

**From:** [Phan, Johnny](#)  
**To:** [Downtown West Project](#)  
**Subject:** FW: Preliminary Draft - Housing Documents  
**Date:** Tuesday, April 6, 2021 3:16:23 PM  
**Attachments:** [Exhibit D - Affordable Housing Program and Key Transfer Terms - MAKE COMMENTS HERE.docx](#)  
[Exhibit D IHO Language.pdf](#)

---

---

**From:** Phan, Johnny  
**Sent:** Sunday, March 28, 2021 4:52 PM  
**To:** Gregg Miller <[gmliller@coblentzlaw.com](mailto:gmliller@coblentzlaw.com)>; Stephanie Straka <[SStraka@coblentzlaw.com](mailto:SStraka@coblentzlaw.com)>; Pam Andes <[PAandes@allenmatkins.com](mailto:PAandes@allenmatkins.com)>  
**Subject:** Preliminary Draft - Housing Documents

**Johnny V. Phan**  
**Chief Deputy City Attorney**  
**Office of the City Attorney**  
**City of San Jose**  
**[200 East Santa Clara Street](#)**  
**[San Jose, CA 95113-1905](#)**  
**Main Ph: [\(408\) 535-1900](#)**  
**Direct No.: [\(408\) 535-1981](#)**  
**Fax No. [\(408\) 998-3131](#)**

## **Exhibit D**

### **Affordable Housing Program**

#### **I. Intro/Recitals**

The Downtown Mixed-Use Plan ("**Project**") provides for the development of a substantial amount of residential units to help address the City's housing crises related to both market rate and affordable housing. This Affordable Housing Program, which assumes 4,000 residential units, furthers Developer's and City's shared goal that development within the Diridon Station Area Plan ("**DSAP**") results in twenty-five percent (25%) of all residential units as affordable housing. Consistent with this goal, in October 2020, the City designated the Diridon Station Area as a prioritized growth area in the City-wide Affordable Housing Investment Plan for the development of affordable housing and use of affordable housing funds to encourage and assist in such development.

This Affordable Housing Program will enable the Project to provide financial and other commitments sufficient to (i) satisfy Developer's obligations under the City's adopted Inclusionary Housing Ordinance ("**IHO**") as set forth in San José Municipal Code Chapter 5.08 in effect on the Effective Date of the Development Agreement, a copy of which is attached hereto as Exhibit D5; and (ii) substantially further achievement of the twenty-five percent (25%) affordable housing goal within the DSAP.

This Affordable Housing Program is provided in order to satisfy and exceed the requirements under the IHO. Pursuant to Sub-Section F of Section 5.08.610 of the IHO [**Note to City**: *when will the newly adopted IHO be added to the Muni Code to replace the old IHO?*], the City Manager has determined that this Affordable Housing Program represents an acceptable alternative method of meeting the City's inclusionary housing requirements because, based on its terms, it will provide as much or more affordable housing at the same or lower income levels, and of the same or superior quality of design and construction, and will otherwise provide greater public benefit, than compliance with the express requirements of the IHO and any existing or future City guidelines for inclusionary housing.

As set forth in this Affordable Housing Program, Developer will fulfill its obligations through land dedication, monetary contributions, and production of on-site moderate income (100% of Area Median Income (as such term is defined below)) affordable residential units, and the City will through Good Faith Efforts direct affordable housing funds generated by the Project to affordable housing projects on the land Developer dedicates to the City pursuant to this Affordable Housing Program for that purpose.

Terms that are used but not defined in this Affordable Housing Program shall have the meanings given such terms in Section VI below or in the body of the Development Agreement to which this Affordable Housing Program is attached.

## **II. Summary of the Affordable Housing Program**

This Affordable Housing Program applies to all housing developed pursuant to the Development Agreement (and is based on the assumption that development of 3,400 market rate and 100% AMI units at an average unit size of 637 rentable square feet will occur) and consists of the following elements, which are summarized here and discussed in more detail in Sections III and IV below:

1. Developer's transfer of three parcels of real property, currently identified as Properties H1, H5 and H6, totaling approximately 2.15 acres, to the City (or its Designee) for use in the production of affordable housing. See Exhibit D1 for Site Plan.
2. Developer's production of a minimum of one hundred and seventy (170) inclusionary housing units at 100% of AMI, which units must be provided within the market rate buildings at a rate of 5% of the total number of units, consistent with the IHO Mixed Compliance Option.
3. Developer's production of a minimum of an additional thirty (30) inclusionary housing units at 100% of AMI as a community benefit, which units must be provided within the market rate buildings at a rate of 0.88% for the first 3,400 units (which, when added to the inclusionary units described in paragraph II.2 above, results in 5.88% of the first 3,400 residential units being restricted units at 100% of AMI).
4. Developer's payment of in-lieu fees (either \$18.70 per rentable square foot (“**rsf**”) if Developer provides 5% of the residential units as inclusionary units or \$43.00 per rsf if Developer does not provide 5% of the residential units as inclusionary units) for all residential developments in the Project area pursuant to the IHO, subject to credits for the value of the H1, H5 and H6 Properties as listed in the table below that are transferred to the City or an affordable housing developer designated by the City (“**Designee**”) as more specifically set forth below.
5. Developer's payment of fees on the Project's office development pursuant to the City's adopted Commercial Linkage Fee Ordinance set forth in San José Municipal Code Chapter 5.11 et seq.
6. Subject to City Council appropriation of funding, the City's commitment to (i) implement the affordable housing priorities for the DSAP that are set forth in the City's Affordable Housing Investment Plan, which reinforces that the DSAP is a priority area for the City's available affordable housing funds, and (ii) use Good Faith Efforts to direct CLF generated from commercial development within the Project Site to the production of affordable housing on land transferred from Developer to the City for that use, and then to affordable housing production within the DSAP's Boundaries.
7. Developer's performance of the Early H6 Work and the Early H5 Work earlier than Developer would otherwise be obligated to perform such work.

8. Housing contribution of community benefits to the Community Stabilization and Opportunity Pathways Fund, as further described in Section IV B. below.

### **III. Inclusionary Housing Ordinance Compliance**

#### **A. Land Dedication; Early H5 and H6 Work; Availability of District Systems.**

Developer shall dedicate Properties H1, H5 and H6, consisting of a total of approximately 2.15 acres of real property to the City (or its Designee) pursuant to separate transfer agreements between the Developer and the City, with respect to each of the properties. If, due solely to Developer's actions, any Property is reduced in size by (i) five percent (5%) or less from its current size as shown on the attached Site Plan (Exhibit D1), then the credits associated with such site shall be adjusted pro-rata or (ii) more than five percent (5%), then Developer shall have to right to (a) provide a replacement site to the City, which site shall be acceptable to the City's Director of Housing in his or her sole and absolute discretion or (b) if no such site is available, as reasonably determined by Developer or if the City rejects that site, then Developer shall pay the in-lieu fee of \$43.00 per rsf. The City will use Good Faith Efforts to deliver 600 units in total on the dedicated Properties. The actual number of units to be constructed on the dedicated Properties will be determined through the City's affordable housing development process, including input from potential affordable housing partners.

Concurrently with entering into the Development Agreement, Developer and City shall enter into separate Transfer Agreements for the eventual transfers of the H1, H5 and H6 Properties to City (the "**H1 Transfer Agreement**", "**H5 Transfer Agreement**" and "**H6 Transfer Agreement**", respectively, and collectively, the "**Transfer Agreements**").

#### **H5 & H6 Early Work**

In response to the City's desire to cause the dedication of the H6 and H5 Properties to occur earlier than required, Developer is willing to perform certain work with respect to those properties earlier than necessary subject to the terms herein below. The City and Developer agree that the cost of performing the Early H5 Work and Early H6 Work is \$19,300,000 as of the Effective Date of the Development Agreement. Such costs shall be subject to Annual Increases until the date of transfer of the H6 Property and the H5 Property respectively. As such, the City agrees that Developer may utilize a portion, in the amount of \$19,300,000, of the CLF that would be due with respect to the first and any subsequent office buildings in the Project comprising \$10,100,000 to accelerate dedication of the H6 Property ("**H6 Early Work CLF Amount**") and \$9,200,000 to accelerate dedication of the H5 Property ("**H5 Early Work CLF Amount**", and collectively with the H6 Early Work CLF Amount, the "**Early Work CLF Amount**"). As set forth in more detail below, Developer will repay the Early Work CLF Amount as CLF; provided, however, that if Developer has not repaid all of the Early Work CLF on or before the expiration of the time period in which Developer must satisfy the Ten Year Development Obligation, then Developer shall pay the then-remaining balance of the Early Work CLF prior to the expiration of such time period.

The demolition and removal of the existing buildings, rough grading of the H6 Property, street and sidewalk improvements, and other work comprising the early H6 work will be further described in an exhibit to the Transfer Agreement for the H6 Property (“**Early H6 Work**”). Developer’s obligation to perform such work will be triggered by approval of the Vertical Improvement superstructure permit associated with the first office building (“**Permit**”), at which time the H6 Early Work CLF Amount will be credited to Developer against its CLF payment obligation for the first and, if applicable, any subsequent office buildings such that the cash payment of CLF owed at Final COO of the first and, if applicable, any subsequent office buildings will be reduced by the H6 Early Work CLF Amount. On receipt of the Permit, Developer will begin necessary drawings and permitting work associated with demolition of the buildings included in the Early H6 Work. Developer anticipates that it will take approximately fifteen (15) months (from the date on which Developer’s obligation to perform the Early H6 Work is triggered) to design, permit and complete the Early H6 Work. Once the Early H6 Work is complete, Developer will transfer the H6 Property per the H6 Transfer Agreement **but in no event will H6 be transferred after the TCO is issued for the first residential building.** , Upon (i) the closing of the transfer of the H6 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City’s request to defer the closing as more specifically set forth in the Transfer Agreement, Developer will (a) receive an IHO credit in the same amount as the H6 Early Work CLF Amount, and (b) be obligated to re-pay the H6 Early Work CLF Amount at Final Certificate of Occupancy (“**Final COO**”) of the office building that results in delivery of the cumulative amount of 2,500,000 sf of office development completed by Developer.

The demolition and removal of the existing buildings, rough grading of the H5 Property, street and sidewalk improvements, and other work comprising the early H5 work will be further described in an exhibit to the Transfer Agreement for the H5 Property (“**Early H5 Work**”). Developer’s obligation to perform such work will be triggered by the City’s notification to Developer (the “**H5 Notice**”) of the occurrence of either of the following, whichever is earlier, that (i) the H5 affordable housing developer has been selected and a funding commitment for predevelopment has been made, but no earlier than the Commencement of Construction of the affordable housing development on the H6 Property or (ii) it is the City’s reasonable expectation that the Temporary Certificate of Occupancy for the affordable housing development on the H6 Property will be issued approximately twelve (12) months from the date of such notice. The H5 Early Work CLF Amount will be credited to Developer against its CLF payment obligation for the first and, if applicable, any subsequent office buildings such that the cash payment of CLF owed at Final COO of the first and, if applicable any subsequent office buildings will be reduced by the H5 Early Work CLF Amount. On receipt of the H5 Notice, Developer will begin necessary drawings and permitting work associated with the Early H5 Work. Developer anticipates that it will take approximately twelve (12) months (from the date on which Developer’s obligation to perform the Early H5 Work is triggered) to design, permit and complete the Early H5 Work. Once the Early H5 Work is complete [**Note to City:** *see Key Terms for timing related to development of market-rate residential*], Developer will transfer the H5 Property per the H5 Transfer Agreement, and upon (i) the closing of the transfer of the H5 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City’s request to defer the closing as more specifically set forth in the Transfer Agreement, Developer will (a) receive an IHO credit in the same amount as the H5 Early Work CLF Amount,

and (b) be obligated to re-pay the H5 Early Work CLF Amount at Final COO of the office building that delivers the cumulative amount of 3,500,000 sf completed by Developer.

District Systems are anticipated to be made available to the H5 and H6 Properties, in which case those Properties would have the right to connect to the District Systems subject to any required regulatory requirements and supply agreements consistent with other residential development being supplied by the District Systems. The timing of delivery and commissioning of the District Systems may not be such that they are available to the H5 and H6 Properties at the time they are being constructed, and Developer makes no representations as to when and if they will be made available in any specific timeframe. In the event they are made available to one or both of the properties, then City may elect to connect at its sole cost and expense.

#### **B. On-Site Inclusionary Units.**

Developer shall provide on-site inclusionary units as part of the market rate residential development in the Project in compliance with this Section 3 and the IHO's "Mixed Compliance Option" as described herein and in the following applicable provisions of the IHO attached at Exhibit D5: [REDACTED].

