and only a small portion of affordable units will be developed for the income level specified in the inclusionary housing ordinance. A master developer agreement is intended to ensure that the developer of the housing development project actually constructs the affordable units. This agreement will often include requirements that a certain number of affordable units must obtain their certificate of occupancy at the same time as market rate units; public agencies should require applicants to propose a schedule for construction of the affordable units.

The master agreement should be recorded on the entire property before a building permit is issued or a final map recorded, whichever occurs earlier, and is released once the affordable units have been constructed. There are, however, instances where this agreement is not needed, such as a single development phase rental project where a regulatory agreement will be recorded prior to issuance of a building permit or final map recorded.

### Table 3. Affordable Housing Master Developer Agreement Checklist

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| --- | --- |
| Item to Include in Agreement | Purpose |
| Recitals regarding approval basis for affordability requirement | So future readers of the agreement understand the city's authority for the requirements; if the agreement is intended to cover inclusionary units as well as density bonus, streamlined ministerial review process (SB35), or other affordability restrictions, these should all be identified in the recitals of the agreement. |
| Legal description (usually in the form of an attachment) | Identifies the property being restricted and is required if the regulatory agreement is being recorded against the property; restriction should apply to entire property. |
| Level of affordability (e.g. very low income; low income; etc.) | Identifies the income levels needed for a tenant to qualify to reside in the identified affordable units. This should also specify the duration of the affordability restriction. |
| Location of affordable units | Particularly important in a mixed-income project; provides the parties with information on which units are initially affordable and which are market rate. |
| Number of bedrooms, square footage, and design and appearance of the affordable units | Identifies the size of the affordable units; note if there is a requirement for comparable size to market rate and if that is achieved (and if not, why not); note if the affordable units are required to have the same design and appearance as the market rate, that should be addressed. |
| Phasing of project construction | Depending on the size of the project, it may be developed in phases. If that is the case, the master agreement should specify how many affordable units are to be constructed in each phase. If it is a one phase project, the agreement generally specifies that the affordable units will be built concurrently with the market rate units. If the affordable units are to be constructed off-site, the agreement should specify expectations on when those units will be constructed and occupied. |
| Procedures for setting initial affordable sales prices or rents | This is particularly important with ownership units, as a regulatory agreement describing affordable cost will not be recorded; instead a resale restriction agreement will be recorded upon initial sale.  |
| Marketing plan | Generally, a marketing plan will be required describing how the units will be marketed to tenants or buyers. If not addressed elsewhere in the agreement, the marketing plan should also discuss how tenant and buyer qualifications will be verified. The city will generally approve the plan, and this section of the agreement should describe the approval process. |
| In lieu fees or other contributions | If the project developer opts to fulfil the inclusionary housing requirements by paying an in lieu fee, donating land, or making a contribution to off-site construction of affordable units, the provisions should be described in the master agreement.  |
| Replacement units and tenant relocation | If the development project will be demolishing existing units, the agreement should address the unit replacement requirements and tenant relocation obligations, if any. See the [Guide to California State Replacement Housing Requirements](https://abag.ca.gov/technical-assistance/guide-california-state-replacement-housing-requirements) for more in depth information on replacement housing and tenant relocation requirements. |
| Amendments | Describes steps to amend the agreement, if needed. |
| Remedies in the event of default | Identifies the available remedies if a party defaults. |
| Termination of agreement | Specifies the mechanism for terminating the master agreement once homebuyer restrictions are recorded, or rent regulatory agreement is recorded. |

## Affordable Housing Regulatory Agreement for Rental Projects Checklist

When a development project is meeting its inclusionary ordinance obligations by providing affordable rental housing units, the city or county is required to record a use restriction on title to the property to enforce the agreement. This is generally done in the form of a regulatory agreement, which lays out the developer's obligations and requirements associated with the affordable housing units. Below is a table with suggested provisions to include in a rental regulatory agreement, as well as the reasoning behind the suggestion. Since inclusionary housing programs vary by city or county, what is included in the agreement should be tailored to the specific inclusionary housing program.

