

permit for buildings of 75 feet in return for various community benefits, as well as a waiver of the opportunity under state law for a density bonus.

## Legal consistency analysis

Certain provisions of the Downtown Initiative appear to violate state and federal law governing exactions, affordable housing requirements and other matters.

- The Downtown Initiative would require new residential rental projects over 60 feet (or 50 feet in the buffer area) to provide either 10% or 20% of the units (depending on height) to very low income households. This requirement is preempted by state law and is unenforceable. If the City were to attempt to enforce it by denying a use permit or imposing it as a condition of a use permit, it could be liable to an applicant for attorneys' fees and possibly damages. (23B.34.040.A & 23B.34.050A.)
- The Downtown Initiative would impose an additional SOSIP fee of \$1.00 per square foot on buildings over 75 feet. This does not appear to be supported by a nexus analysis as required by state and federal law, and is unenforceable. If the City were to attempt to enforce it by denying a use permit or imposing it as a condition of a use permit, it could be liable to an applicant for damages and attorneys' fees. (23B.34.050.B.)
- The Downtown Initiative would require developers of new buildings over 75 feet to provide public bathrooms. The City Attorney's office concluded in 1993 that such a requirement would generally be unconstitutional, as well as preempted by state law. (23B.34.050.C.)
- The Downtown Initiative would require an in lieu fee of \$30 per square foot for on-site open space that is not provided in a project. This does not appear to be supported by a nexus analysis as required by state and federal law, and is unenforceable. If the City were to attempt to enforce it by denying a use permit or imposing it as a condition of a use permit, it could be liable to an applicant for damages and attorneys' fees. (23E.68.070.D.3.)
- The Downtown Initiative would require a payment of \$0.50 per square foot from every project into a loan fund for businesses and entrepreneurs "who seek to grow and retain or create jobs in Berkeley." This does not appear to be supported by a nexus analysis as required by state and federal law, and is unenforceable. If the City were to attempt to enforce it by denying a use permit or imposing it as a condition of a use permit, it could be liable to an applicant for damages and attorneys' fees. (23E.68.085.C.)
- The Downtown Initiative is inconsistent with Measure R, the DAP and the General Plan, and requires the City Manager to develop amendments to the DAP and General Plan to conform them to the zoning amendments made by the Downtown Initiative. This does not appear to be within the reserved initiative power as it is not a legislative action. (*Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504,1509.) (Section 9.)