1. Inclusionary Units. In fulfillment of its IHO obligations, Developer shall produce a minimum of 5% on-site inclusionary units at 100% AMI within the market rate buildings, subject to Developer's right to obtain approval for clustering, as set forth in Section III.B.1(d), below. Assuming a total of 3,400 Developer-constructed residential units across the Project, one hundred seventy (170) on-site inclusionary residential units within the Project Site would be provided as deed-restricted units that are limited to occupancy by households with incomes up to 100% of the AMI, as published annually by the City (hereafter "**Restricted Units**").

a. As a Community Benefit, Developer shall provide, within the first three-thousand four hundred (3,400) Developer-constructed residential units developed, an additional thirty (30) Restricted Units limited to occupancy by households with incomes up to 100% of AMI. The additional 30 units will be provided on a prorata basis with the required 5%, with the result that the market rate buildings are anticipated to contain 5.88% Restricted Units.

b. Each Restricted Unit shall be deed-restricted consistent with the City's standard affordable housing forms for occupancy by income qualified households for the term provided in the Inclusionary Housing Ordinance as of the Effective Date. [Note: City – please provide City's template of the deed restriction, including language related to the term of the restriction, so it can be attached to this Exhibit.]

c. The Restricted Units shall be integrated into market rate housing, in accordance with the dispersion requirements of Section [REDACTED] of the IHO, and shall not be concentrated in a single building, block, or geographic area of the Project. In the case of a project of ten (10) stories or more of mass timber (CLT) or Type 1 (concrete and steel) construction, the Restricted Units, may be dispersed through the lowest 50% of the building as measured by floor

(for example: in a 20 story building, the lowest 50% is floors 1-10; for any fraction, the floor count is rounded up, e.g., if the building is 19 stories, then units would be provided in floors 1-10 stories).

d. Notwithstanding the foregoing provisions of this Section III. B.1, the Director of PBCE may approve (i) a market rate building that clusters Restricted Units in a wing of a building or (ii) placing all of the units in another building (on the same parcel or otherwise in the vicinity of the applicable market rate building(s)) if Developer submits a proposal, approved by the City's Director of Housing, with a satisfactory explanation of clustering benefits through the Conformance Review Process.

e. The Restricted Units shall consist of a mix of unit sizes that is substantially the same as the mix of unit sizes in each respective building (i) in which the Restricted Units are integrated or, (ii) in the case of clustering or location of the Restricted Units in a separate building, with respect to which the Restricted Units are built. The Restricted Units shall have a comparable square footage and the same bedroom count and bedroom count ratio as the market rate units. The number of bedrooms in each unit and the average size of the units in each respective building shall be considered in determining whether the mix and size of Restricted Units is substantially the same as the overall mix and size of units in a building. Square footage will be considered comparable if the total average square footage of the Restricted Units is at least 85% of the total average square footage of the market rate units for each unit by bedroom type (for example, the average square footage for 1-bedroom Restricted Units must be at least 85% of the average square footage for 1-bedroom market rate units).

f. The quality of the exterior design of any building consisting entirely of Restricted Units and overall quality of construction of the Restricted Units must be consistent with the exterior design of comparable buildings containing market rate units. Restricted Units may have different interior finishes and features than the market rate units in the market rate building, as long as the finishes and features are functionally equivalent to the market rate units and are durable and of good quality. Functional equivalency includes the architectural style, detailing, and the quality of materials and the size of structures.

g. If Developer pursues and obtains a residential condominium map for any residential building but operates such building's residential units as rental housing, then the rental housing IHO section applies as described in Section III.B.1. At any such time that all or any portion of the mapped rental units become a for-sale unit, then the Restricted Units shall remain restricted, on a for-sale basis, at the same affordability levels. Existing tenants of the Restricted Units shall have first right of refusal to purchase their units and all subsequent sales of the Restricted Unit shall follow the City's IHO for-sale procedures. If the existing tenant does not exercise its first right of refusal, then the Developer shall make necessary relocation accommodations under [XXXX] of the [City/State] Relocation Law, whereupon the unit may be sold to a qualified buyer at the then-applicable sales price for 100% AMI buyers per the City's IHO for-sale procedures. A Restricted Unit shall remain subject to the applicable regulatory agreement for the full term of the applicable restrictions, and if such form of regulatory agreement changes due to the unit becoming a for-sale unit, then the amount of time as a rental Restricted Unit shall count against the for sale restricted term. [Note: Need to review City's regulatory agreement forms/provisions. City please provide.]



### C. IHO Fees

This Affordable Housing Program assumes compliance with the IHO's "Mixed Compliance Fee" provisions, such that so long as Developer restricts not less than 5.00% of the market rate units of a building as 100% AMI Restricted Units then, unless City has previously approved a lower percentage of 100% AMI units per Section III.B.1.(d) above, Developer shall be obligated to pay an IHO in-lieu fee of \$18.70 per rsf of each market rate residential unit and each Restricted Unit. All fees and credits under this Section II.C are in the amounts in effect in 2021 and shall escalate in lockstep based on the City's methodology for escalating the IHO Fee which is based on the change in the Engineering News Record (ENR) Construction Cost Index for the San Francisco Urban area published by McGraw Hill on January 1 of every year, or its successor publication per the Mixed Compliance Option of the IHO code ("**Annual Increases**"). Pursuant to Schedule D-4, IHO Fee Credits are earned at time of Closing or, if the City exercises its option(s) described in Section 6(a) above to extend the Closing Date, then such credits shall be earned on the date on which the Closing would have occurred but for the City's exercise of its Extension right(s).

1. IHO Fee Rate. The Mixed Compliance Fee provision requires 5% on-site inclusionary units at 100% AMI and payment of the in-lieu fee of \$18.70 per rentable square foot for all units. Therefore, if Developer does not provide such 5% on-site inclusionary units, then the "In-Lieu Fee" option under the IHO applies at the rate of \$43.00 per rentable square foot of residential development in the market rate building, unless City has previously agreed to a lower percentage of 100% AMI units pursuant to clustering (described above in Section III.B.1.(d)) in which case the \$18.70 fee shall apply. See Section B On-site Inclusionary Units for discussion of Community Benefits units at 100% AMI, an additional 0.88% will be provided at that time of the 5% on-site inclusionary (subject to clustering in Section III.B.1(d)). Should the Developer propose a condominium, for-sale project, then the applicable in-lieu fee rate applies which is \$25/rsf, subject to applicable fee increases per IHO Code.

2. Land Dedication (H1 Property) - IHO Fee Credit. Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H1 Property to the City (or Designee) against any IHO Fees owed or that may come due, which credit shall accrue to Developer's benefit at the earlier of (i) the closing of the transfer of the H1 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City's request to defer the closing as more specifically set forth in the Transfer Agreement. As of the Effective Date, the value of the credit for the H1 Property is \$22,034,898. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$22,034,898 at \$18.70/rsf equals 1,179,337 sf of credit for residential rsf (including market rate and 100% AMI units).]

3. Land Dedication (H5 Property) - IHO Fee Credit. Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H5 Property to the City (or Designee) against any IHO Fees owed or that may come due, which credit shall accrue to Developer's benefit at the earlier of (i) the closing of the transfer of the H5 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City's request to defer the closing as more specifically set forth in the Transfer



Agreement. As of the Effective Date, the value of the credit for the H5 Property is \$9,226,561. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$9,226,561 at \$18.70/rsf equals 493,399 sf of credit for residential rentable sf (including market rate and 100% AMI units).]

4. Land Dedication (H6 Property) - IHO Fee Credit. Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H6 Property to the City (or its Designee) against any IHO Fees owed or that may come due, which credit shall accrue to Developer's benefit at the earlier of (i) the closing of the transfer of the H6 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City's request to defer the closing as more specifically set forth in the Transfer Agreement. As of the Effective Date, the value of the credit for the H6 Property is \$10,079,062. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$10,079,062 at \$18.70/rsf equals 538,987 sf of credit for residential rentable sf (including market rate and 100% AMI units).]

5. Land Dedication - IHO Fee Credit.

The table below provides an illustrative summary of how the Project proposes to satisfy and exceed the IHO Fee requirements by means of land dedication and payments, as set forth above in this Affordable Housing Program, assuming development of 3,400 residential units.

This table is provided for illustrative purposes only and the dollar amounts included in the table are approximate numbers based on the assumptions described in this Section C.5, all of which may change as development proceeds based on the actual development program.	
Affordable Land Dedication	IHO Credits
H1	\$22M
H5	\$9.2M
H6	\$10.1M
<b>Total Credits</b>	<b>\$41.3M</b>

The table above illustrates potential IHO Fee Credits (in 2021 dollars) on 3,400 Developer-constructed residential units. If Developer is developing for-sale units, then the applicable fee is \$25/rsf. For any residential units in excess of 3,400, Developer will satisfy its obligations under the IHO through the Mixed Compliance Option, whereby 5% of the units are on-site inclusionary affordable units and in-lieu fee payment of \$18.70/rsf is made, including as set forth in Section 6 below. If Developer does not provide such 5% on-site inclusionary units, then the "In-Lieu Fee" option under the IHO applies at the rate of \$43.00 per rentable square foot of residential development in the market rate building, unless City has previously agreed to a lower percentage of 100% AMI units pursuant to clustering (described above in Section III.B.1(d)) in which case the \$18.70 rsf fee shall apply.

6. Unavailability or Insufficient Amount of IHO Fee Credits. If Developer has (i) not accrued any IHO Fee credits or (ii) exhausted all the credit attributable to the dedication of H1, H5 and H6, then Developer shall pay IHO Fees in the amount of (a) \$18.70 per rsf for each residential unit (in addition to providing 5% on-site inclusionary units at 100% AMI) or (b) \$43.00 per rsf if Developer does not provide the 5% on-site inclusionary units.

7. Excess IHO Fee Credits. If there are excess IHO Fee credits at the end of the Term, then Developer would have the right to monetize the excess IHO Fee credits by selling them to other developers needing credits to satisfy their inclusionary housing obligations provided that Developer's sale(s) of any such excess IHO Fee credits must close and be utilized as part of an approved Affordable Housing Compliance Plan, so long as the City does not unreasonably withhold approval of the Affordable Housing Compliance Plan, within five (5) years after the expiration or termination of the Term.

#### **D. Process; Tracking and Reporting of Developer's Compliance**

1. Data Chart with Application. Developer's obligations in this Affordable Housing Program are subject to Developer proceeding with development, and such obligations shall be satisfied pro-rata on a building-by-building basis, as and when development proceeds, in accordance with this Affordable Housing Program and the other applicable provisions of the Development Agreement. As such, in order to track Developer's compliance with the Affordable Housing Program, Developer shall submit a data chart with each Vertical Conformance Review Application that contains information addressing the following: the total rentable square footage of residential development proposed as part of each Vertical Conformance Review Application, including the number of market rate units and below-market rate units, including applicable AMI percentage; the location of the market rate units and below-market rate units; number of units broken down by unit type (e.g., studio, one bedroom); the leasing and marketing plan for below-market rate units and a description of the access to amenities and the types of fixtures for the market rate units and the below-market rate units, consistent with the guidelines in Sections III.B.1(e) and (f) above. The Affordable Housing Program information required to be submitted with each Vertical Conformance Review Application is further described in the Downtown West Conformance Review Implementation Guide.

2. Notices Regarding the H1, H5 and H6 Properties. Developer will provide City with advance notice of the anticipated closing date for dedication of each of the H1, H5 and H6 Properties per the terms of the respective Transfer Agreement. Developer will also include in the Conformance Review checklist a requirement that the Planning Department notify the Housing Department of Developer's application submittal in order to provide the Housing Department's production division with notice of the initiation of the Early H6 Work and Early H5 Work, as applicable. Developer will also notify the City after a ground lease with, or transfer to, Lendlease or a Lendlease Affiliate has been executed/has occurred for the first residential building.

3. Affordability Restrictions. As a condition precedent to the City's issuance of a Building Permit for development of a residential building in which any inclusionary units are to be constructed, Developer shall record the affordability restrictions attached hereto as Schedule C (the "**Affordability Restrictions**") against the real property on which any Restricted Unit is to be constructed. The term of the Affordability Restrictions for rental units shall be per the IHO.

The Affordability Restrictions shall provide that, upon Developer's or owner's written request at any time following expiration, the City shall provide a release of the Affordability Restrictions in a form reasonably acceptable to the owner within thirty (30) days after such request.

#### **IV. Other Fees and Fee Credits.**

##### **A. Commercial Linkage Fee Provisions.**

1. Payment of CLF. Subject to Section III.A above regarding the Early H5 Work and the Early H6 Work, Developer shall pay the CLF in accordance with the adopted Commercial Linkage Fee Ordinance in effect on the Effective Date of the Development Agreement (a copy of the CLF is attached to the Development Agreement at Exhibit Q, subject to Annual Increases as described in the Commercial Linkage Fee Ordinance.

2. Allocation of CLF. Subject to annual appropriation and compliance with applicable laws, the City shall make Good Faith Efforts to allocate Developer-paid CLF to support the development of affordable housing on land that Developer dedicates for such purpose. Provided, however, if the City demonstrates the commitment of other funding sources for those dedicated parcels, then Developer-paid CLF shall be used to support affordable housing production within the DSAP's Boundaries. Good Faith Efforts include (i) the City's Housing Department making recommendations to the Mayor and City Council to provide any necessary annual budgetary approvals or authorizations that would allow such allocation of the Developer-paid CLF Fees, and (ii) an agreement to commence pre-development activity with respect to one or more Developer-dedicated properties previously transferred to City or for which Developer has satisfied all conditions precedent to City closing, promptly following Developer's submittal of (x) an office building construction permit application that contains information about the total square footage of such building, and (y) information to the City regarding the expected timing of payment of the CLF for such office building (Final Certificate of Occupancy of office building). Such pre-development activity would include identifying potential qualified, experienced affordable housing developers for the Developer-dedicated affordable housing site or sites and identifying a pre-development loan with anticipation of CLF funding for the additional gap loan required. The City's agreement to allocate CLF generated from development within the Project Site to the Developer-dedicated properties shall not constitute use of City's funds to assist Developer since such funds will be used to accelerate production of affordable housing on the Developer-dedicated properties following their transfer to the City. Nothing in this program shall preclude the City from providing financial assistance for additional affordable housing units beyond those required by this Agreement. If no sites have been provided by Developer, or all the sites provided to date have been developed and/or have begun construction, and/or the City has achieved the 25% affordable housing goal in DSAP, then City shall prioritize the use of any CLF generated from development in the Project Site to affordable projects Citywide.

**B. Community Stabilization Fund.** Office Development in the Project Site will result in contributions to the Fund that the City can then make available to housing stabilization efforts, all as more specifically described in Exhibit H (Community Stabilization and Opportunity Pathways Fund) to the Development Agreement.

