

ORDINANCE NO. 469

AN ORDINANCE OF THE CITY OF HERCULES, CALIFORNIA, AMENDING CHAPTER 10-19 OF THE HERCULES MUNICIPAL CODE TO SUSPEND INDEFINITELY THE CITY'S INCLUSIONARY HOUSING REQUIREMENTS

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HERCULES as follows:

1. Purpose.

This Ordinance amends the Hercules Municipal Code in order to suspend indefinitely the provisions of Title 10, Chapter 19, entitled, "Inclusionary Housing."

2. Findings.

WHEREAS, in 2006, the City Council of the City of Hercules approved passage of Ordinance No. 416, establishing an inclusionary housing program for the City of Hercules to insure that private developers construct a required number of affordable units or pay appropriate in-lieu fees; and

WHEREAS, in 2009, two California appellate decisions invalidated significant portions of different inclusionary housing programs, calling into question some of the key legal assumptions underlying such mandates, including the validity of in lieu fees and the imposition of affordable rental unit requirements; the cases are, *BLA v. City of Patterson*, 171 Cal.App.4th 886 (2009), and *Palmer/Sixth Street Properties v. City of Los Angeles*, 175 Cal.App.4th 1396 (2009); and

WHEREAS, the Hercules Ordinance requires affordable units in Redevelopment Project areas, which no longer exist under the ABx26 legislation that eliminated redevelopment agencies and thereby also eliminated the most important funding source cities have had to subsidize affordable housing, and

WHEREAS, due to the elimination of the Hercules Redevelopment Agency and the administrative requirements of managing and monitoring affordable housing programs, the City has opted out of continuing to manage the affordable housing obligations of the former Hercules Redevelopment Agency because there is no funding available to do so, and likewise no funding available for staffing to manage and monitor the requirements of the City's inclusionary housing ordinance; and

WHEREAS, implementation of the inclusionary housing ordinance in the current, distressed real estate market could actually result in the deterrence of housing development in the City, thus undercutting the goal of providing additional affordable housing in the City; and

WHEREAS, the City Council has determined that the proposed amendments contained in this Ordinance have been reviewed pursuant to the provisions of the California Environmental Quality Act ("CEQA") and that no further environmental documentation is required for this

amendment to the Inclusionary Housing Ordinance because the proposed project does not involve any new significant environmental effects, and there is no substantial evidence that the approval of the amendment would have any significant environmental impact.

3. Amendment.

Title 10, Chapter 19, of the Hercules Municipal Code is hereby amended to add a new subsection, delineated in **bold** type, to read as follows:

“Title 10, Chapter 19. Inclusionary Housing

Article 1. General Provisions

Sec. 10-19.101 Title.

This Chapter is known and to be cited as the City of Hercules Inclusionary Housing Ordinance. (Ord. 416 § 3 (part), 2006)

Sec. 10-19.102 Purpose.

The purpose of this Chapter is to:

(a) Enhance the public welfare and assure that further housing development contributes to the attainment of the City’s housing goals by increasing the production of residential units affordable by households of very low, low and moderate income.

(b) Assure that the limited remaining developable land in the City is utilized in a manner consistent with the City’s housing policies and needs. (Ord. 416 § 3 (part), 2006)

Sec. 10-19.103 Definitions.

As used in this Chapter, each of the following terms shall be defined as follows:

(a) “Affordable unit” means an ownership or rental-housing unit, including senior housing, affordable to households with very low, low or moderate incomes as defined in this Chapter.

(1) Rental units are deemed affordable units if the annual rent does not exceed thirty percent (30%) of the maximum income level for very-low, low- or moderate-income households, adjusted for household size and as defined below.

(2) Owner-occupied units are deemed affordable units if the sales price results in an annual housing expenses that do not exceed thirty-five percent (35%) of income level for very-low, low- and moderate-income households, adjusted for household size and as defined below.

