Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: April 23, 2019

TO: Honorable Councilmembers

FROM: City Attorney

SUBJECT: Prorated Payment of the Inclusionary Affordable Housing Fee

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INTRODUCTION

At the January 8, 2019, City Council hearing on the Morena Apartments Homes project in the Clairemont area, the project applicant proposed a change to the project to include less than 10 percent of the units as affordable and pay a prorated portion of the Inclusionary Affordable Housing Fee (Fee).[1] Our Office verbally advised the City Council that approval of the project with a prorated payment of the Fee could not occur at that hearing because the San Diego Municipal Code (Municipal Code or SDMC) does not specifically allow for a prorated payment of the Fee. This Office provided options, such as continuing or returning the item to allow for a combination of less than 10 percent of the units as affordable and a prorated payment of the Fee. This memorandum provides follow-up legal analysis on this issue in response to requests from Councilmembers.

QUESTIONS PRESENTED

1. Is a combination of less than 10 percent affordable units and a prorated payment of the Fee currently permissible under the Municipal Code?

2. How could the City Council allow for a combination of less than 10 percent affordable units and a prorated payment of the Fee?

SHORT ANSWERS

1. No. The language in the Municipal Code requires payment of the Fee unless a residential development is exempt or provides 10 percent of the total dwelling units in the development as affordable; it does not allow for a combination of less than 10 percent of the units as affordable and a prorated payment of the Fee, although the Municipal Code could be amendment to do so.

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[1] The project had been noticed for payment of the Fee and no affordable housing component.

2. If the City Council would like to allow for a combination of less than 10 percent of affordable units and a prorated payment of the Fee, it could amend the Municipal Code to allow for the prorated payment, which would apply to all future developments. For individual developments, an applicant can request a variance, waiver, adjustment, or reduction of the Fee in accordance with the Municipal Code, and a decision maker can grant that request if it can make all of the necessary findings and the action is properly noticed.[2]

BACKGROUND

The Municipal Code includes Inclusionary Affordable Housing Regulations (Regulations), which apply to all residential developments of two or more units, unless the development is exempt pursuant to section 142.1303. SDMC §§ 142.1302, 142.1303. Municipal Code section 142.1304 states that all development subject to the Regulations, except for condominium conversion projects, shall pay the Fee. The amount of the Fee depends on the "applicable square foot charge multiplied by the aggregate *gross floor area* of all of the units" in the development. SDMC § 142.1304(a). The Fee is determined by the rate in effect at the time the building permit application is filed and must be paid on or before the issuance of the first residential building permit for the development. SDMC § 142.1304(c). The Municipal Code allows for an applicant to provide at least 10 percent of the total dwelling units in the development as affordable to targeted ownership households in a for-sale development instead of paying the Fee. SDMC § 142.1305.

ANALYSIS

I. THE MUNICIPAL CODE REQUIRES PAYMENT OF THE FEE UNLESS THE APPLICANT PROVIDES 10 PERCENT OF THE TOTAL DWELLING UNITS IN THE DEVELOPMENT AS AFFORDABLE

Section 142.1304 states that, "[a]ll *development* subject to this Division, except for *condominium conversion developments* which shall comply with Section 142.1306, shall pay an Inclusionary Affordable Housing Fee to the City." "Residential *development* containing at least ten percent of the total *dwelling units* in the proposed *development* as affordable to and occupied by *targeted rental households* for a period of not less than 55 years" is exempt from the Regulations, including payment of the Fee. SDMC § 142.1303(f). For-Sale development, "may elect to comply with this Division by providing at least ten percent of the total *dwelling units* in the proposed *development* as affordable to *targeted ownership households* in a for-sale development," instead of paying the Fee. SDMC § 142.1305(a). The Municipal Code does not allow for a combination of less than 10 percent of the units as affordable and payment of a prorated portion of the Fee. This interpretation is consistent with the following statutory rules of interpretation: (1) courts give words of statutes their plain meaning; (2) the deletion of language from a statute is inferred to be intentional and considered a material change; and (3) when one

[2] At the hearing, this Office mentioned the City Council technically could exempt a development, by uncodified ordinance, from the requirement to pay the full amount of the Fee. However, this is not a recommended alternative because of potential legal risks associated with equal protection.

part of a statute includes a provision, the omission of that provision in another statute indicates the legislature intended to convey a different meaning and the omitted provision should not be implied.

A. Courts Use the Plain Meaning of the Words When Determining Legislative Intent of a Statute

In determining the legislative intent of a statute, courts generally give the words of statutes their plain meaning and avoid rendering words surplusage. *McPherson v. City of Manhattan Beach*, 78 Cal. App. 4th 1252, 1260 (2000); *see also In re Rudy L.*, 29 Cal. App. 4th 1007, 1010 (1994). If the words of a statute are clear and unambiguous, a court's inquiry would end and the plain meaning of the statute would govern. *McPherson*, 78 Cal. App. 4th at 1260 ("'rules of statutory construction are applied only where there is ambiguity or conflict in the provisions of the charter or statute, or a literal interpretation would lead to absurd consequences"') (citation omitted).