## V. **DISC Adjustments**

[**Note**: refer to DISC language Section in DA.]

## VI. **Definitions**

1. **"Area Median Income" or "AMI"** means the annual median income for Santa Clara County, adjusted for household size, as published periodically in the California Code of Regulations, Title 25, Section 6932, or its successor provision, or as established by the City of San José in the event that such median income figures are no longer published periodically in the California Code of Regulations.

2. **"Commercial Linkage Fee" or "CLF"** means the commercial linkage fee adopted by the City Council as set forth in Chapter 5.11 of Title 5 of the San José Municipal Code in effect on the Effective Date of this Development Agreement.

3. **"Fund"** means the Community Stabilization and Opportunity Pathways Fund described in Exhibit H to the Development Agreement.

4. **"H1 Property"** means that property as generally shown on Schedule A attached to this Affordable Housing Plan.

5. **"H5 Property"** means that property as generally shown on Schedule A attached to this Affordable Housing Plan.

6. **"H6 Property"** means that property as generally shown on Schedule A attached to this Affordable Housing Plan.

7. **"Inclusionary Housing Ordinance" or "IHO"** means the City of San José Inclusionary Housing Ordinance as set forth in Chapter 5.08 of Title 5 of the San José Municipal Code, adopted by Ordinance No. \_\_\_\_\_, dated \_\_\_\_\_ 2021, a copy of which is attached hereto at Exhibit \_\_\_\_.

### **Schedule D4 to Affordable Housing Program**

## **Terms for Transfer of Parcels H1, H5 and H6 Pursuant to Transfer Agreements between Developer and City or City's Designated Affordable Housing Developer**

### **Land Dedication – Key Terms of Transfer Agreements for Parcels H1, H5 and H6**

#### **A. Land Dedication.**

Developer shall dedicate the H1, H5 and H6 Properties, consisting of a total of approximately 2.15 acres of real property, to the City or the City's designated affordable housing developer ("Designee") pursuant to separate Transfer Agreements between Developer and the City. Below are the key terms to be included in the respective Transfer Agreements.

#### **B. H1 Property.**

1. **Transfer Agreement:** Concurrently with entering into the Development Agreement, Developer and City shall enter into a separate Transfer Agreement for the transfer of the H1 Property to City in accordance with the terms and conditions set forth below and the terms and conditions of **Attachment A** attached hereto and incorporated herein (the "**H1 Transfer Agreement**"). The H1 Transfer Agreement will not be attached to the Development Agreement as an Exhibit. Any initially capitalized term used but not defined herein shall have the meaning given it in **Attachment A**.

2. **Legal Description of H1:** The indicative site plan of the property to be transferred shall be set forth in the H1 Transfer Agreement, and legal description to be provided prior to the Closing Date (as defined below) in accordance with Developer's Final Map or after the Closing Date, if mutually agreed upon with the City.

3. **Leases:** It shall be a condition to the closing under the H1 Transfer Agreement, for City's benefit, that Developer shall transfer the H1 Property unencumbered by and free of any leases, unless City otherwise waives such condition in writing.

a. **Ongoing Property Condition:** During the escrow period, Developer may record documents in connection with the Approvals. Following the closing, City or its Designee shall be responsible to keep the H1 Property in good, clean and safe condition. In connection therewith, City or Designees, as applicable, shall be responsible to maintain attractive fencing, and to provide for adequate lighting and security prior to and during development and construction of the H1 Property. This requirement shall also be set forth as a restriction in the Grant Deed for the H1 Property, which deed restriction shall run with the land of the H1 Property.

b. **Construction Right of Entry:** Effective as of the closing, City shall grant Developer such construction right of entry as may be reasonably necessary for the construction of Developer's overall project, provided that such rights of entry do not materially interfere with City's development and use of the H1 Property.

c. **Remediation Easement:** Effective as of the closing, City shall grant Developer such remediation easements, licenses or access agreements as are necessary for Developer to implement any Groundwater Work as provided in **Attachment A**, subject to the terms and limitations set forth in **Attachment A** provided the work does not prevent the City from building a building from property line to property line and that the access does not interfere with the VIMS system.

4. **Closing Date:** The closing under the H1 Transfer Agreement shall occur on a date selected by Developer on at least sixty (60) days' prior written notice to City ("**Closing Date**"). Subject to satisfaction of the closing conditions, the H1 Closing Date is anticipated to occur after the H5 Property and the H6 Property have been transferred to the City and on or before issuance of a Final Certificate of Occupancy for the Developer's first residential unit after all existing IHO Fee Credits have been exhausted.

5. **Due Diligence:**

a. **Access:** City shall be entitled to the right of access to the H1 Property to conduct its due diligence on the terms and conditions set forth in the H1 Transfer Agreement. City shall complete its due diligence within ninety (90) days after execution of the Transfer Agreement ("**Diligence Period**"). Subject to the terms and conditions of the H1 Transfer Agreement (including but not limited to Developer's approval rights and coordination with Developer's contractors, as set forth therein), such due diligence shall include site inspections only, given Developer's obligations as set forth in **Attachment A**.

b. **Title:** City shall review and approve title to the Property during the Diligence Period. Developer shall provide City with a then current title report for the H1 Property on or before execution of the Transfer Agreement.

6. **Conditions to Closing:**

a. **City Conditions:** In addition to the closing conditions specifically set forth in Sections B.3 above and **Attachment A**, the following shall be conditions to the closing under the H1 Transfer Agreement, for City's benefit: (i) the title company shall have committed to issue to City a title insurance policy subject only to the permitted exceptions (to be more particularly defined in the H1 Transfer Agreement but which shall include any exceptions recorded in connection with obtaining the Approvals or required in order to satisfy the Approvals, as well as any exceptions recorded in connection with the development pursuant to the Approvals consistent with the Approvals); and (ii) Developer shall not be in default under the H1 Transfer Agreement beyond any applicable notice and cure period.

The City's ability to secure funds or other commitments to enable the construction of affordable housing on the H1 Property shall not be a condition to closing; provided, however, that the City shall have the right to extend ("**Extension**") the Closing Date two (2) times for periods of one hundred eighty (180) days each (each, an "**Extension Period**", the first such extension of the Closing Date being the "**Extended Closing Date**" and the second such extension of the Closing Date being the "**Outside H1 Closing Date**") if the City has not identified the Designee by the scheduled Closing Date or Extended Closing Date, as applicable, by providing Developer

with written notice of the exercise of the extension together with a status report of City's efforts to identify the Designee together with documentation evidencing City's Good Faith Efforts to identify and select the Designee. If the City has identified the Designee by the Extended Closing Date, or has extended closing a second time, then by the Outside H1 Closing Date, the Grant Deed shall identify the Designee as the transferee/grantee of the H1 Property. If City has not identified and selected the Designee by the Extended Closing Date or Outside H1 Closing Date, as applicable, then there will be no further extensions of the closing and City shall take title to the H1 Property in City's name or be in default of the H1 Transfer Agreement. In addition, if, as set forth in the H1 Transfer Agreement, City elects to defer the transfer of title of H1 Property to City (or its Designee) to the Extended Closing Period or Outside H1 Closing Date, as applicable, then the City shall reimburse Developer for property taxes payable with respect to such Property during the deferral period and Developer's costs to light, fence, insure, and maintain the property in a clean and safe manner during the deferral period within thirty (30) days after receipt of Developer's request. IHO Fee Credits are earned at time of closing, or, if the City exercises its option(s) described in this section to extend the Closing Date, then such credits shall be earned on the date on which the closing would have occurred but for the City exercise of its Extension right(s). Developer shall provide the City with reasonable documentation of such taxes and costs.

b. Developer Conditions: In addition to the closing conditions specifically set forth in **Attachment A**, the following shall be conditions to the closing under the H1 Transfer Agreement, for Developer's benefit: (i) the City shall not be in default under the H1 Transfer Agreement beyond any applicable notice and cure period, and (ii) Developer is obligated to transfer the H1 Property in order to satisfy its affordable housing requirements equal to the value of the IHO fee credit for the H1 Property (i.e., see Section B.8) as a result of the amount of market rate units being developed.

c. Pad-Ready Condition. Provided that the conditions set forth in **Attachment A** are satisfied, Developer shall cause the H1 Property to be delivered at closing in rough-graded, pad-ready condition for City's affordable housing development, based on the scope included as an exhibit to the H1 Transfer Agreement.

d. Assignment: Following the closing, City may assign its rights and obligations under **Attachment A** that expressly survive the closing to a developer of affordable housing.

8. IHO Fee Credits: As of the Effective Date, the amount of the IHO fee credit for the H1 Property shall be \$22,034,898 (the "**H1 Transfer IHO Fee Credits**"). \$22,034,898 IHO Fee Credit at \$18.70/rsf equals 1,178,337 sf of credit for market rate rentable sf (including 100% AMI units). IHO Fee Credits are earned at time of closing or, if the City exercises its option(s) described in Section 6(a) above to extend the Closing Date, then such credits shall be earned on the date on which the closing would have occurred but for the City's exercise of its Extension right(s).

9. No Assignment: Except as set forth in Section B.7(d) above, City may not assign its rights or obligations under the H1 Transfer Agreement. As more specifically set forth in Section



6(a), above, the City may identify a Designee to take title to the H1 Property at closing and in such event, Developer shall provide for the H1 Property to be deeded to the Designee at closing.

10. **Purchase Price:** The purchase price for the H1 Property shall be \$1.00. Closing costs shall be split per local custom. If there are any closing costs charged as a result of the H1 Property being transferred directly to the Designee (e.g., documentary transfer tax or recording fees, where there would otherwise be none if the H1 Property was deeded directly to City), then City or the Designee shall be responsible for such closing costs. Additionally, in such event, such closing costs shall be determined based on the market rate for the H1 Property (to be mutually agreed upon in the H1 Transfer Agreement), notwithstanding that the purchase price for the H1 Property is \$1.00.

11. **AS IS Sale:** Except for the environmental obligations as set forth in **Attachment A** that expressly survive the closing, at the closing, Developer shall transfer the H1 Property to City or Designee, as applicable, in its AS IS, WHERE IS condition and City and Designee shall waive and release all claims against Developer related to the physical and environmental condition of the H1 Property. City shall bear all construction costs related to the affordable housing project on the H1 Property.

12. **Default:**

a. **Default by City:** If City defaults under the H1 Transfer Agreement and fails to close, Developer shall have the right to terminate the H1 Transfer Agreement, and in such event, City shall continue to recognize the H1 Transfer IHO Fee Credits that Developer would have received if the H1 Agreement not been terminated due to City's default.

b. **Default by Developer:** If Developer defaults under the H1 Transfer Agreement and fails to perform the obligations thereunder, City's sole and exclusive remedy shall be to terminate the H1 Transfer Agreement, and Developer shall reimburse City for City's reasonable out-of-pocket costs and expenses in connection with its due diligence in which case Developer would not receive any H1 Transfer IHO Fee Credits and Developer shall satisfy its IHO obligations by identifying a site or sites in the DSAP which can accommodate at least 300 affordable units as anticipated on the H1 Property, or Developer pays 150% of the IHO fees due or at mutual agreement of the Developer and City, Developer works with the City to maintain yield by condominium-izing a portion of a high rise residential project for affordable housing.

C. **H5 and H6 Properties.** The H5 and H6 Properties will be transferred separately to the City. Developer anticipates that it will transfer the H6 Property first. Prior to such transfers, Developer will perform the Early H5 and H6 Work, as more specifically described in Section III.A of Exhibit D to the Development Agreement (the “**Early H5 and H6 Work**”), in order to help accelerate the development of affordable housing on the H5 and H6 Properties. Developer will retain ownership of the mid-block crossing between the H5 and H6 Properties and shall provide to City a construction easement over the mid-block crossing for the time period covering construction on the H5 Property, H6 Property, or combination thereof, plus an additional six (6) months after the issuance of the last Temporary Certificate of Occupancy for a building on the H5 and H6 Properties.

1. Transfer Agreement: Concurrently with entering into the Development Agreement, Developer and City shall enter into separate Transfer Agreements for the transfer of the H5 Property and the H6 Property, respectively, to City in accordance with the terms and conditions set forth below and the terms and conditions of the Early H5 and H6 Work (individually the "**H5 Transfer Agreement**" and the "**H6 Transfer Agreement**" and sometimes collectively the "**H5 and H6 Transfer Agreements**"). The H5 Transfer Agreement and the H6 Transfer Agreement will not be attached to the Development Agreement as Exhibit(s).

2. Legal Description of H5 and H6: An indicative site plan of the H5 Property and the H6 Property (collectively, the "**H5 and H6 Properties**") will be attached to the H5 and H6 Transfer Agreements, with legal descriptions to be provided prior to the Closing Date. As set forth in Section C.2.a below, the legal descriptions may be modified prior to the Closing Date for each property in accordance with Developer's Final Map or after the Closing Date, if mutually agreed upon with the City.

a. Parcelization Condition: City acknowledges that the H5 and H6 Properties are not legal parcels as of the Effective Date. It shall be an unwaivable condition to the closing, for Developer's and City's benefit, that the H5 and H6 Properties shall be legal parcels for conveyance prior to the closing which legal separation shall be accomplished at Developer's cost.

b. Early H5 and H6 Work: Developer shall perform the Early H5 and H6 Work using the Early Work CLF Amount (as such term is defined in Section III.A. of Exhibit D to the Development Agreement) prior to the respective closings of the transfers of the H6 Property and the H5 Property.. The description of the Early H5 and H6 Work, will be included as an exhibit to the H5 and H6 Transfer Agreements, respectively.

c. Construction of Private Street. Developer shall construct a private street serving the H block parcels, including the H5 and H6 Properties as part of the Early H5 Work. The City shall give notice to the Developer not later than twelve (12) months prior to the City's anticipated date of receiving a temporary certificate of occupancy ("**TCO**") for the H6 Property (the "**TCO Notice**") so that vacating the private street area, in two phases, can commence. The Developer will construct the private street in two phases - the north-south portion off Auzerais Avenue and the east-west portion off Royal Avenue. Within a commercially reasonable time of providing the TCO Notice to Developer (not to exceed 3 months), the City shall vacate all construction equipment from the north-south portion of the Private Street in order to allow Developer to construct that portion of the street, including associated sidewalk and streetscape fronting the H6 & H5 Parcels. During this period, City or its Designee may obtain access to the H6 parcel for construction purposes from the Los Gatos Creek connector on the west side of H6. On completion of the north-south portion of the Private Street, the Developer will give notice to the City that it is complete and available for access and use. The east-west portion of the Private Street off Royal Avenue will be completed by TCO of the earlier of H3 and H4. The sidewalk adjacent H4 will be completed by TCO of H4. Details on this work will be included as an exhibit to each of the H5 and H6 Transfer Agreements.

