

ORDINANCE NO. 464

**AN ORDINANCE ADDING CHAPTER 17.92 TO THE CLAYTON MUNICIPAL CODE
REGARDING INCLUSIONARY HOUSING REQUIREMENTS (ZOA-04-15)**

THE CITY COUNCIL

City of Clayton, California

**THE CITY COUNCIL OF THE CITY OF CLAYTON DOES HEREBY FIND AS
FOLLOWS:**

WHEREAS, the City of Clayton currently does not have a formal Inclusionary Housing Ordinance; and

WHEREAS, Implementation Measure I.2.1 of the Housing Element of the Clayton General Plan encourages the City to adopt an Inclusionary Housing Ordinance with desired targets of five percent low income and five percent very low income units for residential projects of ten units or more; and

WHEREAS, as noted in the City's Housing Element (2015-2023), there is a significant need for more affordable housing within the City, including for the following reasons:

(1) The State Legislature, through California Government Code Section 65580, declares the availability of housing of vital statewide importance and local governments have a responsibility to use powers vested in them to facilitate the adequate provision for the housing needs of all economic segments of the community.

(2) Rental units in Contra Costa County are not affordable to people with extremely low incomes, such as those who depend on General Assistance, Temporary Assistance to Needy Families, or Supplemental Security Income. Over 2,000 households within Contra Costa County are on a waiting list for Section 8 assistance, and not all affordable housing units qualify for Section 8 housing assistance. In addition, many persons or families cannot accumulate the money required to move into an apartment (i.e., first and last months' rent plus security deposit);

(3) The high cost of housing makes it difficult to find housing that is affordable for those working minimum wage jobs. For example, based on 2000 Census data, twenty-seven percent of low and very-low income households owning their home and twenty-seven percent of low and very-low income households renting their home overpaid for housing costs;

(4) Only households earning above moderate incomes could afford a home priced at or around median. Homeownership is out of reach in Clayton for most lower-income households. For example, moderate income households within the City could not afford the 2013 median home price of \$595,000. Recent appreciation in real estate prices has increased these concerns;

(5) The City has a significant need for new affordable housing. The Association of Bay Area Governments (ABAG) has allocated the following Regional Housing Needs Allocation (RHNA) to the City for the period 2014 to 2022: 51 extremely low- and very

low-income units, 25 low-income units, 31 moderate-income units and 34 above moderate-income units; and

WHEREAS, the legal landscape surrounding the development of affordable housing in California is continually evolving; and

WHEREAS, the court in *Palmer/Sixth Street Properties v. City of Los Angeles* (2009) 175 Cal.App.4th 1396 determined that cities may no longer require developers to construct affordable housing units for rent; and

WHEREAS, the court in *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435 clarified that cities may require developers to construct affordable housing units for sale; and

WHEREAS, on November 18, 2014, the City Council of the City of Clayton adopted an IS/ND for the 2015-2023 Housing Element, which was prepared pursuant to the California Environmental Quality Act (CEQA). The IS/ND concluded there was no substantial evidence to suggest the 2015-2023 Housing Element document would have a significant effect on the environment; and

WHEREAS, on June 28, 2016, the Planning Commission considered all information provided and submitted, took and considered all public testimony, and recommended the City Council approve the ordinance amending the City of Clayton Municipal Code by adding Chapter 17.92 – Inclusionary Housing Requirements; and

WHEREAS, the City Council wishes to adopt this Inclusionary Housing Ordinance to satisfy Housing Element Implementation Measure I.2.1 in compliance with applicable state and local laws.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF CLAYTON DOES ORDAIN AS FOLLOWS:

Section 1. Recitals. The above recitals are true and correct and are hereby incorporated into this Ordinance.

Section 2. Amendment. Chapter 17.92 is hereby added to the Clayton Municipal Code to read in full as set forth in the attached Exhibit A, incorporated by this reference.

Section 3. Severability. If any section, subsection, sentence, clause, or phrase of this Ordinance, or the application thereof to any person or circumstances, is held to be unconstitutional or to be otherwise invalid by any court competent jurisdiction, such invalidity shall not affect other provisions or clauses of this Ordinance or application thereof which can be implemented without the invalid provisions, clause, or application, and to this end such provisions and clauses of the Ordinance are declared to be severable.

