



Leveraging the **Housing Element** to Advance **Inclusionary Zoning & Impact Fees**

Communities can adopt a variety of policies to help ensure that new market-rate housing and jobs-generating development contribute to affordable housing needs. These policies are important to supplement existing public funds for affordable housing, create more integrated communities, and ensure that new development does not make the affordable housing crisis even worse. This toolkit covers two key policies that community members may want to advance through the Housing Element: 1) Inclusionary Zoning policies require new market-rate housing developments to rent or sell a percentage of new homes at below market rates, 2) Housing Impact Fees require new market rate housing and/or new commercial, retail, or other jobs-generating development to contribute money for affordable housing.

Ensure Fair & Inclusive Land Use Policies Make Housing Accessible to Everyone

Generations of racial disparities in wealth exacerbated by federally backed lending practices that discriminate against communities of color have resulted in racially segregated neighborhoods, lower homeownership rates for people of color, and disparate access to essential resources such as jobs, healthcare, grocery stores, and parks. Increasing the supply of diverse housing types, with different densities and affordability levels is a powerful tool to address housing affordability, reduce segregation, and lower greenhouse gas emissions. Housing Element Law requires cities and counties to actively plan for a variety of housing options that are accessible to people of all backgrounds and income levels using the principles of [Fair Housing](#). The following tools can help communities grow in ways that are more inclusive and just.

Inclusionary Zoning

What is Inclusionary Zoning?

Inclusionary Zoning is a policy that was first developed in the 1970s in response to exclusionary and often racially motivated zoning. [Inclusionary Zoning](#) requires private developers to make a certain percentage of the units in a given project available at below market rate (BMR)—typically a rent affordable to someone earning less than the area median income. Each of the over 200 inclusionary policies across the country differs in its requirements, but most policies are focused on integrating affordable units in new market rate developments.

Inclusionary Zoning Policies Directly Address Housing Element Requirements

State Housing Element Law requires all California cities and counties to plan and zone in order to accommodate the projected housing needs of at least four income categories: very low-income, low-income, moderate income, and above-moderate income. Housing Elements must identify constraints to affordable housing development,

and the availability of public funding, land, and project approvals are challenges to affordable development shared by a large number of jurisdictions. Inclusionary Zoning policies can help address all of these constraints, by leveraging private dollars to get affordable housing built, making sure that good sites are not given over wholly to market-rate housing, and ensuring that when market-rate developments get approved, they play a role in meeting affordable housing needs as well. Therefore, adopting or strengthening local Inclusionary Zoning requirements is a high-impact policy that all jurisdictions should consider in their Housing Element.

Housing Element Law also imposes new obligations on all cities and counties related to their duty to affirmatively further fair housing in their communities. Each jurisdiction must analyze the patterns of segregation and concentration of poverty in their communities and identify the factors that contributed to these conditions. The jurisdiction must identify goals to counteract these contributing factors, such as identifying sites for affordable housing throughout the city or county, using available resources to incentivize residential development in areas of opportunity, and investing in disinvested areas in ways that support and stabilize existing residents. Because Inclusionary Zoning is a method to ensure that affordable units are distributed throughout the community, many California jurisdictions are considering adopting Inclusionary Zoning policies or updating existing policies to assist in meeting their affirmatively furthering fair housing obligations.

Is Inclusionary Zoning an Equitable Development Strategy?

Inclusionary Zoning policies were developed to counteract a history of exclusionary zoning policies that reinforced economic and racial segregation. Inclusionary housing can provide an immediate supply of affordable housing for households earning below median income in neighborhoods already rich with services and amenities or in new development areas where amenities are planned. A study of the earliest Inclusionary Zoning programs documents that

inclusionary policies increase racial diversity in the communities that adopt these policies.¹

How Does Inclusionary Zoning Work?

Inclusionary Zoning policies can effectively increase affordable housing stock at the same time and in the same neighborhoods where market rate development is happening. Requiring affordable units to be integrated into (or built in conjunction with and in very close proximity to) market rate developments is what differentiates an inclusionary policy from a more general affordable housing policy. A city or county will adopt an inclusionary policy that, in general, requires every new market rate development of a particular size, often at least 10 units, to set aside a percentage of the units to be rented or sold at affordable rates to people with low or very-low incomes. California state law provides an incentive for market rate developers to include affordable units in their development in the state's Density Bonus Law which allows a developer to build more units than the permitted density would normally allow. This increase in density may offset the cost of developing the affordable units and is a valuable tool for increasing the affordable housing supply on the same site as the market rate units.