3. Leases: It shall be a condition to the closing under each of the H5 and H6 Transfer Agreements, for City's benefit, that Developer shall transfer the H5 and H6 Properties unencumbered by and free of any leases, unless City otherwise waives such condition in writing.

4. Closing Date: The closing under the H6 Transfer Agreement shall occur following Completion of the Early H6 Work, on a date selected by Developer on at least [sixty (60)] days' prior written notice to City ("**H6 Closing Date**"). The closing under the H5 Transfer Agreement shall occur following Completion of the Early H5 Work, on a date selected by Developer on at least [sixty (60)] days' prior written notice to City ("**H5 Closing Date**"). As used in this Section 4, "**Completion**" shall mean that the H5 or H6 Early Work, as applicable, has been completed in accordance with the building permit(s) issued with respect to such work and the City Building Division has completed its final inspection of the work.

a. Ongoing Property Condition: During the escrow period, Developer may record documents in connection with the Approvals. Following each closing, City or its Designee shall be responsible to keep the H5 and H6 Properties in good, clean and safe condition. In connection therewith, City or Designee shall be responsible to maintain attractive fencing and to provide for adequate lighting and security prior to and during development and construction of the H5 and H6 Properties. This requirement shall also be set forth as a restriction in the Grant Deed(s) for the H5 and H6 Properties, which deed restriction shall run with the land of each of the H5 and H6 Properties.

b. Construction Right of Entry: Effective as of the closing, City shall grant Developer such construction rights of entry as may be reasonably necessary for the construction of Developer's overall project, provided that such rights of entry do not materially interfere with City's development and use of the H5 and H6 Properties. In addition, the H5 and H6 Transfer Agreements shall contain provisions whereby the City (or its Designee) and the Developer agree to coordinate construction activities and schedules to ensure timely construction of the private road, as more specifically described in Section C.2(c) above required for mutual benefit of the H5 Property, the H6 Property and the other H block market rate residential parcels, and such provisions shall survive the closing or may be in form of an easement or other agreement.

5. Due Diligence:

a. Access: City shall be entitled to the right of access to the H5 and H6 Properties to conduct its due diligence on the terms and conditions set forth in the Access Agreements. City shall complete its due diligence within ninety (90) days after execution of the applicable Transfer Agreement ("**Diligence Period**"). Subject to the terms and conditions of the Transfer Agreements (including but not limited to Developer's approval rights and coordination with Developer's contractors, as set forth therein), such due diligence may include site testing, including but not limited to testing related to environmental conditions and mitigation or remediation requirements for use of the property for residential purposes.

b. Title: City shall review and approve title to the Property during the Diligence Period. Developer shall provide City with a then current title report for the H5 and H6 Properties on or before execution of the Transfer Agreement for each property.

6. Conditions to Closing:

a. City Conditions: In addition to the closing conditions specifically set forth in Sections C.2(a) and C.3(a) above, the following shall be conditions to the closing under the H5 and H6 Transfer Agreements, for City's benefit: (i) the title company shall have committed to issue to City a title insurance policy subject only to the permitted exceptions (to be more particularly defined in the H5 and H6 Transfer Agreements but which shall include any exceptions recorded in connection with obtaining the Approvals or required in order to satisfy the Approvals, as well as any exceptions recorded in connection with the development pursuant to the Approvals and consistent with the Approvals); (ii) Developer shall not be in default under the respective H5 and H6 Transfer Agreements beyond any applicable notice and cure period; (iii) there shall have been no material adverse change in the environmental condition of the H5 Property or the H6 Property since the date of the H5 Transfer Agreement and the H6 Transfer Agreement, respectively; and (iv) all historical restrictions related to the existing building(s) located on the larger parcel of which the H5 Property and H6 Property are currently a part shall be terminated with respect to the H5 Property and the H6 Property. [Note: early work as condition to closing already covered in the reference to C.2 and C3 above.].

City shall have no right to terminate the H5 Transfer Agreement or the H6 Transfer Agreement if City is unable to secure funds or other commitments to enable the construction of affordable housing on either or both of the H5 Property or the H6 Property; provided, however, that City shall have the right to extend (“**Extension**”) the closing under each of the H5 Transfer Agreement and the H6 Transfer Agreement, respectively, two (2) times for periods of one hundred eighty (180) days each (each, an “**Extension Period**”, the first such extension of the Closing Date being the “**Extended Closing Date**” and the second such extension of the Closing Date being the “**Outside H5/H6 Closing Date**”) if the City has not identified the City’s Designee by the scheduled Closing Date or Extended Closing Date, as applicable, for that property by providing Developer with written notice of the exercise of the extension with the status of City’s efforts to identify the Designee together with documentation evidencing City’s Good Faith Efforts to identify and select the Designee. If the City has identified the Designee by the Extended Closing Date (or has extended a second time, then by the Outside H5/H6 Closing Date, as applicable) the Grant Deed shall identify the Designee as the transferee/grantee of the H5 Property or H6 Property, as applicable. If City has not identified and selected the Designee by the Extended Closing Date or Outside H5/H6 Closing Date, as applicable, then there will be no further extensions of the closing and City shall take title the H5 Property or the H6 Property, as applicable, in City’s name or be in default of the H5 Transfer Agreement or the H6 Transfer Agreement, as applicable. In addition, if, as set forth in the H5 Transfer Agreement or the H6 Transfer Agreement, City elects to defer the transfer of title of the H5 Property or the H6 Property from Developer to City (or its Designee), then the City shall reimburse Developer for property taxes payable with respect to such Property(ies) during the deferral period and Developer’s costs to light, fence, insure, and maintain the subject property in a clean and safe manner during the deferral period within thirty (30) days after receipt of Developer’s request. Developer shall provide the City with reasonable documentation of such taxes and costs. IHO Fee Credits are earned at time of closing, or, if the City exercises its option(s) in this section to extend the Closing Date, then

such credits shall be earned on the date on which the closing would have occurred but for the City exercise of its Extension right(s).

b. Developer Conditions: In addition to the closing condition specifically set forth in Section C.2(a) above, the following shall be a condition to the closing under the H5 and H6 Transfer Agreements, for Developer's benefit: City shall not be in default under the H5 and H6 Transfer Agreements beyond any applicable notice and cure period.

7. Environmental:

a. Environmental Indemnity: If the H5 Property and/or the H6 Property is transferred to the City or Designee, as applicable, Developer shall indemnify, defend, and hold harmless City and City Indemnitees against any and all third party actions or claims for death or personal injury to the extent such actions or claims are caused by exposure to environmental contamination existing at the H5 Property under the H5 Transfer Agreement and the H6 Property under the H6 Transfer Agreement which exposure occurred prior to the closing date of that property and such actions or claims first accrued prior to the Closing Date for that property, which indemnity and defense obligation of Developer shall survive the transfer of the H5 Property or H6 Property to City, as applicable. Notwithstanding the foregoing, in no event shall such indemnity and defense obligation of Developer apply to any actions or claims that arise from the negligence or willful misconduct of City or Designee.

b. Assignment: Following the closing of the H5 Property and/or H6 Property, as applicable, City may assign its rights and obligations under this Section C.7 that expressly survive the closing to a developer of affordable housing.

8. IHO Fee Credits: As of the Effective Date, the amount of the IHO fee credit for the H5 Property shall be \$9,226,561 (the "**H5 Transfer IHO Fee Credits**"). \$9,226,561 IHO Fee Credit at \$18.70/rsf equals 493,399 sf of credit for market rate rentable sf (including 100% AMI units). As of the Effective Date, the amount of the IHO fee credit for the H6 Property shall be \$10,582,222 (the "**H6 Transfer IHO Fee Credits**"). \$10,079,062. IHO Fee Credit at \$18.70/rsf equals 538,987 sf of credit for market rate rentable sf (including 100% AMI units). IHO Fee Credits are earned at time of closing, or, if the City exercises its option(s) described in Section C.6.a above to extend the Closing Date, then such credits shall be earned on the date on which the closing would have occurred but for the City exercise of its Extension right(s).

9. No Assignment: Except as set forth in Section C.7(b) above, City may not assign its rights or obligations under the H5 and H6 Transfer Agreements. As more specifically set forth in Section C.6(a), above, the City may identify a Designee to take title to the H5 or H6 Property at closing and in such event, Developer shall provide for the H5 Property or H6 Property, as applicable, to be deeded to the Designee at closing.

10. Purchase Price: The purchase price for the H5 Property and for the H6 Property shall be \$1.00 per property. Closing costs shall be split per local custom. If there are any closing

costs charged as a result of the H5 Property and/or H6 Property being transferred directly to the applicable Designee (e.g., documentary transfer tax or recording fees, where there would otherwise be none if the subject property was deeded directly to City), then City or the applicable Designee shall be responsible for such closing costs. Additionally, in such event, such closing costs shall be determined based on the market rate for the H5 Property or H6 Property, as applicable (to be mutually agreed upon in the H5 Transfer Agreement or the H6 Transfer Agreement, as applicable), notwithstanding that the purchase price for the H5 Property and H6 Property is \$1.00.

11. AS IS Sale: Except for the Developer's obligations as set forth in Section C.2(b) above and C.7(a) above, at the closing of each of the H5 Property and the H6 Property, Developer shall transfer the H5 Property and the H6 Property to City each in its AS IS WHERE IS condition and City shall waive and release all claims against Developer related to the physical and environmental condition of the property so conveyed. City shall bear all construction costs related to the affordable housing project on the H5 Property and the H6 Property.

12. Default:

a. Default by City: If City defaults under either the H5 Transfer Agreement or the H6 Transfer Agreement and fails to close, Developer shall have the right to terminate the H5 Transfer Agreement and/or H6 Transfer Agreement, as applicable, and in such event, City shall continue to recognize the affordable housing credits Developer would have received as a result of the transfer of the H5 Property, the H6 Property or both (as applicable) to City but for the termination of the respective H5 Transfer Agreement, H6 Agreement or both due to City's default.

b. Default by Developer: If Developer defaults under either the H5 Transfer Agreement, the H6 Transfer Agreement or both, as applicable and the transfers to the City of such properties fails to close accordingly, City's sole and exclusive remedy shall be to terminate the respective H5 Transfer Agreement and or H6 Transfer Agreement, as applicable, and Developer shall reimburse City for City's reasonable out-of-pocket costs and expenses in connection with its due diligence, in which case Developer would not receive any IHO Fee Credits with respect to the H5 Property or H6 Property, as applicable, and would therefore satisfy its IHO obligations by identifying a site or sites in the DSAP which can accommodate at least (a) 120 affordable units in the case of H5 Property, and (b) 180 affordable units in the case of the H6 Property, or Developer pays 150% of the IHO fees due for applicable property, or at mutual agreement of the Developer and City, Developer works with the City to maintain yield by condominium-izing a portion of a high rise residential project for affordable housing.

## **ATTACHMENT A TO H1 TRANSFER PROVISIONS**

The following sets forth the terms regarding the City's acceptance of the H-1 Property:

1. Developer will retain an outside environmental consultant ("**Developer's Environmental Consultant**") with suitable experience in reviewing and overseeing the remediation work to be undertaken on the H1 Property. Developer will contract with this consultant and be solely responsible for the work of this consultant.
2. Developer will seek approval of a new Remedial Action Plan ("**RAP**") from the Department of Environmental Health or other environmental regulatory agency(ies) with jurisdiction that Developer may be referred to by the Department of Environmental Health ("**DEH**") to address the volatile organic compounds ("**VOCs**") and any other contaminants of concern to the DEH ("**COCs**") currently present in soil, soil vapor and groundwater at the H1 Property ("**Environmental Conditions**"), including, but not limited to, those which are the subject of open Geotracker case FORMER TRUE DRIVE-IN CLEANERS (T10000011874).
3. The RAP will be designed to address the Environmental Conditions to allow construction of a concrete foundation structure without an occupiable basement on the entirety of the H1 Property, with a passive vapor intrusion mitigation system integrated into the foundation system which has the capability of being activated, if needed ("**VIMS**") (collectively, the "**Intended Design**") with the ground floor limited to parking and/or commercial uses and/or resident support/offices/community space only and with residential uses allowed only on the second floor and above (the "**Intended Use**"). The H1 Property will be restricted to the Intended Design and Intended Use in the Land Use Covenant and/or Grant Deed to the H1 Property.
4. The RAP will provide that Developer will excavate and dispose of VOCs and COCs impacted soil, to the extent required by DEH for the Intended Design and the Intended Use, at an appropriate disposal facility ("**Soil Removal Work**"). The RAP will also include remedial actions to be implemented by Developer to address DEH requirements for the groundwater ("**Groundwater Work**"). The RAP will be designed to meet all applicable environmental regulatory requirements to allow for the Intended Use in combination with the Intended Design. Any ongoing work of Developer (after the site is transferred to the City) shall not interfere with the City's planned building and shall be accessed from outside the property line and not disturb the vapor barrier or the other elements of the VIMS. The RAP will also provide that the City or its Designee that builds the building on the H1 Property will install, maintain and monitor the passive VIMS (with the ability to convert to an active VIMS through the addition of a fan or motor and shall activate it if and when required by DEH)(collectively, "**VIMS OMM**").