Section 4. Conflicting Ordinances Repealed. Any ordinance or part thereof, or regulations in conflict with the provisions of this Ordinance, are hereby repealed. The provisions of this Ordinance shall control with regard to any provision of the Clayton Municipal Code that may be inconsistent with the provisions of this Ordinance.

Section 5. Effective Date and Publication. This Ordinance shall become effective thirty (30) days from and after its passage. This Ordinance shall be published or posted as required by law.

The foregoing Ordinance was introduced at a noticed public hearing at a regular public meeting of the City Council of the City of Clayton held on July 19, 2016.

Passed, adopted, and ordered posted by the City Council of the City of Clayton at a regular meeting thereof held on August 16, 2016, by the following vote:

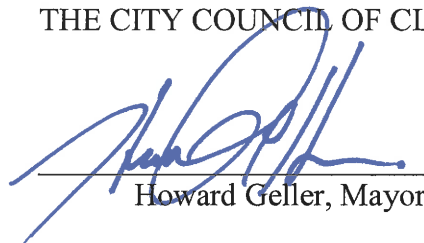
AYES: Mayor Geller, Vice Mayor Diaz, Councilmembers Haydon, Pierce, and Shuey.

NOES: None.

ABSENT: None.

ABSTAIN: None.

THE CITY COUNCIL OF CLAYTON, CA



Howard Geller, Mayor

ATTEST



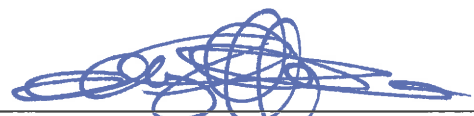
Janet Brown, City Clerk

APPROVED AS TO FORM



Malathi Subramanian, City Attorney

APPROVED BY ADMINISTRATION



Gary A. Napper, City Manager

I hereby certify that the foregoing Ordinance was duly introduced at a noticed public hearing of a regular meeting of the City Council of the City of Clayton held on July 19, 2016, and was duly adopted, passed, and ordered posted at a regular meeting of the City Council held on August 16, 2016.



Janet Brown, City Clerk

Chapter 17.92

INCLUSIONARY HOUSING REQUIREMENTS

Sections:

17.92.000	Intent
17.92.010	Definitions
17.92.020	Applicability
17.92.030	Inclusionary Unit Requirement
17.92.040	Alternatives
17.92.050	Procedures
17.92.060	Standards
17.92.070	Enforcement
17.92.080	General Provisions

17.92.000 INTENT

It is the intent of this Chapter to establish standards and procedures that facilitate the development and availability of housing affordable to a range of households with varying income levels to implement the City's Housing Element and as mandated by Government Code Section 65580. The purpose of this Chapter is to encourage the development and availability of such housing by ensuring the addition of affordable housing units to the City's housing stock is in proportion with the overall increase in new housing units.

17.92.010 DEFINITIONS

Whenever the following terms are used in this Chapter, they shall have the meaning established by this Section:

(a) **"Affordable Housing Costs"** means

(1) For Very Low-Income Households, the product of 30 percent times 50 percent of the area median income adjusted for family size appropriate for the unit.

(2) For Low-Income Households, the product of 30 percent times 70 percent of the area median income adjusted for family size appropriate for the unit.

(3) For Moderate Income Households, Affordable Housing Cost shall not be less than 28 percent of the gross income of the household, nor exceed the product of 35 percent times 110 percent of area median income adjusted for family size appropriate for the unit.

(b) **"Developer"** means any person, firm, partnership, association, joint venture, corporation, or any entity or combination of entities, which seeks City approvals for all or part of a Residential Development. The term "Developer" also means the owner or owners for any such property for which such approvals are sought.

(c) **"Director"** means the City's Director of Community Development.