Inclusionary Zoning policies will differ in the percentage of affordable units required, as well as the affordability levels required. The policies may give developers a range of options to comply, such as allowing construction off-site and land dedication, where development-ready sites can be donated to the local government to develop affordable housing. Some policies will reduce the percentage of units that must be rented or sold below market in exchange for deeper affordability for the required units. The California Coalition for Rural Housing recently released a [searchable database](#) which includes all of California's inclusionary housing programs and allows stakeholders to filter by various characteristics, see where programs are located within the state, and access detailed information about the different policies. The Grounded Solutions Network developed an [Inclusionary Zoning](#)

[Calculator](#) to help advocates understand how policies can be tailored to local conditions and community priorities.

Inclusionary Zoning policies often include an option for developers to pay a fee to the city instead of building the required affordable units integrated into the development. These are called "[in-lieu](#)" fees. Depending on how the fee is structured, it could guide developers toward choosing either to build units on-site or to pay a fee instead. Which option may be preferable depends on local conditions and the details of the Inclusionary Zoning policy.

The Basics

Every Inclusionary Zoning policy involves the following considerations:

- City or county-wide application, or only to particular areas with anticipated growth?
- What percentage of the units should be set aside as affordable?
- What level of affordability will be required, i.e. 15 percent of the units will be affordable to a household earning 30%, 40%, 50% 80% of the Area Median Income, or some combination of affordability?
- Do all affordable units have to be built on-site and be substantially similar in size and appearance as the market rate units?
- Will the policy allow land dedication in lieu of building affordable units?
- Will the policy allow the payment of fees in lieu of building affordable units?

Not So Basics

- If affordable for-sale units will be permitted/required, will owners be allowed to retain all of the equity when the unit is sold?
- When considering the question above, will the decision depend on how long the owner has owned the property?
- If in-lieu fees are permitted, how will the amount of the fees be determined, and will developers be more likely to build on-site or choose a fee instead?
- Will the policy apply to all market rate projects, or only those that include more than a

certain number of units?

Must Haves

Several Inclusionary Zoning ordinances have survived legal challenges based on the fact that the program includes a waiver provision that allows a developer to appeal the application of the program to their development because it would result in an unconstitutional taking. It is unlikely that any developer could demonstrate this type of violation, but the waiver provision is necessary.

Inclusionary Zoning Myth Busters

Inclusionary Zoning policies cannot require affordable rental units. **FALSE!** For a brief period of time, the Court of Appeal opinion in *Palmer/ Sixth Street Properties, LLP v. Los Angeles* (2009) 175 Cal. App. 4th 1396 shed doubt on the ability of jurisdictions with Inclusionary Zoning policies to require affordable rental units because it conflicted with the Costa-Hawkins Law (rent control limitations) which allows landlords to establish the initial rent for a rental unit whenever there is a vacancy. With the adoption of AB 1505 in 2017, the California legislature clarified that Costa-Hawkins does not prevent an Inclusionary Zoning policy from establishing limits on the rent charged in inclusionary units.

Jurisdictions cannot adopt an inclusionary program that requires more than 15 percent of the units to be affordable. **FALSE!** Jurisdictions can adopt Inclusionary Zoning programs that require more than 15 percent of the units to be affordable.² If a jurisdiction adopts a program which requires more than 15 percent of the new units to be affordable to lower income households, the California Department of Housing and Community Development can, under certain circumstances, require the jurisdiction to submit an economic feasibility study demonstrating that the Inclusionary Zoning policy does not unduly constrain housing development.³

In-lieu fees cannot be the equivalent of the cost of a new affordable unit. **FALSE!** The amount of the in-lieu fee is up to the jurisdiction. An in-lieu fee should be tied to the cost of creating

a diverse housing stock that includes housing for lower income households. The fee should not only be tied to the new housing needs that are created when new market rate development occurs.

[Want to design your own Inclusionary Zoning policy?](#) Grounded Solutions Network provides guidance, summarized in below graphic.