5. Developer will be responsible for implementing at its cost the Soil Removal Work in a commercially reasonable manner and timeframe, subject to the Catastrophic Cost Increase provisions below. If the costs of implementing the Soil Removal Work are equal to or greater than Six Million One Hundred Twenty-Nine Thousand Three Hundred Sixty-Three Dollars (\$6,129,363) (such amount being a “**Catastrophic Cap**” and such event being a “**Catastrophic Cost Increase**”), then, Developer may decide not to transfer the H1 Property to City. If a Catastrophic Cost Increase occurs, then Developer shall not be in default and Developer shall satisfy its IHO obligations by identifying a site or sites in the DSAP which can accommodate at least 300 affordable units as anticipated on the H1 Property, or Developer pays 150% of the IHO fees due or at mutual agreement of the Developer and City, Developer works with the City to maintain yield by condominium-izing a portion of a high rise residential project for affordable housing. Developer shall be solely responsible for completing the Groundwater Work after transfer of the H1 Property to the City, at Developer’s sole cost and expense, and for obtaining a no further action letter (“**NFA**”) from the DEH, except as to the responsibility of the City or its Designee for the VIMS and the VIMS OMM as set forth herein.
6. As a condition to the City’s acceptance of the H1 Property, Developer’s Environmental Consultant shall have issued a report, which may be relied upon by both Developer and the City, confirming that the Soil Removal Work has been completed as required by the RAP for the Intended Design and Intended Use.
7. Developer shall provide the NFA to the City (or then owner of the building) after receipt, which will occur after the Groundwater Work is complete.
8. The City will pay a maximum of Five Hundred Thousand Dollars (\$500,000) for the VIMS and VIMS OMM (“**Baseline Costs**”). If the costs of the VIMS and VIMS OMM for the Intended Design and Intended Use, any ongoing monitoring, as well as without limitation, DEH oversight and permitting costs, in the approved final RAP (or associated documents) are in excess of Baseline Costs (“**Excess Costs**”), as determined immediately prior to the scheduled H1 Property Closing Date by an independent consultant retained by the Developer and acceptable to the City (“**RAP Consultant**”) then the following provisions shall apply. The RAP Consultant will estimate costs (both operational and installation hard costs) based on unescalated dollars.
  1. If the Excess Costs, plus the costs of (A) the Soil Removal Work costs and (B) the other anticipated Developer clean-up costs ((A) and (B) collectively, “**Developer Remediation Costs**”), are equal to or more than the Catastrophic Cap, then Developer may elect to follow the procedures provided in subsection (e) above for Catastrophic Cost Increases.
  2. If the Excess Costs, plus the Developer Remediation Costs, are less than the Catastrophic Cap, Developer shall fund the Excess Costs to City at the H1 Property Closing and the City shall hold and invest the Excess Costs in trust to pay the Excess Costs as they accrue over time.

9. Developer will keep the City informed of the timing and status throughout the RAP approval process, including providing the City with the draft and final RAP.
10. Following the transfer of the H1 Property to City (or its Designee), Developer will respond at its sole cost and expense to any inquiries, orders or actions from any regulatory agency with respect to the Groundwater Work or the Environmental Conditions other than the "Building Conditions". The term "**Building Conditions**" shall mean the conditions inside of the future building and/or parking area in the building, including, without limitation, indoor air conditions.
11. Developer will pay all agency oversight and permitting costs associated with the RAP and obtaining the NFA.
12. To the fullest extent permitted by law, Developer shall indemnify, defend and hold harmless the City for any and all claims for response costs or response actions or any third party claims associated with the Groundwater Work or the Environmental Conditions but excluding the Building Conditions. Additionally, if the H1 Property is transferred to the City or Designee, Developer shall indemnify, defend, and hold harmless City and City Indemnitees or Designee against any and all third party actions or claims for death or personal injury to the extent such actions or claims are caused by alleged exposure to environmental contamination existing at the H1 Property which exposure occurred prior to the H1 Property Closing Date and such actions or claims first accrued prior to the H1 Property Closing Date. The indemnity and defense obligations of Developer shall survive the transfer of the H1 Property to City or Designee. Notwithstanding the foregoing, in no event shall such indemnity and defense obligation of Developer apply to the extent that any actions or claims arise from the negligence or willful misconduct of City or the Designee.
13. Developer shall have no responsibility or liability for the Building Conditions, VIMS or the VIMS OMM, including, without limitation, its installation, its failure, its maintenance, repair, operation or monitoring and no responsibility for any claims arising out of the Building Conditions, VIMS, the VIMS OMM, soil vapor, indoor air and/or any claims arising from failure of these systems.
14. The City and Developer agree that all cost amounts set forth herein or determined hereafter pursuant to its terms are the cost as of the Effective Date of the Development Agreement and shall be subject to Annual Increases.



City Clerk

## CITY OF SAN JOSÉ, CALIFORNIA

Office of the City Clerk  
200 East Santa Clara Street  
San José, California 95113  
Telephone (408) 535-1260  
FAX (408) 292-6207

STATE OF CALIFORNIA)  
COUNTY OF SANTA CLARA)  
CITY OF SAN JOSE)

I, Toni J. Taber, City Clerk & Ex-Officio Clerk of the Council of and for the City of San Jose, in said County of Santa Clara, and State of California, do hereby certify that "**Ordinance No. 30538**", the original copy of which is attached hereto, was passed for publication of title on the **23<sup>rd</sup> day of February, 2021**, was published in accordance with the provisions of the Charter of the City of San Jose, and was given final reading and adopted on the **9<sup>th</sup> day of March, 2021**, by the following vote:

AYES: ARENAS, CARRASCO, COHEN, DAVIS, ESPARZA, FOLEY, JONES,  
JIMENEZ, MAHAN, PERALEZ, LICCARDO.

NOES: NONE.

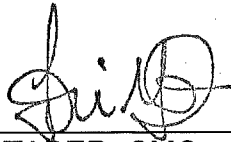
ABSENT: NONE.

DISQUALIFIED: NONE.

VACANT: NONE.

Said Ordinance is effective as of the **9<sup>th</sup> day of April, 2021**.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the City of San Jose, this **10<sup>th</sup> Day of March, 2021**.

(SEAL)   
TONI J. TABER, CMC  
CITY CLERK & EX-OFFICIO  
CLERK OF THE CITY COUNCIL

/rmk

**ORDINANCE NO. 30538**

**AN ORDINANCE OF THE CITY OF SAN JOSE  
AMENDING CHAPTER 5.08 OF TITLE 5 OF THE SAN  
JOSE MUNICIPAL CODE TO UPDATE AND ADD  
DEFINITIONS, COMPLIANCE OPTIONS, AND  
AFFORDABLE HOUSING REQUIREMENTS FOR THE  
CITYWIDE INCLUSIONARY HOUSING PROGRAM**

**WHEREAS**, on January 12, 2010, the San José City Council adopted a Citywide inclusionary housing program to enhance the public welfare by establishing policies which require the development of housing affordable to households of very low, lower, and moderate incomes, meet the City's regional share of housing needs, and implement the City housing element's goals and objectives; and

**WHEREAS**, the Citywide inclusionary housing program assists in alleviating the use of available residential land solely for the benefit of households that are able to afford market rate housing because such market-rate development will be required to contribute to the provision of affordable housing for the entire San José community; and

**WHEREAS**, the Citywide inclusionary housing program also assists in alleviating the demand for housing affordable to extremely low, very low, lower, and moderate income households caused by the service demands of new residents in market-rate residential units; and

**WHEREAS**, the significant deficits in affordable housing in the City of San José that prompted the original adoption of Citywide inclusionary housing program are still in existence; and

**WHEREAS**, according to the 2015-2023 regional housing needs allocation ("RHNA") determined by the Association of Bay Area Governments ("ABAG"), the City of San José has a total housing need of 35,080 units through the year 2023, out of which nearly sixty percent (60%) is for housing affordable to Lower- and Moderate-Income

Households (20,849 units). Of those affordable units, 9,233 units are for Very Low Income Households; 5,428 units are for Lower Income Households; and 6,188 units are for Moderate Income Households; and

**WHEREAS**, according to the Joint Center for Housing Studies of Harvard University publication, America's Rental Housing 2020, San José is the nation's least affordable housing market, requiring an income of \$347,000 to meet the monthly costs of a typical home; and

**WHEREAS**, the City's current General Plan, Envision 2040 continues to support the provision of housing throughout the City to address the needs of an economically, demographically and culturally diverse population; and

**WHEREAS**, the City's current General Plan seeks to facilitate the provision of housing sites and structures across location, type, price and status as rental or ownership that respond to the needs of all economic and demographic segments of the community including seniors, families, the homeless and individuals with special needs; and

**WHEREAS**, the City's current General Plan seeks to facilitate the production of extremely low-, very low-, low-, and moderate-income housing by maximizing use of appropriate policies and financial resources at the federal, state, and local levels; and various other programs; and

**WHEREAS**, the City's current General Plan seeks to integrate affordable housing in identified growth locations and where other housing opportunities may exist, consistent with the Envision General Plan; and

**WHEREAS**, the City's current General Plan seeks to facilitate the development of housing to meet San José's fair share of the County's and region's housing needs; and

**WHEREAS**, the City's current General Plan also states that the City can achieve its goals of providing more affordable housing and achieving an economically balanced community only if part of the new housing built in the City is affordable to households with limited incomes and includes a goal to increase its supply such that 15% or more of the new housing stock developed is affordable; and

**WHEREAS**, on June 28, 2011, the Governor signed into law Assembly Bill X1 26, as subsequently amended by AB 1484, which provided for the dissolution and winding down of redevelopment agencies throughout the State of California ("Dissolution Legislation"). On January 24, 2012, pursuant to the Dissolution Legislation, the City of San José elected to be the Successor Agency ("Successor Agency") to the Redevelopment Agency of the City of San Jose ("Agency") to administer the dissolution and winding down of the Agency. On February 1, 2012, the Agency was dissolved and, upon dissolution, all assets, properties and contracts of the Agency were transferred, by operation of law, to the Successor Agency pursuant to the terms of the Dissolution Legislation; and

**WHEREAS**, upon dissolution of the Agency, the City elected to retain the housing assets and affordable housing functions of the Agency. The City now administers the affordable housing functions of the Agency as the housing successor subject to the provisions of the California Redevelopment Law ("CRL") which relate to affordable housing; and

**WHEREAS**, on October 13, 2013, the Governor signed into law Senate Bill 341 which amends provisions of the CRL relating to certain functions to be performed by housing successors; and

**WHEREAS**, California Government Code Section 65850 was amended, effective January 1, 2018 to make a change in state law superseding the limitations discussed in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2nd Dist. 2009) 175 Cal.App.4th 1396 and confirming that the legislative body of any county or city may

adopt ordinances to require, as a condition of the development of residential rental units, that the development include a certain percentage of residential rental units affordable to, and occupied by, households with incomes that do not exceed the limits for moderate-income, lower income, very low income, or extremely low income households specified in Sections 50079.5, 50093, 50105, and 50106 of the Health and Safety Code; and

**WHEREAS**, these amendments are intended to update the Ordinance consistent with the General Plan and the previously adopted purposes and goals as well as to add new provisions to encourage the development of Inclusionary Units in the areas that market rate housing is being developed throughout the City, and to that end, to provide more options for developers of market rate housing to provide Inclusionary Units within and adjacent to market rate developments; and

**WHEREAS**, the provisions of this Ordinance do not constitute a project, under File No. PP17-008, (General Procedure & Policy Making resulting in no changes to the physical environment); and

**WHEREAS**, the City Council of the City of San José is the decision-making body for this Ordinance; and

**WHEREAS**, this Council has reviewed and considered the "not a project" determination under CEQA prior to taking any approval actions on this Ordinance;

**NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:**

Chapter 5.08 of Title 5 of the San José Municipal Code is hereby amended to read as follows:



## **CHAPTER 5.08 INCLUSIONARY HOUSING**

### **Part 1 Purpose and Findings**

#### **5.08.010 Findings and Declarations**

The City Council finds and declares as follows:

- A. Rental and owner-occupied housing in San José has become steadily more expensive. Although San José has historically provided much of the housing affordable to Santa Clara County's workforce, in recent years housing costs have escalated sharply, increasing faster than incomes for many groups in the community. As a result, there is a severe shortage of adequate, affordable housing for Extremely Low, Very Low, Lower, and Moderate Income Households, as evidenced by the following:
1. The 2000-2007 Regional Housing Needs Plan for Santa Clara County, mandated by California Government Code section 65584 and prepared by the Association of Bay Area Governments, shows that fifty-six percent (56%) of new housing in San José should be affordable to Extremely Low, Very Low, Lower, and Moderate Income Households.
  2. According to the most recent 2007-2014 regional housing needs allocation (RHNA) determined by the Association of Bay Area Governments (ABAG), the City of San José has a total housing need of 34,721 units through the year 2014, out of which nearly sixty percent (60%) is for Lower- and Moderate-Income Households (19,271 units). Of the affordable units: 3,876 units (20%) are for Extremely Low Income Households; 3,875 units (20%) for Very Low Income Households; 5,322 units (28%) for Lower

Income Households; and 6,198 units (32%) for Moderate Income Households. These housing needs represent substantial increases from the previous RHNA. In particular, the Lower Income and Very Low Income housing need increased by forty-five percent (45%) and one hundred twenty-one percent (121%) respectively. Yet, as described below, these goals fall far short of the actual need for households in these income categories.