- (d) **“Discretionary Approval”** means any entitlement or approval, including but not limited to a use permit, variance, design approval, and subdivision map.
- (e) **“Inclusionary Housing Agreement”** means a legally binding, written agreement between a Developer and the City, in form and substance satisfactory to the Director and City Attorney, setting forth those provisions necessary to ensure that the requirements of this Chapter, whether through the provision of Inclusionary Units or through an alternative method, are satisfied.
- (f) **“Affordable Housing Plan”** means the plan referenced in Section 17.92.050.
- (g) **“Inclusionary Housing Fund”** shall have the meaning set forth in Section 17.92.080(a).
- (h) **“Inclusionary Units”** means a dwelling unit developed pursuant to an Inclusionary Housing Agreement that will be offered for sale to Low and Moderate Income Households, at an Affordable Housing Cost, pursuant to this Chapter.
- (i) **“Low Income Households”** means households who are not very low income households but whose gross income does not exceed the qualifying limits for lower income families as established from time to time pursuant to Section 8 of the United States Housing Act for Contra Costa County as set forth in Title 25 of the California Code of Regulations, Section 6932, or its successor provision and adjusted for family size and other factors by the United States Department of Housing and Urban Development.
- (j) **“Low Income Units”** means Inclusionary Units restricted to occupancy by Low Income Households at an Affordable Housing Cost.
- (k) **“Moderate Income Households”** means households who are not low income households but whose gross income does not exceed one hundred and twenty percent (120%) of the median income for Contra Costa County, adjusted for family size and other factors by the U.S. Department of Housing and Urban Development, as published annually in Title 25 of the California Code of Regulations, Section 6932, or its successor provision.
- (l) **“Moderate Income Units”** means Inclusionary Units restricted to occupancy by Moderate Income Households at an Affordable Housing Cost.
- (m) **“Residential Development”** means the construction of new projects requiring any specific plan, development agreement, planned unit development permit, tentative map, minor subdivision, conditional use permit, site plan review or building permit for which an application has been submitted to the City and which would create one or more additional dwelling units to be offered for sale by the construction or alteration of structures. All new construction projects creating one or more additional dwelling units to be offered for sale on contiguous parcels of land by a single Developer shall constitute a single Residential Development subject to the requirements of this Ordinance, and any accompanying regulations, regardless of whether such projects are constructed all at once, serially, or in phases. The term “Residential Development” shall include the conversion of rental units to for-sale units.
- (n) **“Unrestricted Units”** means those dwelling units in a Residential Development that are not Inclusionary Units.

(o) **“Very Low Income Households”** means households whose gross income does not exceed the qualifying limits for very low income families as established from time to time pursuant to Section 8 of the United States Housing Act for Contra Costa County as set forth in Title 25 of the California Code of Regulations, Section 6932, or its successor provision and adjusted for family size and other factors by the United States Department of Housing and Urban Development, adjusted for family size and other factors by the United States Department of Housing and Urban Development.

17.92.020 APPLICABILITY

This Chapter shall apply to all Residential Developments, except as provided below.

- (a) Residential Developments proposed to contain less than ten (10) dwelling units.
- (b) Residential Developments that obtained a current, valid building permit prior to the effective date of the ordinance adding this Chapter.
- (c) Any dwelling unit or Residential Development which is damaged or destroyed by fire or natural catastrophes so long as the use of the reconstructed building and number of dwelling units remain the same, and the cost of such rehabilitation constitutes no more than fifty percent (50%) of the of its reasonable market value at the time of destruction or damage.

17.92.030 INCLUSIONARY UNIT REQUIREMENT

(a) **For-Sale Units:** If the Residential Development includes ten (10) or more units for sale, a minimum of ten percent (10%) of all newly constructed for sale dwelling units in the Residential Development shall be developed, offered to and sold to Low and Moderate Income Households, in a ratio determined pursuant to Section 17.92.060, at an Affordable Housing Cost.

(b) The Inclusionary Unit requirement set forth in this Section may be reduced as follows: If only Low Income Units are provided in lieu of any Moderate Income units, a credit of 1.5 units to every 1 unit shall be provided. However, the credits may only be applied to the extent such credit equals a whole number.

(c) In the event the calculation for the number of Inclusionary Units results in a fraction of an Inclusionary Unit, the Developer shall have the option of either: (i) providing a full Inclusionary Unit at Affordable Housing Costs; or (ii) making an in lieu payment to the Inclusionary Housing Fund in an amount equal to the percentage represented by the fractional unit multiplied by the applicable in lieu fee.

(d) The number of Inclusionary Units required for a particular project will be determined at the time a land use application is filed by the Developer for a Residential Development with the City. If a change in the subdivision design results in a change in the total number of units, the number of Inclusionary Units required will be recalculated to coincide with the final approved project.

(e) For purposes of calculating the number of Inclusionary Units required by this Section, any additional units authorized as a density bonus under Chapter 17.90 and California Government Code Section 65915(b)(1) or (b)(2) will not be counted in determining the required number of Inclusionary Units.