(b) “Applicant” means any person, firm, partnership, association, joint venture, corporation, or any entity or combination of entities that seeks City real property development or approvals.

(c) “Dwelling unit” means a dwelling designed and intended for occupancy by one (1) household.

(d) "Very low, low and moderate income levels" means those income and eligibility levels determined periodically by the California Department of Housing and Community Development based on Contra Costa County median income levels adjusted for family size. Such levels shall be calculated on the basis of gross annual household income considering household size and number of dependents, income of all wage earners, elderly or disabled family members, and all other sources of household income and will be re-certified as set forth by local standards, and state and federal housing law.

(1) "Very low income" means fifty percent (50%) or less of the median income, adjusted for actual household size.

(2) "Low income" means more than fifty percent (50%) to eighty percent (80%) of the median income, adjusted for actual household size.

(3) "Moderate income" means more than eighty percent (80%) to one hundred twenty percent (120%) of the median income, adjusted for actual household size.

(e) "Resale controls and/or rent restrictions" means legal restrictions by which the affordable unit shall be restricted to ensure that the unit remains affordable to very-low, low- or moderate-income households, as applicable, for a period of fifty-five (55) years for rental units and forty-five (45) years for owner-occupied units. With respect to rental units, such rent restrictions shall be in the form of a regulatory agreement recorded against the applicable property. With respect to owner-occupied units, such resale control shall be in the form of resale restrictions, deed of trust, and/or other similar documents recorded against the applicable property.

(f) "Residential development" means and includes, without limitation, detached single-family dwellings, multiple-dwellings structures, groups of dwellings, condominium or townhouse developments, condominium conversions, cooperative developments, mixed use development that include housing units, and residential subdivisions intended to be sold to the general public. (Ord. 416 § 3 (part), 2006)

Sec. 10-19.104 General Requirements.

(a) Affordability Requirement. All new residential development projects designed and intended for permanent occupancy shall construct ten percent (10%) of the total number of dwelling units within the development as affordable units, except as otherwise provided by this Chapter. All new development projects designed and intended for permanent occupancy within a redevelopment project area shall construct fifteen percent (15%) of the total number of dwelling units within the development as affordable units of this fifteen percent (15%) of the units, forty percent (40%) must be affordable to very-low income households. The foregoing shall be applied no more than once to an approved development (and generally at the tentative map stage), regardless of the changes in the character or ownership of the development, provided the total number of units does not change. In applying and calculating the affordability requirement, any decimal fraction less than 0.50 may be disregarded, and any decimal fraction greater than or equal to 0.50 shall be construed as one (1) unit.

(b) Allocation of Units Outside of Redevelopment Project Area to Income Levels. Affordable units provided, outside of a redevelopment project area, pursuant to this Section shall be allocated to households with very low, low and moderate income levels as follows:

Very-low income households 20%

Low-income households 20%

Moderate-income households 40%

To meet regional housing need 20%

Where the calculation of all the allocation results in fewer units than would otherwise be required pursuant to subsection (a) of this Section, one (1) additional unit shall be allocated to the income level with a decimal fraction closer to 0.50.

(c) Conditions of Approval. Any tentative map, conditional use permit, or site development review approving residential development projects subject to this Chapter shall contain conditions sufficient to ensure compliance with the provisions of this Chapter. Such conditions shall detail the number of affordable units required, specify the schedule of construction of affordable units, set forth the applicant's manner of compliance with this Chapter, and require the execution of an agreement imposing appropriate resale controls and/or rental restrictions on the affordable units.

(d) Concurrent Construction. All affordable units in a project or phase of a project shall be constructed concurrently with market-rate units, unless the City Manager determines in writing that extenuating circumstances exist that make concurrent construction infeasible or impractical. If the concurrent construction of the affordable units is found to be infeasible or impractical the developer shall provide the City a performance bond for delivery and construction of the affordable units, which provides for a specific delivery date of the affordable units. The performance bond value, for the total number of affordable units that will be delivered at a later date, shall be determined as indicated in Section 10-19.105(a) (In-lieu Fee).