3. Because of the shortage of affordable housing in San José, many households overpay for their housing. The 2006 American Community Survey found that approximately forty-six percent (46%) of San José households who own their homes pay more than thirty percent (30%) of income for their mortgage, while forty-eight percent (48%) of renter households pay more than thirty percent (30%) of income for housing. These households are overpaying for their housing, according to standards of the United States Department of Housing and Urban Development. Additionally, the 2000 U.S. Census reports that, in San José, nearly 27,000 Extremely Low Income, 23,000 Very Low Income, and 20,000 Lower Income Households experienced a housing problem, which means a household is either spending more than 30% of its household income on housing costs or is living in overcrowded or substandard conditions, or both. Providing decent housing at affordable costs allows households to utilize their resources for other necessary pursuits, such as education, food, investment, and saving for retirement. Providing decent rental housing at affordable costs allows households to save money to purchase a home.

- B. As stated in the City of San José 2020 General Plan (Appendix 3), it is the City's policy to enhance the public welfare by encouraging a variety of housing prices throughout the City to give households of all income levels the opportunity to find suitable housing. It is also the City's policy to identify adequate sites for the City's

existing and projected housing needs (Appendix 3) and to encourage the geographic dispersal of affordable housing throughout the City to enhance the social and economic well-being of all residents (Appendix 3). The City can achieve its goals of providing more affordable housing and achieving an economically balanced community only if part of the new housing built in the City is affordable to households with limited incomes.

- C. In order to meet the needs of San José households, dwelling units will need to house a variety of household types, incomes, and age groups. Pursuant to the San José 2020 General Plan, new homes should be located where adequate transportation, sanitation, water, and other infrastructure is available, and within reasonable proximity of education, recreation, and other amenities.
- D. The San José 2020 General Plan also includes a policy that affordable housing be distributed throughout the City of San José, and not concentrated in any particular area or areas. To further this goal, this Chapter provides incentives for affordable housing to be constructed on the same site as the Market Rate Units in a development project.
- E. The inclusionary ordinance codified in this Chapter will substantially advance the City's legitimate interest in providing additional housing affordable to all income levels and dispersed throughout the City because Inclusionary Units required by the ordinance codified in this Chapter, including both rental and ownership units, must be affordable to either Very Low, Lower, and Moderate Income Households.
- F. The ordinance codified in this Chapter is being adopted pursuant to the City's police power authority to protect the public health, safety, and welfare. Requiring affordable units within each development is consistent with the community's housing element goals of protecting the public welfare by fostering an adequate supply of housing for persons at all economic levels and maintaining both

economic diversity and geographically dispersed affordable housing. Requiring builders of new market rate housing to provide some housing affordable to Very Low, Lower, and Moderate Income Households is also reasonably related to the impacts of their projects, because:

1. Rising land prices have been a key factor in preventing development of new affordable housing. New market-rate housing uses available land and drives up the price of remaining land. New development without affordable units reduces the amount of land development opportunities available for the construction of affordable housing.
2. New residents of market-rate housing place demands on services provided by both public and private sectors, creating a demand for new employees. Some of these public and private sector employees needed to meet the needs of the new residents earn incomes only adequate to pay for affordable housing. Because affordable housing is in short supply in the City, such employees may be forced to live in less than adequate housing within the City, pay a disproportionate share of their incomes to live in adequate housing in the City, or commute ever increasing distances to their jobs from housing located outside the City. These circumstances harm the City's ability to attain employment and housing goals articulated in the City's General Plan and place strains on the City's ability to accept and service new market-rate housing development.

#### **5.08.020 Purpose**

The purpose of this Chapter is to enhance the public welfare by establishing policies which require the development of housing affordable to households of Very Low, Lower, and Moderate Incomes, meet the City's regional share of housing needs, and implement the goals and objectives of the General Plan and Housing Element.

The adoption of a Citywide inclusionary housing program will also assist in alleviating the use of available residential land solely for the benefit of households that are able to afford market rate housing because such market-rate development will be required to contribute to the provision of affordable housing for the entire San José community, and will assist in alleviating the impacts of the service needs of households in new market-rate residential development by making additional affordable housing available.

The City Council desires to encourage the development of Inclusionary Units to be located upon the same site as market rate Residential Development to provide for integration of Very Low, Lower, and Moderate Income households with households in market rate neighborhoods and to disperse Inclusionary Units throughout the City where new residential development occurs.

The City Council also desires to provide the residential development community with alternatives to construction of the Inclusionary Units on the same site as the market rate Residential Development. Therefore, Part 5 of this Chapter, entitled Developers' Compliance Options, includes a menu of options from which a Developer may select an alternative to the construction of Inclusionary Units on the same site as the market rate Residential Development as required by Part 4 of this Chapter. Nothing in this Chapter shall deem or be used to deem the compliance options in Part 5, including but not limited to the in lieu fee authorized pursuant to Section 5.08.520, as an *ad hoc* exaction, as a mandated fee required as a condition to developing property, or as a fee subject to the analysis in *Building Industry Association of Central California v. City of Patterson* (5th Dist. 2009) 171 Cal.App.4th 886.

## **Part 2**

### **Definitions**

#### **5.08.100 Definitions**

The definitions set forth in this Part shall govern the application and interpretation of this Chapter. Words and phrases not defined in this Part 2 shall be interpreted so as to give this Chapter its most reasonable application.

#### **5.08.105 Affordable Housing Cost**

“Affordable Housing Cost” means the housing cost for Dwelling Units as defined by California Health & Safety Code section 50052.5 for owner-occupied housing and the affordable rent for rental units as defined by California Health & Safety Code section 50053, as applicable, except that: (a) the affordable rent for Moderate Income Rental Inclusionary Units that are located within the Market Rate Residential Development or provided pursuant to Section 5.08.590 shall be no more than thirty percent (30%) of one hundred percent (100%) of Area Median Income; (b) the affordable rent for Moderate Income Rental Inclusionary Units that are not located upon the same site as the Market Rate Residential Development or Moderate Income Rental Inclusionary Units that are located on the same site but are geographically concentrated shall be no more than thirty percent (30%) of eighty percent (80%) of Area Median Income; and (c) that the affordable rent for Dwelling Units that do not include private cooking and/or bathroom facilities shall be ninety percent (90%) of the otherwise applicable affordable rent for studio (0-bedroom) Dwelling Units.

#### **5.08.107 Affordable Housing Developer**

“Affordable Housing Developer” shall mean an experienced developer of affordable housing developments in the City of San José meeting the criteria provided in the Inclusionary Housing guidelines.

#### **5.08.110 Affordable Housing Development**

“Affordable Housing Development” means, for a rental Residential Development, a development that has a recorded affordability restriction that: (a) has a term of at least fifty-five (55) years; (b) limits the rental of all dwelling units except the manager’s units, such that the rent of the restricted income units is in not excess of Affordable Housing Cost at thirty percent (30%) of sixty percent (60%) of the Area Median Income or as otherwise restricted at a substantially similar level as allowed under the Inclusionary Housing Guidelines; (c) restricts at least ten percent (10%) of the units to very low income households at incomes up to fifty percent (50%) of Area Median Income; and (d) is made for the benefit of and enforceable by the City, Santa Clara County or a State or Federal Agency. “Affordable Housing Development” means, for a for-sale Residential Development, a development that has a recorded affordability restriction with a term of at least forty-five (45) years that limits the sale of all dwelling units to households with an income not exceeding one hundred ten percent (110%) of the Area Median Income at a price not exceeding Affordable Housing Cost and is made for the benefit of and enforceable by the City, Santa Clara County or a State or Federal Agency.

#### **5.08.115 Affordable Housing Siting Policy**

“Affordable Housing Siting Policy” means the collective goals and policies in the General Plan housing element and other policies adopted by the City Council (as may be amended or supplemented from time to time) to encourage the siting of affordable housing throughout all areas of the City of San José in order to provide greater opportunities to lower income households, and encourage racial and economic integration. The Inclusionary Housing Guidelines will provide information on the application of the policy.



**5.08.120 Affordable Housing Plan**

“Affordable Housing Plan” means a plan containing all of the information specified in and submitted in conformance with Section 5.08.610 of this Chapter specifying the manner in which Inclusionary Units will be provided in conformance with this Chapter and the Inclusionary Housing Guidelines, and consistent with the San José General Plan and Title 20 of the San José Municipal Code.

**5.08.125 Applicant**

“Applicant” or “Developer” means a person, persons, or entity that applies for a Residential Development and also includes the owner or owners of the property if the Applicant does not own the property on which development is proposed.

**5.08.130 Area Median Income**

“Area Median Income” or “AMI” means the annual median income for Santa Clara County, adjusted for household size, as published periodically in the California Code of Regulations, Title 25, Section 6932, or its successor provision, or as established by the City of San José in the event that such median income figures are no longer published periodically in the California Code of Regulations.

**5.08.135 Building Permit**

The term “Building Permit” includes full structural building permits as well as partial permits such as foundation-only permits.

**5.08.140 City Manager**

“City Manager” means the City Manager of the City of San José or his or her designee.

#### **5.08.145 Certificate of Occupancy**

“Certificate of Occupancy” is the permit issued by the San José Building Division authorizing the initial occupancy of a residential unit, including a temporary certificate of occupancy.

#### **5.08.150 Common Ownership or Control**

“Common Ownership or Control” refers to property owned or controlled by the same person, persons, or entity, or by separate entities in which any shareholder, partner, member, or family member of an investor of the entity owns ten percent (10%) or more of the interest in the property.

#### **5.08.155 Construction Phase**

“Construction Phase” means either:

- A. The area included within one City approved tentative subdivision map for Residential Development where a single final map implements the entire approved tentative map;
- B. The area included within each separate final map for Residential Development where multiple final maps implement the entire approved tentative map; or
- C. An area designated as a Construction Phase in an approved Affordable Housing Plan.

#### **5.08.160 Contiguous Property**

“Contiguous Property” means any parcel of land that is:

- A. Touching another parcel at any point;
- B. Separated from another parcel at any point only by a public right of way, private street or way, or public or private utility, service, or access easement; or
- C. Separated from another parcel only by other real property of the Applicant which is not subject to the requirements of this Chapter at the time of the Planning Permit application by the Applicant.

**5.08.165 Deemed Substantially Complete**

“Deemed Substantially Complete” is a term that applies to an application for a specific land use entitlement or entitlements that is requested by the Applicant and in accordance with Title 20 (Zoning) and Title 21 (Environmental Clearance) herein, and means that such application:

- A. Accurately includes all data required on the appropriate Planning Permit checklist that is utilized upon the date of receipt of the application;
- B. Is duly executed by the Applicant or the Applicant’s authorized representative;
- C. Includes the full payment of all required fees;
- D. Includes an accurate and complete application for environmental clearance; and
- E. Includes the Affordable Housing Plan required by Section 5.08.610.A.

**5.08.170 Density Bonus Units**

“Density Bonus Units” means those additional Dwelling Units approved in a Residential Development pursuant to California Government Code section 65915 *et seq.* that are in

excess of the maximum residential density otherwise permitted by the San José General Plan.

**5.08.175 Dwelling Unit**

“Dwelling Unit” shall have the definition given for dwellings in Section 20.200.320, Section 20.200.330, and Section 20.200.340 of Chapter 20.200 of Title 20 of the San José Municipal Code and shall also include any type of dwelling allowed under Title 20 of the San José Municipal Code, except dwellings expressly excluded under the Inclusionary Housing Guidelines.

**5.08.180 Extremely Low Income Household**

“Extremely Low Income Household” shall have the definition given in California Health & Safety Code section 50106.

**5.08.185 First Approval**

“First Approval” means the first of the following approvals to occur with respect to a Residential Development: development agreement, general plan amendment, specific or area plan adoption or amendment, zoning, rezoning, pre-zoning, annexation, planned development permit, tentative map, parcel map, conditional use permit, special use permit, or building permit.

**5.08.190 For-Sale**

“For-Sale” means and refers to any separately conveyable Dwelling Unit, including a condominium, stock cooperative, community apartment, or attached or detached single family home, for which a parcel or tentative and final map is required for the lawful subdivision of the parcel upon which the Dwelling Unit is located or for the creation of the unit in accordance with the Subdivision Map Act (California Government Code

section 66410 *et seq.*) after compliance with the applicable requirements of the Subdivided Lands Act (California Business and Professions Code section 11000 *et seq.*) listed in the Inclusionary Housing Guidelines or any Residential Development including such For-Sale Dwelling Units.

#### **5.08.192 Inclusionary Fee Fund**

“Inclusionary Fee Fund” means a fund or account designated by the City to maintain and account for all monies received pursuant to this Chapter.

#### **5.08.195 Inclusionary Housing Agreement**

“Inclusionary Housing Agreement” means an agreement or agreements in conformance with Section 5.08.600 of this Chapter between the City and an Applicant, governing how the Applicant shall comply with this Chapter.

#### **5.08.200 Inclusionary Housing Guidelines**

“Inclusionary Housing Guidelines” means the requirements for implementation and administration of this Chapter adopted by the City Manager, pursuant to Section 5.08.730.A of this Chapter.

#### **5.08.205 Inclusionary Unit**

“Inclusionary Unit” means a Dwelling Unit required by this Chapter to be affordable to extremely low, very low, lower, or moderate income households.

#### **5.08.210 Lower Income Household**

“Lower Income Household” shall have the definition given in California Health & Safety Code section 50079.5.