17.92.040 ALTERNATIVES

In lieu of including the Inclusionary Units in the Residential Development pursuant to Section 17.92.030, the requirements of this Chapter may be satisfied through the following alternatives set forth in this Section.

(a) Off-Site. As an alternative to providing Inclusionary Units upon the same site as the Residential Development, the Developer may elect, by right, at the Developer's sole discretion to construct Inclusionary Units off-site subject to the following requirements:

(1) If the Developer constructs units off-site, the percentage of required Inclusionary Units shall be increased to fifteen percent (15%).

(2) The site of the Inclusionary Units has a General Plan designation that authorizes residential uses and is zoned for Residential Development at a density to accommodate at least the number of otherwise required Inclusionary Units, including the additional five percent (5%) for development off-site, within the Residential Development. The Developer shall obtain all required Discretionary Approvals and complete all necessary environmental review of such site.

(3) The site is suitable for development of the Inclusionary Units in terms of configuration, physical characteristics, location, access, adjacent uses, and other relevant planning and development criteria.

(4) Environmental review for the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and all such hazards are or shall be mitigated to the satisfaction of the City prior to acceptance of the site by the City.

(5) The construction schedule for the off-site Inclusionary Units shall be included in the Affordable Housing Plan and the Inclusionary Housing Agreement.

(6) Construction of the off-site Inclusionary Units shall be completed prior to or concurrently with the Residential Development.

(7) Unless otherwise noted, all requirements applicable to on-site Inclusionary Units shall apply to off-site Inclusionary Units.

(b) In Lieu Fee. For Residential Developments proposing ten (10) units, the Developer may elect, by right, at the Developer's sole discretion to pay a fee in lieu of developing an Inclusionary Unit on-site. The amount of the in-lieu fee to be paid by Developer pursuant to this Section shall be the applicable in-lieu fee set forth in the fee schedule adopted by the City Council. For all Residential Developments proposing eleven (11) units or more, the Developer may request to pay a fee in lieu of all or some of the Inclusionary Units otherwise required by the Ordinance in lieu of developing Inclusionary Units on-site. The fee shall be charged for each unit or fraction of a unit as set forth in Section 17.92.030(c), and the fee shall be paid as follows:

(1) The amount of the fee to be paid by Developer pursuant to this subsection shall be the fee schedule established by Resolution of the City Council, and as adjusted from time to time by Resolution of the City Council.

(2) One-half (1/2) of the in-lieu fee required by this subsection shall be paid (or a letter of credit posted) prior to issuance of a building permit for all or any part of the Residential Development. The remainder of the fee shall be paid before a certificate of occupancy is issued for any unit in the Residential Development.

(3) The fees collected shall be deposited in the Inclusionary Housing Fund.

(4) No certificate of occupancy shall be issued for any corresponding Unrestricted Units in a Residential Development unless fees required under this Section have been paid in full to the City.

(c) Land Dedication. In lieu of building Inclusionary Units, a Developer may request to dedicate land to the City suitable for the construction of Inclusionary Units that the City Council reasonably determines to be equivalent or greater value than is produced by applying the City's in lieu fee to the Developer's inclusionary obligation and otherwise meets the following standards and requirements:

(1) Marketable title to the site is transferred to the City, or an affordable housing developer approved by the City, prior to the commencement of construction of the Residential Development pursuant to an agreement between the Developer and the City and such agreement is in the best interest of the City.

(2) The site has a General Plan designation that authorizes residential uses and is zoned for Residential Development at a density to accommodate at least the number of otherwise required Inclusionary Units within the Residential Development, and conforms to City development standards.

(3) The site is suitable for development of the Inclusionary Units in terms of configuration, physical characteristics, location, access, adjacent uses, and other relevant planning and development criteria including, but not limited to, factors such as the cost of construction or development arising from the nature, condition, or location of the site.

(4) Infrastructure to serve the dedicated site, including but not limited to streets and public utilities, must be available at the property line and have adequate capacity to serve the maximum allowable Residential Development pursuant to zoning regulations.

(5) Environmental review of the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and all such hazards are or will be mitigated to the satisfaction of the City prior to acceptance of the site by the City.