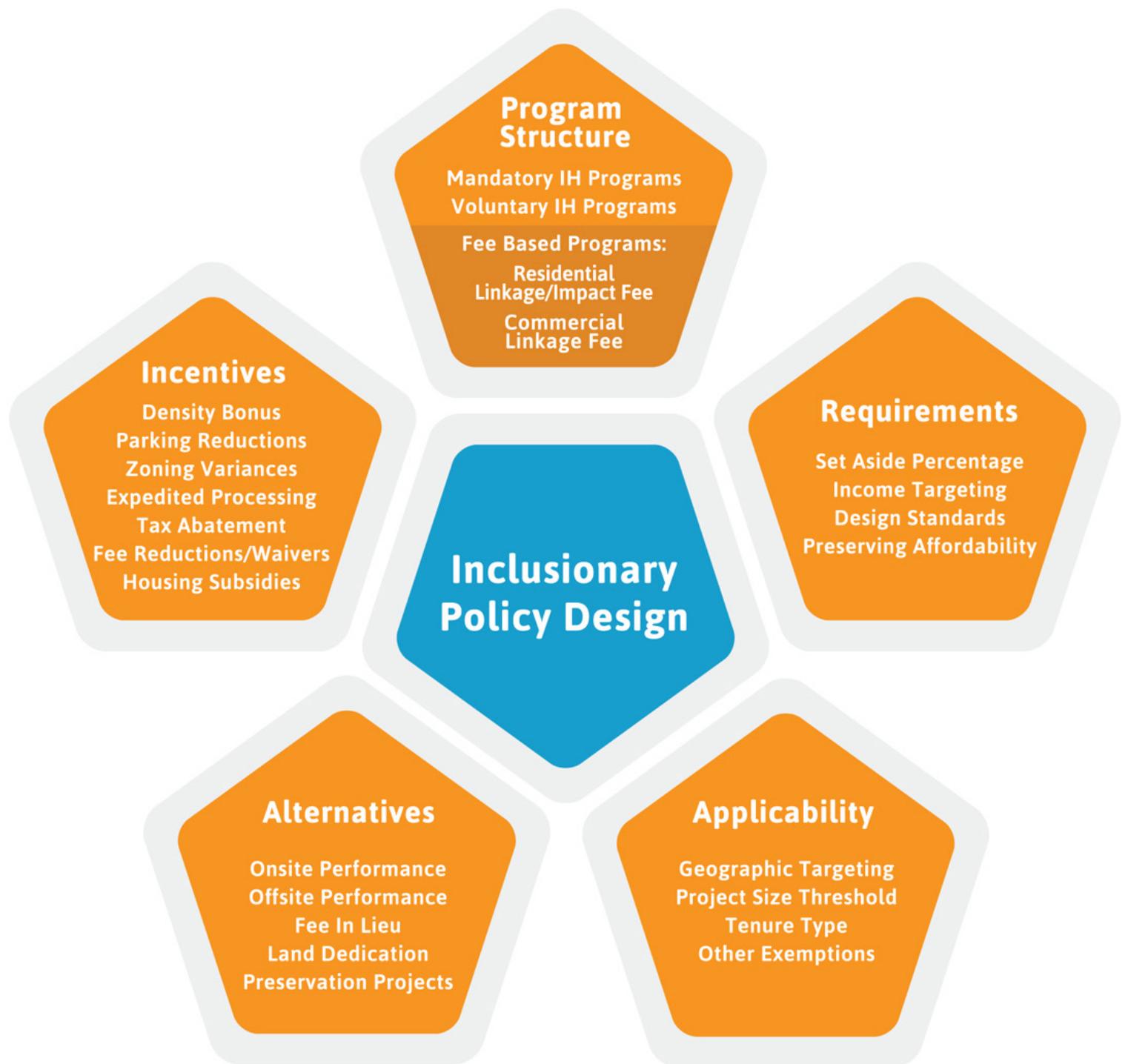
Commercial Linkage Fees and Housing Impact Fees

What are Commercial Linkage Fees & Housing Impact Fees?

Commercial Linkage Fees (CLFs) are fees charged to the developers of new office, warehouse, or retail properties and used to fund the development of affordable housing. Housing Impact Fees are fees charged to the developers of new market rate housing construction to offset the development's impact on the community and used to fund the development of affordable housing.

CLFs are intended to mitigate the housing impacts of new commercial developments on the community. A new retail project would be expected to generate lower-wage jobs which impacts the housing market by increasing the need for lower cost housing. Although the fees are often referred to as jobs-housing linkage fees, it is not just the creation of new jobs that necessitates the fees, but the new housing need that compounds the existing need for affordable housing.

Housing Impact Fees are intended to mitigate the housing impacts of new market rate housing developments on the community. Every person who moves into a new market rate home will generate a need for services that requires employees who are paid low wages, such as hairdressers, baristas, landscapers, healthcare workers, restaurant staff, and school teachers. These new workers need affordable housing, thus increasing the need for new below market rate homes.



Guidance on designing your own Inclusionary Zoning policy, via [Grounded Solutions Network](#)

How Do Commercial Linkage Fees and Housing Impact Fees Work?

CLFs are typically assessed based on the square footage of the new office, warehouse, or retail project. Housing Impact Fees are typically assessed based on the square footage or number of units of the market rate housing development. (Note: While both Housing Impact Fees and in-lieu fees that developers can pay instead of building units required by an Inclusionary Zoning policy generate funding that cities then use to fund affordable housing, the legal basis for the fees and their implementation are different).