**5.08.212 Market Area**

“Market Area” means a specific geographic area designated through the adoption by the City Council of a resolution or policy.

**5.08.215 Market Rate Unit**

“Market Rate Unit” means a new Dwelling Unit in a Residential Development that is not an Inclusionary Unit as defined by Section 5.08.205.

**5.08.220 Moderate Income Household**

“Moderate Income Household” shall have the definition given in California Health & Safety Code section 50093(b), except that for the purposes of moderate income rental Inclusionary Units that are located upon the same site as the Market Rate Residential Development rental units, “Moderate Income Household” means a household earning no more than one hundred percent (100%) of Area Median Income and for the purposes of moderate income rental Inclusionary Units that are not located upon the same site as the Market Rate Residential Development rental units or are geographically concentrated except as allowed under Section 5.08.590, Partnership for Clustered Units, “Moderate Income Household” means a household earning no more than eighty percent (80%) of Area Median Income.

**5.08.222 Moderate Market Area**

“Moderate Market Area” means a Market Area or other geographical area designated by or pursuant to a City Council resolution or policy based on findings, including findings regarding residential building activity levels for market rate housing.

**5.08.225 Operative Date**

“Operative Date” shall have the definition given in Section 5.08.300.

**5.08.227 Opportunity Area**

“Opportunity Area” means a geographic area designated by or pursuant to a resolution or policy adopted by the City Council.

**5.08.230 Physical Needs Assessment**

“Physical Needs Assessment” means a report by a qualified housing professional identifying those items that are necessary repairs, replacements and maintenance at the time of the assessment or that will likely require repair or replacement within three (3) years of the assessment, and the estimated cost of all such items, which repair replacement and maintenance must be completed prior to the approval of the unit as an Inclusionary Unit. For the purposes of this Section, a “qualified housing professional” is a Physical Needs Assessment firm that is approved for that purpose by the California Housing Finance Agency, or as may otherwise be approved as qualified pursuant to criteria in the Inclusionary Housing Guidelines.

**5.08.235 Planning Permit**

“Planning Permit” means a tentative map, parcel map, conditional use permit, site development permit, planned development permit, development agreement, or special use permit, or any discretionary permit excluding general plan amendments, zoning and rezoning, annexation, specific plans, and area development policies.

#### **5.08.240 Redevelopment Project Area**

“Redevelopment Project Area” means any area designated as a Redevelopment Project Area by the Council of the City of José pursuant to the provisions of the Community Redevelopment Law in California Health & Safety Code section 33000 *et seq.*

#### **5.08.245 Rental**

“Rental” means and refers to a Dwelling Unit that is not a For-Sale Dwelling Unit, and does not include any Dwelling Unit, whether offered for rental or sale, that may be sold separately from any other Dwelling Unit as a result of the lawful subdivision of the parcel upon which the Dwelling Unit is located or creation of the unit in accordance with the Subdivision Map Act (California Government Code section 66410 *et seq.*), or any Residential Development including such Rental Dwelling Units.

#### **5.08.250 Residential Development**

“Residential Development” means any project requiring a Planning Permit for which an application has been submitted to the City, and where the Residential Development:

- A. Would create ten (10) or more new, additional, or modified Dwelling Units by:
  - 1. The construction or alteration of structures,
  - 2. The conversion of a use to residential from any other use, or
  - 3. The conversion of a use to For-Sale residential from Rental residential use.
- B. Is contiguous to property under Common Ownership or Control where the combined residential capacity of all of the Applicant’s property pursuant to the



General Plan designation or zoning at the time of the Planning Permit application for the Residential Development is ten (10) or more residential units.

**5.08.253 Strong Market Areas**

“Strong Market Area” means a Market Area or other geographical area that designated by or pursuant to a City Council resolution or policy based on findings, including findings regarding residential building activity levels for market rate housing.

**5.08.255 Surplus Inclusionary Unit**

“Surplus Inclusionary Unit” means any Inclusionary Unit constructed in connection with Residential Development without any City subsidy which exceeds the numerical requirement for Inclusionary Units for that Residential Development pursuant to this Chapter.

**5.08.260 Unit Type**

“Unit Type” means any form of dwelling described in Section 20.200.320, Section 20.200.330, or Section 20.200.340, or any other section of Chapter 20.200 of Title 20 of the San José Municipal Code or in state law.

**5.08.265 Utilities**

“Utilities” means garbage collection, sewer, water, electricity, gas and other heating, cooling, cooking and refrigeration fuels.

**5.08.270 Very Low Income Household**

“Very Low Income Household” means a household earning no more than the amount defined by California Health & Safety Code section 50105.

**Part 3**  
**Operative Date and Applicability**

**5.08.300 Operative Date of Chapter**

This Chapter shall be operative:

- A. Six (6) months after the first day of the month following the first twelve (12) month consecutive period prior to January 1, 2013 in which two thousand five hundred (2,500) residential building permits have been issued by the City, with a minimum of one thousand two hundred fifty (1,250) permits issued for Dwelling Units outside of the North San José Development Policy Area; or
- B. January 1, 2013.

**5.08.310 Applicability**

The provisions of this Chapter shall apply to:

- A. All Residential Development, as defined in Section 5.08.250 of this Chapter, except for any Residential Development determined to be exempt under Section 5.08.320 of this Chapter;
- B. All Residential Development and Contiguous Property that is under Common Ownership or Control.

**5.08.320 Exemptions**

- A. This Chapter shall not apply to any of the following:

1. Projects that are not Residential Developments as defined in Section 5.08.250 of this Chapter.
2. Residential Developments with a total of less than ten (10) Dwelling Units.
3. Residential Developments which are developed in accordance with the terms of a development agreement adopted by ordinance pursuant to the authority and provisions of California Government Code section 65864 *et seq.* and City Ordinance No. 24297, and that is executed prior to the Operative Date of the ordinance codified in this Chapter, provided that such Residential Developments shall comply with any affordable housing requirements included in the development agreement or any predecessor ordinance in effect on the date the development agreement was executed.
4. Residential Developments which are developed in accordance with the terms of a disposition and development agreement pursuant to the authority and provision of California Health and Safety Code section 33000 *et seq.*, and that is approved by the Board of the San José Redevelopment Agency and is executed prior to the Operative Date of this Chapter, provided that such Residential Development shall comply with any affordable housing requirements included in the disposition and development agreement or any other law or policy in effect at the time of execution of the disposition and development agreement.
5. Residential Developments exempted by California Government Code section 66474.2 or 66498.1, provided that such Residential Developments shall comply with any predecessor ordinance, resolution, or policy in effect on the date the application for the development was Deemed Substantially Complete.

6. Residential Developments for which a Planning Permit has been approved by the City no later than the Operative Date of this Chapter.
  7. Residential Development in a Planned Community, as specified in the San José 2020 General Plan, and:
    - a. The Residential Development is not in the Redevelopment Project Area;
    - b. A Specific Plan was adopted by the City for the Planned Community prior to 1993;
    - c. The Specific Plan and/or a Planning Permit specifies that the Residential Development will occur in phases and authorizes the phased construction of new on-site and off-site infrastructure; and
    - d. One or more phases of the Residential Development, and the required infrastructure improvements related to each of those phases, has been completed in conformance with the Specific Plan and Planning Permits prior to the Operative Date.
- B. Planning Permit Expiration. Upon the expiration of any Planning Permit, any exemptions pursuant to Subsection A terminate for the Residential Development and, unless otherwise exempted, the Residential Development shall be subject to the inclusionary housing requirements of this Chapter, and shall not proceed until such time as a new Affordable Housing Plan is approved in conjunction with any other required Planning Permit or amendment thereto. This provision shall not apply to any discretionary extension of a Planning Permit or Land Use approval beyond its initial term.

- C. Limited Extension of Exemption Due to Delay. The City Manager may grant a request for an extension of the timelines in this Section exempting Residential Development from this Chapter where a change in federal, state or local law would cause the need for a material redesign of the approved Residential Development that would render any of the approved land use entitlements, if implemented as approved, in violation of federal, state, or local law and would require amendment or revision of the Planning Permit.

## **Part 4**

### **Affordable Housing Requirements**

#### **5.08.400 Inclusionary Housing Requirement**

All new Residential Developments and Contiguous Property under Common Ownership and Control shall include Inclusionary Units. Calculations of the number of Inclusionary Units required by this Section shall be based on the number of Dwelling Units in the Residential Development, excluding any Density Bonus Units as defined in Section 5.08.170 of this Chapter.

- A. On-Site Inclusionary Requirement. Unless otherwise exempted or excepted from this Chapter, Residential Developments shall include Inclusionary Units upon the same site as the Residential Development as follows:

1. For-Sale Residential Development:  
Fifteen percent (15%) of the total Dwelling Units in the Residential Development shall be made available for purchase at an Affordable Housing Cost to those households earning no more than one hundred ten percent (110%) of the Area Median Income. Such units may be sold to households earning no more than one hundred twenty percent (120%) of the Area Median Income.

2. Rental Residential Development:

Either (i) five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Moderate Income Households, five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Lower Income Households and five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Very Low Income Households, or (ii) ten percent (10%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Extremely Low Income Households.

3. Affordable Housing Development:

An Affordable Housing Development that has recorded an unsubordinated City affordability restriction applicable to all non-manager units may be deemed to have complied with this Section consistent with the procedure in the Guidelines, provided however, any use of units in such a Development to meet the obligations of another Development under this Chapter must comply with all applicable requirements of this Ordinance.

- B. Limited Waiver. Excepted from the requirements of this Section is any Dwelling Unit that would otherwise be required to be a Moderate Income Inclusionary Unit for which an application for waiver of the terms of the subordinate shared appreciation documents or other documents implementing for-sale inclusionary provisions required by Section 5.08.600.A herein has been granted by the City Manager. Such an application shall be granted when the Affordable Housing Cost is within five percent (5%) of the appraised unrestricted market value of the unit. The approval of any application pursuant to this Subsection 5.08.400.B

shall terminate upon the earlier of the sale in accordance with Subsections 1 through 3 herein of the Inclusionary Unit for which the limited waiver has been granted pursuant to this Section, or six (6) months following approval of the limited waiver by the City Manager, unless such term is extended by the City Manager because the unit continues to qualify for the waiver in accordance with the requirements of this Section. An Inclusionary Unit that is subject to such approved limited waiver shall:

1. Be sold at or below the Affordable Housing Cost;
2. The Inclusionary Unit shall initially be owner-occupied;
3. No income verification shall be required by the City of the purchaser of such an Inclusionary Unit; and
4. The requirements of the subordinate shared appreciation documents or other documents implementing for-sale inclusionary provisions executed pursuant to Section 5.08.600 of this Chapter shall be waived by the City. The limited waiver in this Subsection B shall be administered in accordance with this Chapter and the Inclusionary Housing Guidelines.

#### **5.08.410 Fractional Units**

In computing the total number of Inclusionary Units required in a Residential Development, fractions of one-half (1/2) or greater shall be rounded up to the next highest whole number, and fractions of less than one-half (1/2) shall be rounded down to the next lowest whole number.

#### **5.08.420 Contiguous Property under Common Ownership and Control**

An Applicant for a Planning Permit shall not avoid the requirements of this Chapter by submitting piecemeal Planning Permit applications. At the time of the application for

First Approval for the Residential Development, the Applicant shall identify all Contiguous Property under Common Ownership and Control. The Applicant shall not be required to construct dwelling units upon the Contiguous Property at the time of the application for First Approval; however, the Applicant shall be required to include the Contiguous Property under Common Ownership or Control in its Affordable Housing Plan. The Inclusionary Housing Guidelines shall include procedures to facilitate compliance for phased and master planned developments. The Inclusionary Housing Agreement shall be recorded against the Residential Development and the Inclusionary Housing Agreement or a separate implementing covenant with a term of at least twenty (20) years shall be recorded against all Contiguous Property under Common Ownership or Control and such agreements shall require compliance with this Chapter upon development of each Contiguous Property at such time as there are Planning Permit applications that would authorize a total of ten (10) or more residential units for the Residential Development and the Contiguous Property under Common Ownership or Control.

#### **5.08.430 Residential Development with Overlapping Inclusionary Requirements**

When overlapping inclusionary housing requirements could be applied to a Residential Development pursuant to this Chapter because the Residential Development is located upon a parcel or parcels subject to more than one of the requirements in this Section, the entire Residential Development shall be subject to the requirement that results in the production of the greatest amount and greatest depth of affordability of Inclusionary Dwelling Units.

#### **5.08.440 Residential Development with Both For-Sale and Rental Units**

When a Residential Development includes both For-Sale and Rental Dwelling Units, the provisions of this Chapter that apply to For-Sale Residential Development shall apply to that portion of the development that consists of For-Sale Dwelling Units, while the



provisions of this Chapter that apply to Rental Residential Development shall apply to that portion of the development that consists of Rental Dwelling Units.

**5.08.450 On-Site Inclusionary Housing Incentives**

- A. The Developer of a Residential Development providing Inclusionary Units upon the same site as the market rate units pursuant to Section 5.08.400 may, at the Developer's sole option, submit a written request for density bonus, waivers or incentives pursuant to California Government Code Section 65915 *et seq.* and Chapter 20.190 of this Code, if the Residential Development includes the provision of affordable Inclusionary Units within the Residential Development that meets the minimum thresholds for density bonus pursuant to California Government Code Section 65915 *et seq.*
- B. Affordable Housing Plan. The incentives requested by the Developer of the Residential Development shall be included in the proposed Affordable Housing Plan submitted at the time of application for the First Approval, and any incentives authorized by the City pursuant to Chapter 20.190 of this Code shall be included in the Affordable Housing Plan, if approved by the City, for the Residential Development.