(6) The City shall not be required to construct restricted income units on the site dedicated to the City, but may sell, transfer, lease, or otherwise dispose of the dedicated site. Any funds collected as the result of a sale, transfer, lease, or other disposition of sites dedicated to the City shall be deposited into the Inclusionary Housing Fund.

17.92.050 PROCEDURES

(a) At the times and in accordance with the standards and procedures set forth herein, Developer shall:

(1) Submit an Inclusionary Housing Plan for approval by the Director, setting forth in detail the manner in which the provisions of this Chapter will be implemented for the proposed Residential Development. If land dedication or off-site units are proposed, the Inclusionary Housing Plan shall include information necessary to establish site location, suitability, development, constraints, and the number of Inclusionary Units assigned pursuant to this Chapter.

(2) Execute and cause to be recorded an Inclusionary Housing Agreement, unless Developer is complying with this Chapter pursuant to Section 17.92.040(b) (in lieu fee) or Section 17.92.040(c) (land dedication).

(b) No Discretionary Approval shall be issued for all or any portion of a Residential Development subject to this Chapter until the Developer has submitted an Inclusionary Housing Plan.

(c) No building permit shall be issued for the Residential Development, or any portion thereof, subject to this Chapter unless the City Council has approved the Inclusionary Housing Plan and the Inclusionary Housing Agreement (if required) is recorded.

(d) No certificate of occupancy shall be issued for the Residential Development, or any portion thereof, subject to this Chapter unless the approved Inclusionary Housing Plan has been fully implemented.

(e) The City Manager or designee may establish and amend policies for the implementation of this Chapter.

17.92.060 STANDARDS

(a) Inclusionary Units shall be reasonably dispersed throughout the Residential Development; shall be proportional, in number of bedrooms, to the Unrestricted Units. If the Residential Development offers a variety of unit plans with respect to design, materials and optional interior amenities, the Inclusionary Units shall be identical with the Residential Development's base-plan in terms of design, appearance, materials, finished quality and interior amenities. If multiple floor plans with the same number of bedrooms are proposed, the Inclusionary Units may be the units with the smaller floor plans.

(b) All Inclusionary Units in a Residential Development shall be constructed concurrently with or prior to the construction of the Unrestricted Units. In the event the City approves a phased project, the Inclusionary Units required by this Chapter shall be constructed and occupied in proportion to the number of units in each phase of the Residential Development. In no case shall an Affordable Housing Unit be the final dwelling unit issued a Certificate of Occupancy of a Residential Development or its approved phase(s).

(c) Inclusionary Units shall be sold to Low and Moderate Income Households at a ratio established pursuant to a Resolution adopted by the City Council, and shall be provided at the applicable Affordable Housing Cost.

(d) The number of bedrooms must be the same as those in the Unrestricted Units, except that if the Unrestricted Units provide more than four (4) bedrooms, the Inclusionary Units need not provide more than four (4) bedrooms.

(e) Inclusionary Units shall prohibit subsequent rental occupancy, unless approved for hardship reasons by the City Manager or designee. Such hardship approval shall include provision for United States military personnel who are required to leave the country for active military duty.

(f) Prior the development of any units in a Residential Development, a deed restriction or other enforceable obligation approved by the City Attorney shall be recorded limiting the Developer and any successors, whenever an Inclusionary Unit is sold, to sell such unit to persons meeting the income eligibility requirements for Low and Moderate Income Households as applicable for a period of fifty-five (55) years.

17.92.070 ENFORCEMENT

(a) The provisions of this Chapter shall apply to all Developers and their agents, successors and assigns proposing a Residential Development. All Inclusionary Units shall be sold in accordance with this Chapter. It shall be a misdemeanor to violate any provision of this Chapter. Without limiting the generality of the foregoing, it shall also be a misdemeanor for any person to sell or rent to another person an Inclusionary Unit under this Chapter at a price exceeding the maximum allowed under this Chapter or to sell an Inclusionary Unit to a Household not qualified under this Chapter. It shall further be a misdemeanor for any person to provide false or materially incomplete information to the City or to a seller or lessor of an Inclusionary Unit to obtain occupancy of housing for which he or she is not eligible.

(b) Any individual who sells an Inclusionary Unit in violation of the provisions of this Chapter shall be required to forfeit all monetary amounts so obtained. Recovered funds shall be deposited into the Inclusionary Housing Fund.