(e) Design and Distribution of Affordable Units. All affordable units shall reflect the range of numbers of bedrooms provided in the project as a whole and shall not be distinguished by exterior design, construction, or materials. Affordable units may be smaller size than the units in the project and may have fewer amenities than the market-rate units in the project. All affordable units shall be reasonably dispersed throughout the project. (Ord. 416 § 3 (part), 2006)

Sec. 10-19.105 Exceptions to Affordability Requirement.

Developers of projects subject to Section 10-19.104(a) of this Chapter shall the number of total dwelling units within the development as affordable units, unless subject to an exception set forth in this Section. All exceptions require City Council approval, which shall be obtained at or prior to the last discretionary approval for the project.

(a) Payment of Fees In Lieu of Creation of Affordable Units. Upon request of the applicant, the City Council shall permit the applicant to pay a fee in lieu of constructing up to forty percent (40%) of the affordable units that the developer would otherwise be required to construct pursuant to Section 1019.104(a) of this Chapter. The amount of the fee shall be as set forth in a resolution of the City Council, which may be amended from time to time to reflect inflation and changed conditions in the City and the region. In-lieu fees shall be paid at the time and in the amount set forth in the in-lieu fee resolution in effect at the time of issuance of the building permit.

(b) Off-Site Projects. An applicant may construct the affordable units not physically within the development in lieu of constructing some or all of the affordable units within the development, with the approval of the City Council, if the City Council finds:

- (1) That construction of the units off-site in lieu of constructing units on-site is consistent with the Chapter's goal of creating, preserving, maintaining, and protecting housing for very-low, low- and moderate-income households.
- (2) That the units to be constructed off site are consistent with this Chapter.
- (3) That it would be infeasible or impractical to construct affordable units on-site.
- (4) That conditions of approval for the project require that the off-site affordable units would be governed by the terms of a deed restriction and, if applicable, rental restrictions similar to that used for the on-site affordable units.
- (5) That the conditions of approval for the project, or other security such as a cash deposit, bond, or letter of credit, are adequate to require the construction of the off-site affordable units concurrently with the completion of the construction of the residential development or within a reasonable period (not to exceed two (2) years).

(c) Land Dedication. An applicant may dedicate land to the City or City-designated local non-profit housing developer in lieu of construction of some or all of the required affordable units, if the Council finds that:

- (1) That dedication of land in lieu of construction units is consistent with the Chapter's goal of creating, preserving, maintaining, and protecting housing for very-low, low- and moderate-income households.
- (2) That the dedicated land is usable for its intended purpose, is free of toxic substances and contaminated soils, and is fully improved, with infrastructure, adjacent utilities, grading and all development impact fees paid excluding any inclusionary zoning ordinance fees.
- (3) That the proposed land dedication is of sufficient size to meet the following requirement:

A. The dedication includes land sufficient to construct the number of units that the applicant would otherwise be required to construct, based on the size of lots in the subdivision for which the applicant is meeting its obligation.

(d) Credit Transfers. An applicant may fully or partially satisfy the requirements of Section 10-19.104(a) of this Chapter through the use of transfer credits created pursuant to Section 10-19.107 of this Chapter. Credit certificates shall be presented to the Community Development Director, who shall note at the time of project approval the credit certificate by number. Credit certificates may only be used to satisfy the requirements for inclusionary units for the income category (i.e., very low, low or moderate) and the number of bedrooms for which they were issued. The City may offer credit certificates from historical projects at a value as determined by subsection (a) of this Section.

(e) Waiver Requirements. The City Council, at its discretion, may waive, wholly or partially, the requirements of this Chapter and approve alternate methods of compliance with this Chapter if the applicant demonstrates, and the City Council finds, that such alternate methods meet the purposes of this Chapter. (Ord. 416 § 3 (part), 2006)

Sec. 10-19.106 General Procedures for Implementing Inclusionary Zoning Requirements.