In the face of ambiguity, courts may look beyond the words of the statute to determine the meaning of the statute, including legislative history and how the statute has been interpreted and applied by an agency. A court can take into consideration the context, the history at the time of legislation, the public policy, and contemporaneous construction. *Alford v. Pierno*, 27 Cal. App. 3d 682, 688 (1972). An agency's interpretation of its statute will be given greater deference "where 'the agency has expertise and technical knowledge,'" and where there are "'indications of careful consideration by senior agency officials,'" *Citizens for Responsible Equitable Envtl. Dev. v. City of San Diego*, 184 Cal. App. 4th 1032, 1041 (2010) (citing *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 12 (1998)). However, deference will not be given when such an interpretation is unreasonable, clearly erroneous or unauthorized. *Pac. Legal Found. v. Unemployment Ins. Appeals Bd.*, 29 Cal. 3d 101, 111 (1981); *see also Excelsior Coll. v. Cal. Bd. of Registered Nursing*, 136 Cal. App. 4th 1218, 1232 (2006).

Here, the statutes at issue would most likely not be considered ambiguous and a court would not look at extrinsic evidence to determine its meaning. The Municipal Code sections state that applicable development "shall pay" the Fee, unless the applicant elects to provide "at least ten percent of the total *dwelling units* in the proposed *development* as affordable." SDMC §§ 143.1304, 143.1305. The Municipal Code states that "'[s]hall' is mandatory; 'may' is permissive." SDMC § 11.0209(b). When a statute distinguishes between "may" and "shall," it is generally clear that "shall" imposes a mandatory duty. *Kingdomware Technologies, Inc. v. U.S.*, 136 S. Ct. 1969, 1977 (2016). The term "at least" is not a defined term in the Municipal Code and is to be construed according to the context and approved usage of the language. SDMC § 11.0209(e). "At least" is defined by Merriam-Webster to mean "at the minimum." *Least.* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/at%20least (last visited Feb. 26, 2019). As such, payment of the full amount of the Fee is a mandatory requirement except when an applicant elects to provide a minimum of 10 percent of total dwelling units in the development as affordable.

B. The Prorated Payment Language was Removed from the Previous Regulations, which Infers an Intent to Materially Change the Regulations

The Regulations previously allowed for a prorated payment of the Fee, but City Council elected to delete that language when it amended the Regulations in 2011. When the legislature amends existing law by deleting a provision, the presumption is that a change in the law was intended. *Plomteaux v. Dep't of Motor Vehicles*, 51 Cal. App. 3d 177, 180 (1975). "It has been repeatedly declared that where changes have been introduced by amendment it is not to be assumed that they were without design, and further, that by substantially amending a statute the Legislature demonstrates an intent to change the pre-existing law." *Abbott v. City of San Diego*, 165 Cal. App. 2d 511, 524 (1958) (citation omitted).

In 2011, the Regulations were substantively changed to comply with a California Court of Appeal decision, which held that the Costa-Hawkins Rental Housing Act,[3] which allows for an owner of residential rental property to set its own rental rates, applied to an inclusionary housing ordinance in Los Angeles. *Palmer/Sixth Street Props., L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396 (2009) (*Palmer*). Prior to the substantive changes in 2011, the Regulations stated that, "[f]or any partial unit calculated, the applicant shall pay a prorated amount of the in lieu fee." San Diego Ordinance O-19505 at Section 4 (July 5, 2006).[4] According to the rules of statutory interpretation, a court would find that the removal of the language demonstrates an intent to change the preexisting law to no longer allow for payment of a prorated amount of the Fee.

C. The Inclusion of Particular Language in One Section and the Omission of that Language in a Different Section Is Presumed to Be Intentional and to Convey a Different Meaning

Because a prorated payment of the Fee is expressly permitted for density bonus projects, we must assume it was intentionally omitted for non-density bonus projects. When one part of a statute includes a provision, the omission of that provision in another statute indicates the legislature intended to convey a different meaning, and the omitted language should not be implied. *Klein v. U.S.*, 50 Cal. 4th 68 (2010); *Hicks v. E.T. Legg & Assocs.*, 89 Cal. App. 4th 496 (2001). It is the court's responsibility to interpret different terms used by a legislature in the same statutory scheme to have different meanings. *Walt Disney Parks & Resorts U.S., Inc. v. Superior Court*, 21 Cal. App. 5th 872, 879 (2018). Similarly, the exclusion of language from one section is presumed to be intentional. *Sebelius v. Cloer*, 569 U.S. 369 (2013); *see also Jurcoane v. Superior Court*, 93 Cal. App. 4th 886, 894 (2001) ("Where the Legislature makes express statutory distinctions, we must presume it did so deliberately, giving effect to the distinctions, unless the whole scheme reveals the distinction is unintended.").

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[3] The Costa-Hawkins Rental Housing Act applies to residential rental property issued a certificate of occupancy after February 1, 1995. Cal. Civ. Code § 1954.52.

