

AFFORDABLE HOUSING COVENANTS ENSURING CONTINUED AFFORDABILITY

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Outline

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- Affordability Requirements of State Land Use Programs
- Common Issues that Arise in Drafting Covenants
- Checklist of Key Provisions in Recorded Covenants
- Summary of Best Practices

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WHY RECORDED COVENANTS?

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- Gov't Code § 27281.2 requires recordation of a covenant if condition is imposed that restricts ability to convey the property.

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PROGRAMS

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EVERY PROGRAM IS DIFFERENT

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PROGRAMS

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- State Density Bonus Law
 - Government Code §§ 65915 et seq.
- SB 35
 - Government Code § 65913.4
- “By Right” Zoning (housing element sites)
 - Government Code § 655832(h), (i)
- Housing Accountability Act
 - Government Code § 65589.5(h)(3)
- Inclusionary Zoning

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THE BIG ISSUES

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Affordability Requirement and Affordability Level	5% (density bonus) to 50% (SB 35) Very low, low, or moderate
How % is Calculated	On base density only or on total units?
Maximum Income for Household	HCD's published income table by household size or fixed % of median income?
Affordable Rent	VLI: 1/12 of 30% of 50% AMI; LI: 1/12 of 30% of 60% AMI

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THE BIG ISSUES

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Affordable Sales Price	VLI: 1/12 of 30% of 50% AMI LI: 1/12 of 30% of 70% AMI MI: 1/12 of 35% of 110% AMI
Term of Rental Restrictions	55 years or not specified
Term of Ownership Restrictions	Equity sharing or 45 years or not specified
Prevailing Wages	Only required for SB 35
CEQA	SB 35 and "by right" exempt

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INCOME TABLE ODDITIES

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Table 2: Los Angeles County 2022 Income Limits

	Household Size			
	1	2	3	4
Very Low	\$41,700	\$47,650	\$53,600	\$59,550
Low	\$66,750	\$76,250	\$85,800	\$95,300
Median	\$63,750	\$72,900	\$82,000	\$91,100
Moderate	\$76,500	\$87,450	\$98,350	\$109,300

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IMPLEMENTING ORDINANCES

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□ Density Bonus

- Equity share is rarely adequate to purchase another home at the same income level;
- Consider: require long term affordability in density bonus ordinance

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IMPLEMENTING ORDINANCES

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□ **By Right Zoning**

- Must zone “by right”
 - when city wants to designate a site for lower income housing that was designated in a previous housing element;
 - if zoning needed for lower income housing site is adopted after housing element due date (HCD interpretation)
- Consider: specifying income limits, calculation of rents and sales prices, affordability length in ordinance

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IMPLEMENTING ORDINANCES

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□ **Inclusionary Ordinance**

- City can establish its own policies
- Term is often longer (even “perpetuity”)
- Consider: making affordability requirements, calculations, etc. similar to state density bonus for ease in drafting agreements

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LOCAL PREFERENCES AND FAIR HOUSING

- Live/work preference for local residents and local workers
 - Required as condition of local funding
 - Adopted in affordable housing ordinance or guidelines
- Potential issues:
 - Disparate Impact
 - Affirmatively furthering fair housing/HCD
 - Government Code 65008
 - Requirements from project funders

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MINIMIZING RISK OF VIOLATING FAIR HOUSING REQUIREMENTS

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- Identify substantial and legitimate goal
 - Reduce commute length, VMT, road congestion
 - Prevent displacement; reduce overcrowding; house unhoused population
 - Attain goals identified in housing element
- Broaden preference area
- Apply preference to portion of project
- Apply preference for a limited period of time; i.e. impose preference at lease up

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ARTICLE 34 OF THE CALIFORNIA CONSTITUTION

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No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body [including cities] until, a majority of the qualified electors of the city. . . approve such project by voting in favor thereof . . .

Consider issue if a **rental** project with city restricting more than 49% of units to lower income.

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IS THE PROJECT SUBJECT TO ARTICLE 34?

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1. Is the project a “low rent housing project?”

- ❑ Public Housing Election Implementation Law (H & SC §§37000 et seq.)
- ❑ Some exempt projects:
 - Ownership projects
 - No more than 49% restricted to lower income
 - Replacing existing lower income housing

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IS THE PROJECT SUBJECT TO ARTICLE 34?

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2. Is the city developing, constructing, or acquiring the housing?

- ❑ Some exempt functions:
 - Enforcing state laws and local ordinances (SB 35)
 - “Performing conventional activities of a lender.”
 - These don't include requiring affordable housing.

If can't find an exemption: restrict 49% at low income, remaining units at 90% of median, and rely on other funding sources to restrict to low income.

