**Office of**
**The City Attorney**
**City of San Diego**

**MEMORANDUM**
**MS 59**

**(619) 236-6220**

**DATE:** April 12, 2005

**TO:** Land Use and Housing Committee

**FROM:** City Attorney

**SUBJECT:** Inclusionary Housing In-Lieu Fees

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This memo is in response to the Land Use and Housing Committee's request that the City Attorney analyze a proposal to eliminate the in-lieu fee component of the City's inclusionary housing regulations.

## BACKGROUND

On June 3, 2003, the City Council adopted the Inclusionary Housing Ordinance [Ordinance]. In relevant part, the Ordinance requires that 10 percent of most residential development be affordable to targeted rental households or targeted ownership households. As an alternative to building the units on the same site as the market rate units, the developer may build the units on a different site, but within the same community planning area. Additional alternatives to building the affordable units on the same site or within the same community planning area as the market rate units include building the affordable units outside the community planning area, seeking a variance or waiver from the requirements of the Ordinance, or paying an in-lieu fee to avoid the obligation of constructing the affordable units.

The in-lieu fee is calculated by multiplying the gross floor area of all of the units in the development by the applicable square foot charge. For developments with more than ten units, the fee ranges between $1.00 and $2.50 during the first three years of the program. For projects with less than ten units, the fee ranges between $.50 and $1.50 during the same time period. In the fourth year (2007), the Housing Commission shall determine the fee based on 50 percent of the difference between the median housing cost and the housing price affordable to the median household. San Diego Municipal Code § 142.1310.

## ANALYSIS

It is well known that California has experienced a reduction in the supply of housing with a corresponding increase in housing prices. Consequently, the lack of affordable housing continues to intensify. In response to the escalating housing prices, more and more local governments are adopting inclusionary housing programs to increase the supply of affordable housing.

Notwithstanding the prevalence of inclusionary housing programs, little case law exists to guide local jurisdictions on the practical aspects of implementing such programs. The seminal case, *Home Builders Association of Northern California v. City of Napa*, 90 Cal. App. 4th 188 (2001), affirms the viability of inclusionary housing programs under a facial taking and due process challenge. The court's opinion also creates a framework by which other jurisdictions can measure the constitutional strength of their regulations.

In *Napa*, the inclusionary housing program consisted of a requirement that 10 percent of all newly constructed residential units be affordable as that term was defined in the regulations. The ordinance offered the developer the option of building the units, constructing affordable units on another site, dedicating land, or paying an in-lieu fee. The program also included a process whereby the developer could request a reduction, adjustment, or complete waiver of the obligations under the ordinance.

While the *Napa* court discussed the alternative compliance provisions of the inclusionary housing program, the court did not rely, necessarily, on the alternative compliance provisions to uphold the constitutionality of the regulations. Rather, the court focused on the city's ability to waive the inclusionary requirements, where necessary, to avoid unconstitutional applications. *Id.* at 194. The court reasoned that since the City of Napa "has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking." *Id.* Moreover, in responding to the facial due process challenge, the court further reasoned that the City of Napa would in fact implement the regulations, through the waiver process, in a manner that would avoid an unconstitutional application on its terms. *Id.*

Although the *Napa* court relied on the waiver provision in upholding the inclusionary regulations, from a policy perspective, the additional alternatives (donation of land, payment of an in-lieu fee, constructing units off site) would do more to achieve the ultimate goals of an inclusionary housing program. It could be argued, therefore, that permitting flexibility will result in the construction or availability of more affordable housing opportunities than simply an on site set aside requirement with a waiver provision.

It should be noted, however, that the status of an inclusionary housing in-lieu fee remains unresolved by the courts. At least one respected author suggests that an in-lieu fee alternative, determined on a case by case basis, would render the regulations vulnerable to greater judicial scrutiny. Daniel J. Curtin, *Land Use and Planning Law*, 472 (25th ed. 2005). Where the in-lieu fee is one of general applicability, such as the City of San Diego's, an adequate factual basis to

demonstrate a connection between the ordinance's requirements and the impacts of development should suffice. *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643, 669 (2002).

Similarly, it could be argued that the in-lieu fee would be subject to the Mitigation Fee Act (California Government Code sections 66000 - 66025). This issue was raised in the *Napa* case. The court did not respond to this claim as it was deemed waived in an unpublished portion of the court's decision. Curtin, *Land Use and Planning Law*, at 472, n. 37. However, we do not believe such an argument would prevail.

The Mitigation Fee Act authorizes local jurisdictions to impose certain types of fees as a condition of approving a development project. Fee is defined as:

> a monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project **for the purpose of defraying all or a portion of the cost of public facilities related to the development project**, but does not include fees specified in Section 66477, fees for processing applications for governmental regulatory actions or approvals, fees collected under development agreements . . . or fees collected pursuant to agreements with redevelopment agencies . . . .

Cal. Gov't Code § 66000 (emphasis added).

In *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996), the City of Culver City required the developer, under its art in public places ordinance, to either pay $32,200 to the city art fund or contribute an approved work of art of an equivalent value. The developer challenged the requirement in accordance with the Mitigation Fee Act. Cal. Gov't Code § 66020. The court held that the fee was not the kind of development fee contemplated by the Mitigation Fee Act. Rather, the "requirement to provide art or a cash equivalent there is more akin to traditional land-use regulation . . . . [which] have long been held to be valid exercises of the city's traditional police power." *Ehrlich*, 12 Cal. 4th at 886. Similarly, inclusionary zoning ordinances constitute a proper exercise of its police powers as a traditional land-use regulation. *Home Builders*, 90 Cal. App. 4th at 194. Moreover, inclusionary zoning ordinances are "a generally applicable legislative enactment rather than an individualized assessment imposed as a condition of development." *Id.* at 194 – 95.

The in-lieu fee under the City's inclusionary housing regulations does not meet the definition of fee under the Mitigation Fee Act. The in-lieu fee is not for the purpose of defraying all or a portion of the cost of public facilities related to the development project. Rather, the in- lieu fee is required as an alternative method of complying with the zoning requirement to provide a certain percentage of "affordable housing" within the development. Moreover, it is a traditional

land-use regulation and does not constitute an individualized assessment imposed as a condition of development.

## CONCLUSION

Under limited existing case law, the in-lieu fee is not legally required as an alternative under inclusionary housing regulations. However, for the policy reasons briefly discussed above, such an option could increase the availability of affordable housing. Finally, while still untested, the inclusion of the in-lieu fee could expose the regulations to a standard of greater judicial scrutiny, if challenged.

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