(a) Agreements. Prior to the issuance of a building permit for an affordable unit, resale restrictions or rental controls, or both, as the case may be, shall be set forth in an agreement between the City and the developer, in a form consistent with the City Council-adopted form agreement, which agreement shall be recorded against the property containing the affordable units. The agreement shall be executed by the City Manager, and its requirements shall run with the land and bind the applicant's successors.

(b) Rental Units; Occupancy; Annual Report. Agreements involving rental units shall require the owner of the affordable units to ensure that the units are occupied by tenants whose monthly income levels do not exceed very low to moderate income levels and shall preclude tenants from subletting or subleasing the unit. The agreement shall also require the owner of the affordable unit to submit an annual report to the City Manager, in a format approved by the City. The report shall include, but not be limited to, the following information: an identification of the affordable units within the project; the monthly rents charged and proposed to be charged; vacancy information for the prior year; and the monthly income for tenants of each affordable unit throughout the prior year.

(c) Ownership Units, Occupancy, City's Right of First Refusal. Agreements for ownership units shall specify that the inclusionary units must be occupied by the owner or owners and may not be leased or rented without the written approval of the City. The resale restrictions shall provide that in the event of the sale of an affordable unit, the City shall have the right to purchase any affordable owner-occupant unit at the maximum price that could be charged to an eligible household.

(d) Selection Criteria. No household shall be permitted to occupy a unit that is required under this Chapter to be affordable unless the City or its designee has approved the household's eligibility. Eligible potential occupants of affordable units will be qualified on the basis of household income; the median combined household income statistics for

Contra Costa County published periodically by the California Department of Housing and Community Development, all sources of household income and assets, the relationship between household size and the size of available units, and any further criteria required by law. The developer shall use a selection method established by the City's Affordable Housing Program. (Ord. 416 § 3 (part), 2006)

Sec. 10-19.107 Affordable Unit Credits.

(a) Creation. Affordable unit credits may be created by the City Council. One (1) affordable unit credit certificate shall be issued

for each affordable unit constructed in excess of the number of affordable units to be constructed for the project as required by this Chapter. The certificate shall designate a specific income category (i.e., very low, low or moderate income) and number of bedrooms for which they are issued.

(b) Ownership and Use of Credits. Affordable unit credit certificates are issued to and become the possession of the City, who may then use them to satisfy the requirements of this Chapter for another project in the City. (Ord. 416 § 3 (part), 2006)

Sec. 10-19.108 Incentives to Encourage On-Site Construction of Affordable Units.

The City may, but shall not be required to, offer incentives or financial assistance to encourage the on-site construction of affordable units in excess of minimum total number of units in the project to the extent resources for this purpose are available and approved for such use by the City Council or City Manager. Such incentives may include, but shall not be limited to, the following:

(a) Fee Deferral.

(1) Development Processing Fees. The City Manager may approve deferred payment of City processing fees applicable to the review and processing of the project. The terms and payment schedule of the deferred fees shall be subject to the approval of the City Manager.

(2) Development Impact Fees. The City Council may authorize the deferred payment of development impact fees applicable to the affordable units. Approval of this incentive requires demonstration by the applicant that the deferral increases the project's feasibility. The applicant must provide appropriate security to ensure future payment of such fees.

(b) Design Modifications. The City Council may approve design modifications to affordable units that increase the feasibility of the construction of affordable units, including but not limited to, the following:

- (1) Reduced lot size;
- (2) Reduced setback requirements;
- (3) Reduced open space requirements;
- (4) Reduced landscaping requirements;
- (5) Reduction interior or exterior amenities;
- (6) Reduction in parking requirements;
- (7) Height restriction waivers. (Ord. 416 § 3 (part), 2006)

Sec. 10-19.109 Inclusionary Zoning In-Lieu Fee Fund.

