



Association of Bay Area Governments



Technical Assistance
for Local Planning

HOUSING

DISCLAIMER: This document is to assist cities and counties that may adopt a Housing Element before January 31, 2023 and before receiving HCD approval of the proposed Housing Element. To be in substantial compliance with state law, a Housing Element must contain all of the elements mandated by state Housing Element law.

Feasibility Study Requirements

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This document explains what an inclusionary zoning feasibility study is, why it might be helpful and when it is required.

1. Background

Preparing studies that assess the development feasibility of affordable housing requirements are a best practice for jurisdictions adopting, amending or evaluating inclusionary zoning ordinances. They help jurisdictions set requirements that do not have excessive adverse impacts on new development. They can also ensure that inclusionary requirements do not run afoul of government regulations. More recently, specific *requirements* regarding feasibility studies may be mandated by [AB 1505](#) (2017; §65850.01), which was a legislative remedy to the 2009 *Palmer*¹ decision that invalidated rental inclusionary housing ordinances.

This memo summarizes general feasibility considerations, state law requirements and [ABAG-MTC's Transit Oriented Communities' Policy](#) ("TOC Policy").

While cities are generally free to set their own affordable housing requirements, there are some relevant rules. Specifically:

- Generally, the US Constitution and government regulations require that affordability requirements must allow property owners to have a "fair and reasonable rate of return," and a feasibility study provides evidence that a reasonable rate of return is possible.
- When reviewing Housing Elements, HCD asks that agencies demonstrate that their inclusionary requirements are not a constraint on housing development. Again, a feasibility study is one way of providing evidence of this.

¹*Palmer/Sixth Street Properties LP v. City of Los Angeles*, 175 Cal.App.4th 1396.

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- Under AB 1505 (2017) the Department of Housing and Community Development (HCD) may require a jurisdiction to do a feasibility study if its inclusionary zoning policy requires more than 15 percent lower-income units.
- Additionally, to get credit for an inclusionary program under the TOC Policy, jurisdictions must do a feasibility study if their requirement is *less* than 15 percent lower-income units (or an economically equivalent percentage of affordable units at any other income level). Eventually, this is likely to be tied to funding.

2. Lower-Income Requirement Over 15 Percent

When can a Feasibility Study Be Required by HCD?

HCD may require a feasibility study under Government Code §65850.01 if all of these conditions apply:

1. **Recent changes** – The ordinance was adopted or amended recently (after 2017), and
2. **Greater than 15 percent lower income** – The ordinance requires that more than 15 percent of total units in a residential rental development to be affordable to households with incomes at or below 80 percent of area median income (“AMI”), and
3. **Not enough progress on above-moderate-income RHNA** - Either the jurisdiction has not met 75 percent of its above-moderate share of its Regional Housing Needs Allocation (RHNA) over at least a five-year period, OR the jurisdiction has not submitted its Annual Progress Report (APR) for two consecutive years.

If the conditions listed above are met and result in an HCD request, a study must be provided by the jurisdiction within 180 days demonstrating that “the ordinance does not unduly constrain the production of housing.”

HCD’s Review Standards for Feasibility Studies

While HCD has the ability to request a feasibility study, the scope of HCD’s review is limited to confirming that the feasibility study meets the following standards:

1. **Qualified preparer** – The study preparer is a qualified entity with demonstrated expertise preparing economic feasibility studies, and
2. **Study available for comment on jurisdiction’s website** – The study was available on the city or county’s website for at least 30 days and was subsequently considered at a regularly scheduled meeting of the legislative body (City Council or Board of Supervisors) prior to approval, and
3. **Followed best practices** - The study followed best professional practices and was sufficiently rigorous to assess whether the rental inclusionary requirement is feasible.

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Upon submission of an economic feasibility study, HCD has 90 days of submission to confirm if the study meets the above three standards. If HCD finds the study not in compliance, the jurisdiction may appeal the findings.

Even when an economic feasibility study is completed but not required by HCD, it is good practice to comply with these requirements, so that if HCD later requests an economic feasibility study, the study already prepared will meet these standards.

Consequences of Noncompliance

If HCD ultimately does not find a jurisdiction's feasibility study in compliance with the above standards, then the jurisdiction may not require a rental housing development to include more than 15 percent of total units as affordable to households with incomes at or below 80 percent AMI.

Similarly, if HCD requests a feasibility study, and the feasibility study is not submitted within 180 days, the jurisdiction may not require more than 15 percent of total units in a rental housing development to be affordable to households with incomes at or below 80 percent of AMI until the study is submitted and found to meet the required standards.

3. Lower-Income Requirement Under 15 Percent

When is a Feasibility Study Required by ABAG-MTC?

In September 2022, ABAG-MTC adopted its TOC Policy, rooted in Plan Bay Area 2050 (PBA 2050), the region's Long Range Transportation Plan and Sustainable Communities Strategy. While complying with the TOC Policy is voluntary and does not apply to all jurisdictions, it will likely be a factor in future ABAG-MTC funding decisions.

The TOC Policy includes a requirement that a jurisdiction have at least two of seven possible Affordable Housing Production Policies in place. One of those possible policies is inclusionary zoning. The inclusionary zoning policy must comply with several requirements, including that the requirement must be for *at least* 15 percent of a rental project's total units to be affordable to households earning at or below 80 percent of AMI. An inclusionary zoning policy that requires fewer than 15 percent of the units to be affordable at that income level must provide a financial feasibility study showing that a 15 percent requirement is not feasible.

This TOC policy does not have additional instructions at this time, though there are active discussions about how to help jurisdictions meet this requirement.

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4. HCD Housing Element Requirements

HCD requires cities and counties to analyze inclusionary requirements as a potential constraint on housing development as part of their Housing Element, especially if above-moderate-income housing has not recently been constructed in the jurisdiction.

[HCD's Building Blocks](#) require this analysis of inclusionary ordinances as part of the constraints analysis:

Like other ordinances related to the development of housing, the Housing Element must include a description and analysis of the inclusionary framework.

For example, the Housing Element should describe:

- Types of incentives the jurisdiction has or will adopt to encourage and facilitate compliance with inclusionary requirements,
- What options are available for developers to meet affordability requirements,
- How the ordinance interacts with density bonus law, the amount of any in-lieu fee, and
- What finding a developer must make in order to choose to pay the in-lieu fee.

An economic feasibility study, although not required, can consider all of these factors and describe how the inclusionary ordinance has been designed to ensure that housing development remains feasible.

5. Constitutional Requirements

In 2015, the California Supreme Court considered whether inclusionary requirements were a “taking” that violated the U.S. Constitution.² The Court concluded that inclusionary requirements were a form of price control, and explained that they would be unconstitutional if found to be “confiscatory, that is, if they deny a property owner a fair and reasonable return on its property.”

An economic feasibility analysis can provide evidence that an inclusionary ordinance allows property owners a “fair and reasonable return” and so does not constitute a taking.

Resources

- [HCD memo on inclusionary zoning feasibility requirements](#)
- [Zoning for Affordability Workgroup](#)

² *California Building Industry Ass'n v. City of San Jose*, 61 Cal. 4th 435.