(c) The City may institute any appropriate legal actions or proceedings necessary to ensure compliance with this Chapter, including but not limited to: (1) actions to revoke, deny or suspend any permit, including a building permit, certificate of occupancy, or discretionary approval; (2) civil actions for injunctive relief or damages; (3) actions to recover from any violator of this Chapter civil fines, restitution to prevent unjust enrichment, and/or enforcement costs; and (4) any other action, civil or criminal, authorized by law or by any regulatory document, restriction, or agreement under this Chapter.

(d) In any action to enforce this Chapter or an Inclusionary Housing Agreement recorded hereunder, the City shall be entitled to recover its reasonable attorney's fees and costs.

(e) Failure of any official or agency to fulfill the requirements of this Chapter shall not excuse any person, owner, Developer or household from the requirements of this Chapter.

(f) The remedies provided for herein shall be cumulative and not exclusive and shall not preclude the City from any other remedy or relief to which it would otherwise be entitled under law or equity.

17.92.080 GENERAL PROVISIONS

(a) Inclusionary Housing Fund

There is hereby established a separate fund of the City, to be known as the Inclusionary Housing Fund. All monies collected pursuant to 17.92.040, 17.92.060 and 17.92.070 shall be deposited in the Inclusionary Housing Fund. Additional monies from other sources may be deposited in the Inclusionary Housing Fund. The monies deposited in the Inclusionary Housing Fund shall be subject to the following conditions:

(1) Monies deposited into the Inclusionary Housing Fund must be used to increase and improve the supply of housing affordable to Very Low, Low, and Moderate, Income Households in the City. Monies may also be used to cover reasonable administrative or related expenses associated with the administration of this Section.

(2) The fund shall be administered, subject to the approval by the City Manager, by the Director of Community Development, or his or her designee, who may develop procedures to implement the purposes of the Inclusionary Housing Fund consistent with the requirements of this Chapter and through the adopted budget of the City.

(3) Monies deposited in accordance with this Section shall be used in accordance with the City's Housing Element, or subsequent plan adopted by the City Council to construct, rehabilitate, or subsidize affordable housing or assist other government entities, private organizations, or individuals to do so. Permissible uses include, but are not limited to, assistance to housing development corporations, equity participation loans, grants, pre-home ownership co-investment, pre-development loan funds, participation leases, or other public-private partnership arrangements. The Inclusionary Housing Fund may be used for the benefit of both rental and owner-occupied housing. In no case is the City obligated to actually construct affordable housing units on its own.

(b) Administrative Fees

The City Council may by Resolution establish reasonable fees and deposits, which shall fund the City's costs associated with the administration and monitoring of the Inclusionary Units and administration of the Inclusionary Housing Fund.

(c) Appeal

Within ten (10) calendar days after the date of any decision of the Director under this Chapter, an appeal may be filed with the City Clerk. Within ninety (90) calendar days of the request for an appeal is filed or a later time as agreed to by the appellant, the City Council shall consider the appeal. The City Council's decision shall be final.

(d) Waiver

(1) Notwithstanding any other provision of this Chapter, the requirements of this Chapter may be waived, adjusted, or reduced if a Developer shows, based on substantial evidence, that there is no reasonable relationship between the impact of a proposed Residential Development and the requirements of this Chapter, or that applying the requirements of this Chapter would take property in violation of the United States or California Constitutions.

(2) Any request for a waiver, adjustment, or reduction under this Section shall be submitted to the City concurrently with the Affordable Housing Plan required by Section 17.92.050. The request for a waiver, adjustment, or reduction shall set forth in detail the factual and legal basis for the claim.

(3) The request for a waiver, adjustment, or reduction shall be reviewed and considered in the same manner and at the same time as the Affordable Housing Plan, and is subject to the appeal process in subsection (c) above.

(4) In making a determination on an application for waiver, adjustment, or reduction, the Developer shall bear the burden of presenting substantial evidence to support the claim. The City may assume each of the following when applicable:

(i) That the Developer will provide the most economical Inclusionary Units feasible, meeting the requirements of this Chapter and any implementing regulations.

(ii) That the Developer is likely to obtain housing subsidies when such funds are reasonably available.

(5) The waiver, adjustment or reduction may be approved only to the extent necessary to avoid an unconstitutional result, after adoption of written findings, based on substantial evidence, supporting the determinations required by this Section.