[4] While the removal of the prorated payment language was part of the comprehensive changes to the Regulations, it was not required to comply with the *Palmer* decision.

The City's Affordable Housing Regulations state that density bonus projects[5] providing less than 10 percent of the pre-density bonus dwelling units as affordable must pay a prorated portion of the Fee "so that the inclusionary requirement may be satisfied by a combination of providing affordable rental *dwelling units* and paying a pro-rated Inclusionary Affordable Housing Fee." SDMC § 143.0720(b). The Regulations do not include this language for non-density bonus projects. The omission of this language from the Regulations indicates a clear intention to require something different for non-density bonus projects, i.e. full payment of the Fee, then for density bonus projects.

II. THE COUNCIL MAY AMEND THE MUNICIPAL CODE TO ALLOW PRORATED PAYMENT OF THE FEE OR APPROVE SPECIFIC REQUESTS FOR A VARIANCE, WAIVER, ADJUSTMENT, OR REDUCTION OF THE FEE

The City Council can amend the Municipal Code to allow for a combination of providing less than 10 percent of the units as affordable in the development and payment of a prorated portion of the Fee, which would apply to all future developments. For individual developments, a request for a variance, waiver, adjustment, or reduction of the Fee could be made and approved in accordance with the Municipal Code.

A. Amendment to the Land Development Code of the Municipal Code

The Land Development Code of the Municipal Code may be amended in accordance with Municipal Code section 111.0107 to allow for a combination of providing less than 10 percent of the units as affordable in the development and a prorated payment of the Fee. SDMC § 111.0107. As a zoning code regulation, the proposed amendment to allow for a prorated payment of the Fee would need to go to the Planning Commission for a recommendation and then to the City Council for a decision on the amendment. SDMC § 111.0107(a)(1). Notice for both the Planning Commission and City Council hearings is required in accordance with Municipal Code sections 112.0305 and 112.0307, as applicable. *Id.*

B. Variance, Waiver, Adjustment, or Reduction

An applicant can request a variance, waiver, adjustment, or reduction from the Regulations to allow for a combination of providing less than 10 percent of the units as affordable in the development and payment of a prorated portion of the Fee. The Regulations allow for a variance, adjustment, or reduction from the Regulations to be requested and decided in accordance with Process Four and a waiver to be requested and decided in accordance with Process Five. SDMC § 142.1307(a). "Any variance, waiver, adjustment or reduction shall require that the findings in Section 142.1308(a) or in Section 142.1308(b) be made." *Id.*

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[5] Density bonus projects are those residential development projects that guarantee a portion of their development will be available to moderate income, low income, very-low income, or senior households in accordance with the City's Affordable Housing Regulations. SDMC §§ 143.0710 - 143.0750.

A decision maker may approve or conditionally approve an application for a variance, waiver, adjustment, or reduction of the Regulations if the decision maker makes the findings set forth in Municipal Code section 142.1308(a). The decision maker must find that "(1) Special circumstances, unique to that *development*, justify granting the variance, waiver, adjustment or reduction; (2) The *development* would not be feasible without the modification; (3) A specific and substantial hardship would occur if the variance, waiver, adjustment, or reduction were not granted; and (4) No alternative means of compliance are available which would be more effective in attaining the purposes of this Division than the relief requested." SDMC § 142.1308(a).

In addition, a decision maker may approve or conditionally approve an application for a variance, waiver, adjustment, or reduction to the provisions of the Regulations if the decision maker finds that there is an absence of any reasonable relationship or nexus between the impact of the development and the amount of the Fee. SDMC § 142.1308(b). Since a decision on a variance, waiver, adjustment, or reduction is decided in accordance with Process Four or Five, a Notice of Application and a Notice of Public Hearing are required pursuant to the Municipal Code. SDMC §§ 112.0301(a), 112.0301(c). As such, the decision maker can grant a variance, waiver, adjustment, or reduction to prorate the Fee so long as the necessary findings can be made and the decision is properly noticed.[6]

CONCLUSION

The language in the Municipal Code currently requires payment of the Fee unless a residential development is exempt or provides 10 percent of the total dwelling units in the development as affordable. The Municipal Code does not allow for a combination of less than 10 percent of the units as affordable and payment of a prorated portion of the Fee. If the City Council would like to allow for a combination of less than 10 percent of the units as affordable and payment of a prorated portion of the Fee, it could amend the Municipal Code to allow for prorated payments. For individual developments, an applicant can request a variance, waiver, adjustment, or reduction of the Fee in accordance with the Municipal Code and a decision maker can grant that request if it can make all of the necessary findings and the action is properly noticed.

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By */s/ Corrine L. Neuffer*
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[6] The agenda description must comply with the Ralph M. Brown Act. Cal. Gov't. Code § 54954.2(a)(1) ("At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting.").

CLN:als
MS-2019-11
Doc. No.: 194778_2
cc: Honorable Mayor, Kevin L. Faulconer
Andrea Tevlin, Independent Budget Analyst
Elyse Lowe, Director, Development Services