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GETTING ARTICLE 34 AUTHORITY

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- Election may authorize housing without designating specific sites or projects
 - Davis v. City of Berkeley (1990)
- Countywide election can authorize in cities (Santa Clara County)

- **Short limitations period:** within 60 days of approval of project or funding

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PREVAILING WAGES

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- Federal
 - Certain housing programs may trigger federal Davis-Bacon prevailing wages
- State prevailing wages commonly triggered by:
 - SB 35
 - Grants/city assistance (structure as loans to avoid)
 - Fee waivers (exempt up to the lesser of \$600K or 2% of total project cost)
 - Land writedowns

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Affordable Housing Covenants

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REQUIRED COVENANTS

- Master Developer Agreement/Affordable Housing Agreement:
 - *All projects*
- Rent Regulatory Agreement:
 - *Rental projects*
- Homebuyer Documents:
 - *Entered into by the homebuyer*

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MASTER DEVELOPER AGREEMENTS: ENSURING THE HOUSING IS BUILT

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- Key issue is **ensuring that the affordable housing is built at the same time as the market-rate housing**
 - Required phasing as condition of approval
 - Concurrent issuance of building and occupancy permits for affordable and market-rate units
 - Record against **entire property**, not just affordable units

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MASTER DEVELOPER AGREEMENTS: OTHER KEY TERMS

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- Type, location, number of bedrooms of affordable units
 - H & S Code § 17929: units can't be isolated to one floor or one area on one floor
- How to set initial sales price or rents
- Determining eligible buyers or renters; marketing plan

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RENT REGULATORY AGREEMENTS: ADDITIONAL KEY TERMS

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- Who will determine tenant eligibility and certify incomes annually?
- What will happen when tenants go over-income?
- Possible conversion of condos to ownership units
- Restrictions on subordination
 - ▣ Land use restrictions should not be subordinated
- Provisions for long-term monitoring by city/fees

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HOMEBUYER DOCUMENTS: LESSONS FROM THE GREAT RECESSION

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Problems:

- Agreements entered into with developer, not homebuyer
- Sometimes attached to grant deeds; not recorded as separate documents
- Title companies and lenders didn't recognize restrictions

“Catch me if you can”



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RECOMMENDED HOMEBUYER DOCUMENTS

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- Resale Restriction and Option to Purchase Agreement (recorded)
- Promissory Note (not recorded)
- Deed of Trust (recorded)
- Request for Notice of Default or Sale (recorded)
- Disclosure to Buyers (not recorded)

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RESALE RESTRICTION AGREEMENT

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The Basic Document that Contains All of the Community's Policies for the Homes

- Level of Affordability
- Term of Affordability **or** Equity-Sharing
- Owner Occupancy Requirement
- Refinancing/Home Equity Financing

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RESALE RESTRICTION AGREEMENT

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Resale Provisions:

- How Resale Price is Determined
- How Property is Transferred; City Option to Purchase
- Treatment of Capital Improvements
- Treatment of Deferred Maintenance

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RESALE RESTRICTION AGREEMENT

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Other Key Provisions:

- Transfers Due to Inheritance, Divorce, Marriage
- Defaults Triggering Option to Purchase
 - ▣ Lender's Declaration of Default
 - ▣ Not Owner-Occupied
 - ▣ Sale in Violation of Restrictions

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OTHER HOMEBUYER DOCS

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- **Promissory Notes and Deed of Trust**
 - Consider requiring because banks & title companies never ignore deeds of trust; can be a performance DOT
- **Request for Notice of Default or Sale**
 - City will be notified more quickly of a default than under deed of trust
- **Disclosure to Homebuyer**
 - Separate disclosure that explains terms of resale restriction, promissory note, and deed of trust

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BEST PRACTICES

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SUMMARY OF BEST PRACTICES

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- Draft recitals that clearly lay out the legal bases for the covenants.
- Require long-term affordability in for-sale units in density bonus ordinances; define “lower income” in ‘by right’ ordinances.
- Know the level of affordability, eligible tenants and buyers, calculations of affordable rents or sales prices, and the term of affordability.

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BEST PRACTICES

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- Avoid local preferences if possible; if included, design to minimize potential disparate impact.
- Consider Article 34 if more than 49% of the units are restricted to lower income households.
- Record a master developer agreement for each project, and replace with a rent regulatory agreement or homebuyer documents when the units are built.

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BEST PRACTICES

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- Adopt conditions of approval to ensure that the affordable units are built concurrently with the market-rate units.
- Provide loans, not grants, to affordable housing developments; consider a ground lease, not sale of the fee, when making land available.
- Consider how the city will monitor the units and pay for the monitoring.

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THANK YOU

Questions?

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