### Table 4. Affordable Housing Regulatory Agreement for Rental Projects Checklist

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| --- | --- |
| Item to Include in Agreement | Purpose |
| Recitals regarding approval basis for affordability requirement | So future readers of the agreement understand the city's authority for the requirements; if the agreement is intended to cover inclusionary units as well as density bonus, streamlined ministerial review process (SB35), or other affordability restrictions, these should all be identified in the recitals of the agreement. |
| Legal description (usually in the form of an attachment) | Identifies the property being restricted and is required if the regulatory agreement is being recorded against the property; restriction should apply to entire property. |
| Level of affordability (e.g. very low income; low income; etc.) | Identifies the income levels needed for a tenant to qualify to reside in the restricted units. |
| Location of affordable units | Particularly important in a mixed-income project; provides the parties with information on which units are restricted and which are market rate; if affordable units are allowed to "float" throughout the project as tenants become over income, the process to approve new affordable units should be included. |
| Number of bedrooms and square footage of the affordable units | Identifies the size of the affordable units; note if there is a requirement for comparable size to market rate and if that is achieved (and if not, why not). |
| Term | Identifies the duration of the affordability restriction. If affordable units are counted for multiple programs (e.g. inclusionary; density bonus; streamlined ministerial approval), note whether there are differences in the term of affordability and reconcile (e.g. require the longest duration of all affordable units). |
| Calculation of affordable rents | Provides the formula or methodology to be used to determine the affordable rent. If affordable units are counted for multiple programs (e.g. inclusionary; density bonus; streamlined ministerial) note whether there are any differences in methodology for setting rent. |
| Mechanism for annual increases | Describes how much rent can be increased annually and whether city approval is required prior to implementing the increases. |
| Determination of tenant eligibility | In addition to qualifying incomes specified earlier, should also identify any other requirements (e.g. if there are an live/work or other preferences; household size based on number of bedrooms). |
| Annual certification of incomes | To ensure continued tenant eligibility. |
| Policies for over-income tenants | Addresses how the city would like to handle situations where a tenant's income increases after tenancy has begun; if project is receiving state or federal funds, there may be certain requirements on how over-income tenants should accommodated. |
| Required lease terms | If city has any requirements for tenant leases (e.g. non-discrimination), these should be identified in the regulatory agreement. |
| Procedures for marketing affordable units | Generally, a marketing plan is required and approved by the city; specific requirements to include in the marketing plan may be included.  |
| Property management and maintenance | Provides the city's expectation on management and maintenance of the property; for example, that landscaping needs to be kept up, graffiti removed, affordable units updated to the same standards as market rate and at the same rate, property management company identified and approved by the city, etc. |
| Record keeping | Provides expectations for record keeping, document retention, city access to records, and submission of annual compliance reports. |
| Tenant notification when term of affordability expires | Notice should be provided to tenants before increasing their rents after termination of affordability restrictions. |
| Amendments | Describes steps to amend the agreement, if needed. |
| Remedies in the event of default | Identifies the available remedies if a party defaults. |
| If building is a condominium, provisions for conversation to ownership and tenant relocation/benefits | Specifies expectations of how tenants will be treated if the property is converted to ownership and units sold. |

## Affordable Housing Homebuyer Documents Checklist

Inclusionary housing ordinances and programs generally apply to both rental and ownership housing projects. If the developer of a housing development project intends to sell the housing units, rather than renting them, a series of documents should be prepared for the eventual owner of the affordable units. These documents include:

1. Resale Restriction and Option to Purchase Agreement (recorded). This is described in the table below.
2. Promissory Note (not recorded). This is to secure any financial assistance provided by the city or county to the homebuyer, and also an equity share in proceeds of the dwelling unit if it is sold above the affordable price identified in the resale restriction agreement.
3. Deed of Trust (recorded). This document secures the promissory note and is recorded on title. It can be in the form of a performance deed of trust if no financial assistance is provided.
4. Request for Notice of Default or Sale (recorded). This document requires notice be given whenever the holder of a deed of trust declares a default or the property is sold due to a default. The city or county will be notified more quickly of the default than they would be under the deed of trust.
5. Disclosure to Buyers (not recorded). The disclosure explains to the future homebuyer the terms of the resale restriction, promissory note, and deed of trust in plain language.

A paper prepared for the Institute for Local Government, available [here](https://abag.ca.gov/technical-assistance/ensuring-continued-affordability-homeownership-programs), explains the purpose behind each of these documents.