In-lieu fees shall be deposited into a fund known as the "Inclusionary Zoning In-Lieu Fees Fund" ("Fund").

(a) Use. All monies in the fund, together with any interest earnings on such monies less reasonable administrative charges, shall be used or committed to use by the City for the purpose of providing very-low, low- and moderate-income ownership or rental housing in the City of Hercules.

(b) Annual Report. The City Manager shall prepare an annual report to the City Council identifying the balance of monies in the Fund and the affordable units provided and any monies committed to providing very-low, low- and moderate-income housing. The annual report shall also include a review of administrative charges. (Ord. 416 § 3 (part), 2006)

Sec. 10-19.110 Violations.

It shall be unlawful for any person, firm, corporation, partnership or other entity that is subject to this Chapter pursuant to Section 1019.104(a) of this Chapter to violate any provision or to fail to comply with any of the requirements of this Chapter shall constitute a misdemeanor; except that notwithstanding any other provisions of this Code, any such violation constituting a misdemeanor under this Chapter, may in the discretion of the enforcing authority, be charged and prosecuted as an infraction. Any person convicted of an infraction under the provisions of this Code shall be punishable as provided by the Government Code of the State of California. (Ord. 416 § 3 (part), 2006)

Sec. 10-19.111 Enforcement.

(a) General. The City Manager shall enforce this Chapter, and its provisions shall be binding on all agents, successors, and assigns of an applicant. The City Manager may suspend or revoke any building permit or approval upon finding a violation of any provision of this Chapter. No land-use approval, building permit, or certificate of occupancy shall be issued for any residential development unless exempt from or in compliance with this Chapter. The City may institute any appropriate legal actions or proceedings necessary to ensure compliance herewith, including, but not limited to, actions to revoke, deny, or suspend any permit or development approval.

(b) Excessive Rents/Legal Action. If the City Manager determines that rents in excess of those allowed by operation of this Chapter have been charged to a tenant residing in an affordable unit, the City may take appropriate legal action to recover, and the project owner shall be obligated to pay to the tenant, or to the City in the event the tenant cannot be located, any excess rents charged. (Ord. 416 § 3 (part), 2006)

Sec. 10-19.112 Appeals.

Decisions of the City Manager under this Chapter may be appealed as provided in this Municipal Code. (Ord. 416 § 3 (part), 2006)

Sec. 10-19.113 Suspension.

The provisions of this Chapter 10.19 are suspended as of the effective date of Ordinance No. 469 and shall not become reinstituted by the City Council except by subsequent Ordinance."

SECTION 2. Publication and E ffective Date.

a. This Ordinance shall be published in accordance with applicable law, by one or more of the following methods:

1. Posting the entire Ordinance in at least three (3) public places in the City of Hercules, within fifteen (15) days after its passage and adoption; or

2. Publishing the entire Ordinance at least once in the West County Times, a newspaper of general circulation published in the County of Contra Costa and circulated in the City of Hercules, within fifteen (15) days after its passage and adoption; or

3. Publishing a summary of the Ordinance prepared by the City Attorney in the West County Times and posting a certified copy of the entire Ordinance in the office of the City Clerk at least five (5) days prior to the passage and adoption, and a second time within fifteen (15) days after its passage and adoption, along with the names of those City Council Members voting for and against the Ordinance.

b. This Ordinance shall go into effect thirty (30) days after the date of its passage and adoption.


THE FOREGOING ORDINANCE was first read at a regular meeting of the Hercules City Council on the 22nd day of May, 2012, and was passed and adopted at a regular meeting of the Hercules City Council on the 12th day of June, 2012, by the following vote:

AYES: Boulanger, Delgado, de Vera, Wilkins, Romero

NOES: None

ABSENT: None

ABSTAIN: None


Dan Romero, Mayor

ATTEST:

