

# Inclusionary Zoning and Construction Excise Tax FAQ

## **Inclusionary Zoning**

### **What is “inclusionary zoning”?**

Inclusionary zoning is a land use ordinance that works to create affordable housing units in market-rate developments. The term “inclusionary zoning” is in contrast to “exclusionary zoning,” land use policies that functioned to exclude more affordable kinds of housing from communities.

Inclusionary zoning may be mandatory, in which all new development must designate a certain percentage of units as affordable, or voluntary, in which a developer can build affordable housing in exchange for governmental incentives, such as fee waivers or tax abatements.

### **What is the background of inclusionary zoning in Oregon?**

Until 2016, Oregon prohibited local jurisdictions from requiring affordable housing set-asides in market development. This tool is widely used across the United States.

This ban was lifted with Senate Bill 1533 in 2016, allowing cities and counties to implement inclusionary zoning within certain parameters. (SB 1533 also established the authority for a new construction excise tax, discussed below.) The portion of SB 1533 on inclusionary zoning is codified in Oregon Revised Statutes 197.309.

### **Who can implement inclusionary zoning?**

Either a city or county may implement inclusionary zoning for development within its jurisdiction covered by its land use ordinances. A county may implement land use ordinances requiring affordable housing set-asides in regions of land that are unincorporated and governed by the county. A city or county can adopt an inclusionary zoning regulation on or after November 29, 2016.

### **Why would my city or county want to adopt inclusionary zoning?**

We want all members of our communities to have a safe place to call home. Inclusionary zoning is one tool local jurisdictions can use to help meet the housing needs of people who live in their communities.

### **How many units can a jurisdiction require to be set aside as affordable?**

A jurisdiction may require that up to 20% of units be set aside as affordable.

### **How is “affordability” defined?**

SB 1533 defines “affordable housing” as housing units affordable to households with incomes at or above 80% of the area median income (AMI), an approximate income level earned by workers such as teachers, firefighters, and nurses. Affordable developments funded by state and federal resources do not traditionally fund housing for families at this income level. Today, the private sector is not building housing units for this demographic either, meaning inclusionary zoning can be an important tool to serve these working families.

## **Which developments can be required to include affordable units?**

*For sale or rentals:* A jurisdiction may require affordable housing units in for-sale or rental developments.

*Multifamily structures of 20 units or more:* A jurisdiction can only require an affordable unit set-aside in developments consisting of a multifamily structure(s) of 20 units or more. A “multifamily structure” is defined as a structure that contains three or more housing units that share at least one wall, floor, or ceiling surface with another unit in the same structure.

*New developments:* Inclusionary zoning regulations adopted pursuant to ORS 197.309 can only apply to new developments that have not already submitted a permit application. If a project has not been completed within the period required by the permit, a new permit must be sought, which may be subject to inclusionary zoning regulations.

## **Does a developer have to actually build the units in its development?**

A jurisdiction must allow developers to pay a fee in lieu of actually constructing the units. A fee in lieu allows the developer to pay a jurisdiction a set amount of money that can then be used by the jurisdiction to support affordable housing in another location. There is no cap on where a jurisdiction may set the in-lieu fee. While it must allow for an in-lieu fee, a jurisdiction may but does not have to offer the developer the option to build affordable units off-site in order to fulfill the affordable housing requirements.

## **Does a jurisdiction need to offer any incentives to developers?**

A city or county must offer at least one of the following incentives:

- Whole or partial fee waivers or reductions
- Whole or partial waivers of system development charges or impact fees set by the city or county
- Finance-based incentives
- Full or partial exemptions from property taxes (If a city or county uses any state statute authorizing property tax exemptions for “low income housing”—meaning housing affordable at or below 60% AMI—the city or county must instead use 80% AMI as the standard for affordability when using the exemption to fulfill the inclusionary zoning incentive requirement.)

A city or county may offer any of the following incentives in addition to the required incentive(s):

- Density adjustments
- Expedited permitting
- Modification of height, floor area, or other site-specific requirements
- Other incentives as determined by the city or county

## **Can a city still offer voluntary incentives to develop affordable housing without inclusionary zoning?**

Yes. Nothing in the bill restricts a city or county, regardless of whether they pass an inclusionary zoning regulation, from offering voluntary incentives to increase the supply of affordable units in a development, decrease the sale or rental price of units, or deepen the affordability of units that are required under mandatory inclusionary zoning policies.