Implementing a Commercial Linkage Fee or Housing Impact Fee typically involves several stages: A nexus study, a feasibility study, an implementation strategy, and an adoption of the fee and ordinance. (See “The Basics” section below for more information about nexus studies.)

Benefits of Commercial Linkage Fees and Housing Impact Fees

Commercial Linkage Fees help localities address the problem of “[jobs-housing fit](#),” the number of low-wage jobs in the jurisdiction compared to the number of homes affordable to low-wage earners. CLFs help localities with a lot of commercial development that will bring new jobs but where the housing market is already unable to accommodate the community’s housing needs.

Housing Impact Fees have the same advantages as CLFs — they offer flexible funding sources and can be used to leverage other sources of funding, like federal Low Income Housing Tax Credits. Fee revenue can be used to produce units that are outside the operating parameters of the inclusionary housing program, such as lower AMI units, special needs housing, homeless housing, or transitional housing. This can be invaluable to the community, especially if other funding sources are limited.

Revenue from either source can also be used to balance the outcomes. For example, if developers are primarily producing affordable for-sale units to meet the inclusionary program’s

requirements, fee revenue can be used to produce affordable rental housing. Or if development is concentrated in one area, fee revenue can be used to provide affordable housing in areas where no development is occurring. Fees can also be used to pay for capital improvements or to preserve the affordability of existing housing.

CLFs also face some of the same challenges as Housing Impact Fees and in-lieu fees. For example, it is important to make sure expenditure of the money is not over-concentrated in low-income neighborhoods.

The Basics

- **Base the fee on the findings of a [nexus study](#).** It is important that the locality establish the fee based on the measurable contribution of a likely project to the overall need for affordable housing. A nexus study can make that connection and can also be a means for establishing the legal defensibility of the fee. A nexus study will establish a maximum fee that is consistent with the housing need created by new development of various types. *Keep in mind that the nexus study should not be confused with the feasibility study, which focuses on whether a fee or other requirement will be financially feasible for developers.*
- **Consider a performance option for residential projects.** Even for primarily fee programs, the locality can offer developers the option of providing units on-site in lieu of paying the fee. An on-site or off-site performance option might appeal to certain developers who want to closely and publicly associate with the provision of the affordable housing that their project generates. Most commercial developments will opt for a fee as they do not specialize in residential developments.
- **Phase in the fee over time.** Any new fee will add to the cost of development. A sudden increase in costs could be difficult for developers to absorb. Phasing a new fee in stages over two or three years will allow time for land prices to adjust appropriately without

unduly impacting projects that are currently in the planning stages.

Examples of CLFs

San Jose

Fees also depend on what part of San Jose the development is located.

- **Developments over 100,000 sq. ft:**
 - \$12/sq. ft. if paid at certificate of occupancy
 - \$15/sq. ft. if paid in phases
- **Developments under 100,000 sq. ft:**
 - \$0 for first 40,000 sq. ft.
 - \$3/sq. ft after 40,000 sq. ft.
- **Hotels/warehouses:** \$5/sq. ft.
- **Retail:** \$0/sq. ft.

Walnut Creek

- **Commercial development:** \$5/sq ft. (not including parking structures)
- **Mixed-use:** Exempt

Mountain View⁴

- **Office/high tech/industrial**
 - Less than 10,000 sq. ft. \$12.50/sq. ft.
 - More than 10,000 sq. ft. \$25/sq. ft.
- **Commercial/retail/entertainment/hotel**
 - Less than 25,000 sq. ft. \$1.25/sq. ft.
 - More than 25,000 sq. ft. \$2.50/sq. ft.

Credits

This toolkit reflects the work of a Bay Area Housing Element advocacy working group that includes (in alphabetical order): East Bay Housing Organizations, Enterprise Community Partners, GENESIS, Greenbelt Alliance, The Housing Leadership Council of San Mateo County, The Law Foundation of Silicon Valley, The Nonprofit Housing Association of Northern California, Public Advocates, Public Interest Law Project, RichmondLAND, Urban Habitat, and Working Partnerships USA.

Endnotes

1 Karen Destorel Brown, *Expanding Affordable Housing Through Inclusionary Zoning: Lessons From The Washington Metropolitan Area*, The Brookings Institution Center on Urban and Metropolitan Policy, October 2001, at 14-16.

2 See Government Code § 65850.01.

3 The law only authorizes the California Department of Housing and Community Development to review such policies if a jurisdiction has failed to submit an Annual Housing Element Progress Report for the last two years or if a jurisdiction has failed to meet at least 75 percent of its share of above-moderate Regional Housing Need Allocation over five years. Government Code § 65850.01(a).

4 [Bay Area Housing Impact and Commercial Linkage Fees](#), Non-Profit Housing Association of Northern California.