### Table 5. Affordable Housing Homebuyer Documents Checklist

|  |  |
| --- | --- |
| Item to Include in Agreement | Purpose |
| Recitals regarding approval basis for affordability requirement | So future readers of the agreement understand the city's authority for the requirements; if the agreement is intended to cover inclusionary units as well as density bonus, streamlined ministerial review process (SB35), or other affordability restrictions, these should all be identified in the recitals of the agreement. |
| Legal description (usually in the form of an attachment) | Identifies the property being restricted and is required if the regulatory agreement is being recorded against the property; restriction should apply to entire property. |
| Level of affordability (e.g. low income; moderate income etc.) | Identifies the income levels needed for a purchaser to qualify to purchase in the restricted unit. |
| Term  | When resale price is restricted: Identifies the duration of the affordability restriction. If affordable units are counted for multiple programs (e.g. inclusionary; density bonus; streamlined ministerial approval), note whether there are differences in the term of affordability and reconcile (e.g. require the longest duration of all affordable units).When resale price is not restricted: Term of the required repayment of initial subsidy.  |
| Means for calculating resale price (if resale price is restricted) | Provides the methodology for determining the affordable sales price if the property is resold in the future. |
| Provisions for sharing equity or appreciation (if resale price is not restricted)  | Provides the methodology for sharing equity or appreciation in the property between the owner and the city. |
| Buyer protections if home price declines | This is often included because the homebuyer's potential for appreciation is limited. Often, the homeowner is allowed to recover at least the original purchase price, real estate commission, and cost of (approved) capital improvements. |
| Treatment of capital improvements and deferred maintenance at resale | Address whether the homeowner will recoup capital improvements costs and whether prior approval by the city is required for certain capital improvements. Should also discuss how to address deferred maintenance of the property at time of resale.  |
| Owner occupancy and annual certification | The agreement will generally include a provision requiring the homeowner to reside at the property for a specified amount of time during each year. It may also prohibit renting of the home without prior approval of the city. The annual certification is the mechanism for the homeowner to demonstrate compliance with these requirements.  |
| Property Maintenance  | The city may want to identify its expectations regarding maintenance. |
| Provisions for repayment of any secondary financing benefiting a public agency | The agreement should describe how and when city financing, such as a down payment assistance loan, will be repaid. |
| Procedures for property transfer and option to purchase | The agreement will lay out what transfers are permitted, and which are not. Usually, the public agency will have an option to purchase the property if the homeowner attempts to engage in a non-permitted transfer of the property. |
| Treatment of involuntary transfer | This provision addresses what is to occur if there is an involuntary transfer, such as upon divorce or to an heir upon death. |
| Provisions for refinancing and home equity loans | A city may allow the refinancing of the mortgage, for example to obtain a lower interest rate or to pay off another loan but restrict the ability to obtain cash from the refinance. The public agency may require prior approval and require the homeowner to pay a fee or administrative costs involved in the public agency's review and approval of a proposed loan refinance. |
| Insurance requirements | This section provides insurance requirements and how insurance proceeds are to be used. A city often will require that it named as an additional insured. |
| Buyer's consent to the option to purchase | Because the city is providing an option for it to purchase the property under limited circumstances, there should be an express agreement from the buyer. This section should also specify under what circumstances the city may exercise the option and whether it may assign the option to another individual or entity. |
| Amendments | Describes steps to amend the agreement, if needed. |
| Default | Identifies that constitutes a default under the agreement. In addition to violating the terms of the agreement, this typically includes a lender's declaration of default, the homeowner's failure to occupy the home as its principal residents, failure to pay property taxes, and a sale or transfer in violation of the restrictions. |
| Remedies in the event of default | Identifies the available remedies if a party defaults, including the city's ability to exercise the option to purchase the home. |

## CONCLUSION

In conclusion, if a city or county adopts an inclusionary housing policy, it should do so through an ordinance that imposes the requirements of the program on new development, and it is also a good practice to adopt implementing program guidelines. Another best practice is to enter into an agreement with the developer, or homeowner if the affordable unit is for sale, restricting the level of affordability and identifying other requirements associated with the affordable unit. Recording the agreement alerts future buyers of the property to the affordability restrictions on the property to ensure ongoing affordability and provides a mechanism for the city or county to enforce it.

1. In the Bay Area, 20% moderate can substitute for 10% lower. See § 65913.4 [↑](#footnote-ref-1)
2. ‘Base density’ means density without a density bonus. [↑](#footnote-ref-2)
3. California Department of Housing and Community Development. [↑](#footnote-ref-3)
4. The statements on this page are inconsistent with HCD’s SB 35 Guidelines and 2022 amendments to SB 35. [↑](#footnote-ref-4)
5. Affordable sales price is calculated after determining a reasonable down payment, with monthly costs, including mortgage, taxes, and homeowner association fees. [↑](#footnote-ref-5)