## **Construction Excise Tax**

### **What is the construction excise tax (CET) in SB 1533?**

Cities and counties are preempted from passing any taxes on construction unless otherwise allowed in statute. SB 1533 changes state law to allow cities and counties to pass a new construction tax (commonly referred to as a “construction excise tax”) designed to support affordable housing. A construction excise tax can be imposed on residential, commercial, and/or industrial construction, with certain parameters.

**Residential Construction Excise Tax:** A city or county may impose a construction excise tax set at 1% or less of the permit valuation on residential development, including both new structures and construction that results in additional square footage to an existing residential structure.

**Commercial and industrial Construction Excise Tax:** A city or county may also impose a construction excise tax on commercial and industrial development, including the commercial and industrial portions of a mixed-use property, that results in a new structure or additional square footage. There is no cap on the rate of the tax.

### **Who can implement a CET under SB 1533?**

A city or county which issues building permits may adopt a construction excise tax as of June 2, 2016. Metro does not have the authority to establish a construction excise tax under SB 1533.

### **How are the revenues distributed?**

The city or county may retain up to 4% of construction excise tax revenues as an administrative fee to cover its costs incurred in implementing the construction excise tax. After the administrative fee has been deducted from total revenues, the allocation of revenue must be as follows:

#### **Residential construction excise tax**

- All revenue is distributed toward affordable housing:
  - 50% for incentives
  - 35% for other affordable housing
  - 15% to Oregon Housing and Community Services to be used toward programs which offer down payment assistance

#### **Commercial or industrial construction excise tax**

- 50% of revenues must be dedicated toward programs of the city or county related to housing.
- The remaining 50% of revenue is unrestricted in its allocation.

### **Does a jurisdiction need to have inclusionary zoning in place, either mandatory or voluntary, in order to levy a construction excise tax?**

No, there is no requirement under SB 1533 that a city or county must adopt an inclusionary zoning ordinance (either voluntary or mandatory) in order to adopt a residential, industrial, or commercial construction excise tax. The design of the construction excise tax complements mandatory or voluntary inclusionary zoning, but it can be adopted on its own.

### **How does a jurisdiction have to spend revenues from a construction excise tax?**

If a jurisdiction adopts both a mandatory inclusionary zoning ordinance and a residential construction excise tax ordinance, 50% of the residential construction excise tax revenue must be used for the things listed in ORS 197.309 (5) (c) and (d) and (7). The things listed in (7) include the incentive(s) that a jurisdiction must offer a developer when implementing mandatory inclusionary zoning.

If a city adopts a residential construction excise tax but not a mandatory inclusionary zoning ordinance, 50% of the revenue still must go toward things listed in ORS 197.309 (5) (c) and (d) and (7). The things listed in (7) could be used to assist any developer creating affordable housing, including nonprofit affordable housing developers.

**Can both a city and county adopt a construction excise tax pursuant to SB 1533? What if the cumulative tax rates exceed the 1% residential construction excise tax cap?**

Only the entity that issues the building permits may impose a construction excise tax. Since either the city or the county issues a building permit and not both, there is no issue with a cumulative tax exceeding the 1% cap.

**For communities with an existing construction excise tax, does the existing construction excise tax count toward the 1% cap on residential construction excise taxes allowed under SB 1533?**

The 1% cap only applies to a new residential construction excise tax adopted pursuant to SB 1533. A jurisdiction does not need to include any existing construction excise tax rates in the 1% cap on residential construction excise taxes.

**Who has implemented a construction excise tax? Who is interested?**

The City of Bend adopted a construction excise tax of 0.3% on residential, commercial, and industrial development in 2006, with the revenues dedicated toward affordable housing. The fee has allowed Bend to lend about \$13.5 million for the development of affordable housing. In 2007, the Legislature preempted local jurisdictions from implementing additional construction excise taxes.

The City of Portland implemented a 1% construction excise tax on residential, commercial, and industrial development that will go into effect on August 1, 2016. The City of Portland decided to allocate all proceeds from the commercial and industrial construction excise tax to affordable housing.

A number of jurisdictions around the state have expressed interest in a construction excise tax.