**5.08.460 Timing of Construction of Inclusionary Units**

- A. All required Inclusionary Units shall be made available for occupancy concurrently with the Market Rate Units. For the purposes of this subsection, "concurrently" means:
  - 1. When the Inclusionary Units require construction and building permits therefor, for each Building Permit issued for an Inclusionary Unit the City may issue no more than six (6) Building Permits for Market Rate Units, and the City may not approve any final inspections for single-family

detached homes, or any certificates of occupancy for all other residences, unless at least fifteen percent (15%) of all final inspections or certificates of occupancy, as appropriate, in the Residential Development have been approved for Inclusionary Units.

2. When the Inclusionary Units do not require construction and Building Permits therefor, upon authorization for occupancy by the City of each Inclusionary Unit at an Affordable Housing Cost, the City may issue no more than five (5) Building Permits for Market Rate Units, and the City may not approve any final inspections for single-family detached homes, or any certificates of occupancy for all other residences, unless at least twenty percent (20%) of all Inclusionary Units for the Residential Development have been authorized for occupancy at an Affordable Housing Cost by the City.
- B. The City may not issue Building Permits for more than ninety percent (90%) of the Market Rate Units within a Construction Phase in a Residential Development until it has issued Building Permits, or authorized for occupancy at an Affordable Housing Cost as applicable, for all of the Inclusionary Units to be included in that Construction Phase. The City may also not approve final inspections for single-family detached homes, or certificates of occupancy for all other residences, for more than ninety percent (90%) of the Market Rate Units within a Construction Phase until it has approved final inspections or certificates of occupancy, as appropriate, or authorized for occupancy at an Affordable Housing Cost as applicable, for all of the Inclusionary Units within that Construction Phase.
- C. The Applicant may elect to comply with the requirements of this Chapter by utilizing any of the Applicant's options under Part 5 of this Chapter. The phasing requirements of Subsections A and B shall not apply to any in lieu Inclusionary Unit credit pursuant to Sections 5.08.520 (In Lieu Fee), 5.08.530 (Dedication of Land), and 5.08.560 (HUD-Restricted Units).

- D. Subject to the approval of the City Manager, the Applicant may alternatively elect to contract with an affordable housing Developer with experience in obtaining tax-exempt bonds, low income housing tax credit financing, and other competitive sources of financing, that is approved by the City to construct all or part of the Inclusionary Units required by Section 5.08.400. The Inclusionary Housing Agreement required in Section 5.08.600 of this Chapter shall contain specific assurances guaranteeing the timely completion of the required Inclusionary Units, including satisfactory assurances that construction and permanent financing will be secured for the construction of the units within a reasonable time. Such assurances may include a requirement that the Affordable Housing Developer and the Applicant execute an agreement that requires the closing of construction financing for the Inclusionary Units prior to the issuance of the first certificate of occupancy for the Residential Development or that the Applicant shall secure its obligations to the City by a letter of credit or escrow account in the amount of the In Lieu Fee, acceptable to the City in form and substance. The Inclusionary Housing Agreement shall include provisions for the payment of the City's costs of monitoring and administration of compliance with the requirements of this Chapter. After the Inclusionary Housing Agreement is approved by the City, then the phasing requirements of Subsection B apply only to Inclusionary Units not included in the contract with the City-approved affordable housing Developer. Off-site projects by a City-approved affordable housing Developer where all units are affordable to Lower Income Households are exempted from the timing requirements of this Section 5.08.460.

**5.08.470 Standards for Inclusionary Units**

- A. Single-family detached Inclusionary Units shall be dispersed throughout the Residential Development. Townhouse, row-house, multifamily Inclusionary Units and other unit types shall be located so as not to create a geographic

concentration of Inclusionary Units within the Residential Development, except as provided for Residential Developments under Section 5.08.590.

- B. The quality of exterior design and overall quality of construction of the Inclusionary Units shall be consistent with the exterior design of all Market Rate Units in the Residential Development and meet all site, design, and construction standards included in Title 17 (Buildings and Construction), Title 19 (Subdivisions), and Title 20 (Zoning) of this Code, including but not limited to compliance with all design guidelines included in applicable specific plans or otherwise adopted by the City Council, and the Inclusionary Housing Guidelines. Inclusionary Units shall have functionally equivalent parking when parking is provided to the Market Rate Units.
- C. Inclusionary Units may have different interior finishes and features than Market Rate Units in the same Residential Development, as long as the finishes and features are functionally equivalent to the Market Rate Units and are durable and of good quality and comply with the Inclusionary Housing Guidelines.
- D. The Inclusionary Units shall have the same amenities as the Market Rate Units, including the same access to and enjoyment of common open space and facilities in the Residential Development.
- E. The Inclusionary Units shall have the same proportion of Unit Types as the Market Rate Units in the Residential Development except:
  - 1. Single family detached Residential Projects may include single family attached Inclusionary Units;
  - 2. Single-family detached Inclusionary Units may have smaller lots than single-family detached Market Rate Units in a manner consistent with Title 20 of this Code; and

3. Inclusionary Units made available for rent may consist of any Unit Type selected by the Applicant. Provided, however, Unit Types that do not include a private kitchen and/or bathroom may not be substituted for Unit Types that have a private kitchen and bathroom.
- F. The Inclusionary Units shall have a comparable square footage and the same bedroom count and bedroom count ratio as the Market Rate Units.

#### **5.08.480 Minimum Requirements**

The requirements of this Chapter are minimum requirements and shall not preclude a Residential Development from providing additional affordable units or affordable units with lower rents or sales prices than required by this Chapter.

### **Part 5 Developers' Compliance Options**

#### **5.08.500 Developers' Compliance Options**

- A. On-Site. A Developer may construct on-site inclusionary rental units where the Developer would otherwise be required by this Chapter to construct on-site inclusionary for-sale units. If a Developer desires to construct on-site inclusionary rental units in lieu of on-site inclusionary for-sale units, the requirement for such on-site rental inclusionary units shall be: (i) Five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Moderate Income Households, five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Lower Income Households and five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable

Housing Cost to Very Low Income Households, or (ii) ten percent (10%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Extremely Low Income Households.

- B. Off-Site. As an alternative to providing Inclusionary Units upon the same site as the Market Rate Residential Development required by Part 4 of this Chapter, the Developer may select any of the compliance options in Sections 5.08.510 through 5.08.590 of this Chapter. If the Developer selects any of the compliance options in *Sections 5.08.510, 5.08.520, and 5.08.530 through 5.08.580* of this Chapter, the basis for the inclusionary housing requirement shall be that no less than twenty percent (20%) of the total of all units in the Residential Development shall be Inclusionary Units, unless otherwise specified.

The off-site Inclusionary Units for the Residential Development shall be located within the same Opportunity Area unless, at the time of submission of the Affordable Housing Plan, the Developer has petitioned and provided credible documentation in writing to the City that there is insufficient available land within the Opportunity Area to construct the off-site Inclusionary Units, in which event such Inclusionary Units shall be constructed upon a site approved by the City. Until such time as the Council designates Opportunity Areas or provides criteria for such designation, the off-site Inclusionary Units shall be located in the same Market Area as the Market Rate Units unless, at the time of submission of the Affordable Housing Plan, the Developer has petitioned and provided credible documentation in writing to the City that there is insufficient available land within the same Market Area to construct the off-site Inclusionary Units, in which event such Inclusionary Units shall be constructed upon a site approved by the City.

#### **5.08.510 Off-Site Construction**

The inclusionary housing requirement in Section 5.08.400 may be satisfied by the construction of affordable housing on a site different from the site of the Residential

Development in lieu of constructing the affordable units within the Residential Development as follows:

A. For-Sale Residential Development:

1. Off-site for-sale inclusionary units numbering no less than twenty percent (20%) of the total dwelling units in the Residential Development shall be made available for purchase at an Affordable Housing Cost to those households earning no more than one hundred ten percent (110%) of the Area Median Income; or
2. Off-site rental inclusionary units numbering no less than five percent (5%) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Moderate Income Households earning no more than eighty percent (80%) of the Area Median Income, off-site rental inclusionary units numbering no less than five percent (5%) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Lower Income Households earning no more than sixty percent (60%) of the Area Median Income, and off-site rental dwelling units numbering no less than ten percent (10%) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Very Low Income Households.

- B. Rental Residential Development: Off-site rental inclusionary units numbering no less than five percent (5%) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Moderate Income Households earning no more than eighty percent (80%) of the Area Median Income, off-site rental inclusionary units numbering no less than five percent (5%) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Lower Income

Households earning no more than sixty percent (60%) of the Area Median Income, and off-site rental inclusionary units numbering no less than ten percent (10%) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to those Very Low Income Households.

C. Additional Requirements for Off-Site For-Sale and Rental Residential Inclusionary Units. All Inclusionary Units constructed off-site of the Residential Development shall also comply with all of the following criteria:

1. The site of the inclusionary housing conforms to the City's Affordable Housing Siting Policy.
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.
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 Market Rate Residential Development pursuant to Section 5.08.460.

**5.08.520 In Lieu Fee**

- A. The inclusionary housing requirement in Section 5.08.400 may be satisfied by the payment of a fee to the City in lieu of constructing the affordable units within the Residential Development, provided that such fee is received by the City after the issuance of the development permit for the project, but prior to the issuance of the certificate of occupancy for the first Market Rate Unit in the Residential Development.

- B. In lieu fees shall be determined as follows:

1. For-Sale Residential Development: The in lieu fee for For-Sale Residential Developments shall be established as specified in the Inclusionary Housing Guidelines based on the amount by which the average sales price of an attached Market Rate Unit exceeds the affordable sales price for an average-sized attached unit ("Affordability Gap – For Sale"). The average size, number of bedrooms, and sales price of an attached Market Rate Unit shall be based on units completed in the prior sixty (60) month reporting period and sold within the prior twenty-four (24) month period. The affordable sales prices for an average-sized attached unit shall be determined consistent with this Section and the Inclusionary Housing Guidelines based on the Affordable Housing Cost for a household earning no more than one hundred ten percent (110%) of the Area Median Income. The Affordability Gap - For-Sale shall be multiplied by the percentage of Inclusionary Units required by Section 5.08.510.A. and divided by the average square footage of the Market Rate Units reflected in the sales data to determine the per square foot in lieu fee.

2. Rental Residential Development: The in lieu fee for Rental Residential Developments shall be established based on the difference between market rate rents and affordable rents as described in this Section and the Inclusionary Housing Guidelines. Market rate rents shall be based on rents charged for the most recently built three thousand (3,000) market rate rental units, excluding affordable units and projects for special populations such as seniors. Average affordable rents for each income category (Moderate, Low and Very Low) shall be determined based on the maximum rents allowed pursuant to Section 5.08.510.B, minus an allowance for utilities, weighted to reflect the average number of bedrooms in the three thousand (3,000) market rate rental units used to determine market rate rents. The amount by which the annualized market rate rent exceeds the annualized affordable rent for each income category shall then be capitalized using a current published capitalization rate for Class A urban multifamily housing in San José to obtain the affordability gap for a single unit in that income category ("Affordability Gap - Rental"). The in lieu fee shall then be made applicable on a square footage basis by multiplying the Affordability Gap - Rental for each income category by the percentage of Inclusionary Units required for that income category under Section 5.08.510.B and then dividing the result by the average square footage of the three thousand (3,000) market rate rental units used to determine market rate rents. The total in lieu fee shall be the sum of the fees for each of the individual income categories.
3. Less Than 19 Units. The in lieu fee for Residential Developments with up to nineteen (19) dwelling units that provide ninety percent (90%) or more of maximum residential density permitted for the site by the San José General Plan shall be half of the amount otherwise due under this Section.

- C. The in lieu fee for each For-Sale Residential Development shall be determined based on the net square footage of the For-Sale Residential Development as calculated by the City. The in lieu fee for each Rental Residential Development shall be determined based on the rentable square footage of the Rental Residential Development as calculated by the City. To account for inflation in affordable housing development costs the in lieu fee shall be increased on July 1 of each year by the Engineering News Record ("ENR") Construction Cost Index for the San Francisco area published by McGraw Hill on January 1 of every year, or its successor publication, for the preceding twelve (12) months until such time that a new in lieu fee is determined pursuant to this Section.
- D. The Council may by resolution based on findings, designate defined Market areas or other geographical areas as Strong Market Areas or Moderate Market Areas, and specify different in lieu fees which apply in those defined geographical areas which do not exceed the fees that do not exceed the fees which otherwise apply pursuant to this Section.
- E. The amount of in lieu fees shall be established in accordance with the provisions of this Section 5.08.520 by the City Council's annual resolution establishing the Schedule of Fees and Charges, or as established otherwise by resolution of the City Council, and may include in the fee the actual estimated costs of administration and the estimated cost of increases in the price of housing and construction from the time of payment of the in lieu fee to the estimated time of provision of the affordable units by the City. The amount of the in lieu fee shall be updated periodically, as required.
- F. The in lieu fee pursuant to this Section 5.08.520 may be reduced for Residential Development of ten (10) or more floors or stories in height not including any non-residential uses where the highest occupied floor has a floor level elevation is at least one hundred fifty (150) feet above street level (High Rise Residential Development) in any specified area of the City by City Council resolution or

policy providing incentives for the provision of high rise Residential Development. The reduction of in lieu fees pursuant to this Subsection 5.08.520.F shall only apply through the adoption by the City Council of a resolution or policy for all such development and shall not apply to individual High Rise Residential Development projects.

- G. No certificate of occupancy shall be issued by the City for any Market Rate Unit in the Residential Development prior to the payment in full of all in lieu fees to the City. The Developer shall provide both notice by recorded document against the Residential Development and, additionally, for each For-Sale Dwelling Unit therein, the Developer shall provide specific written notice to any purchaser of any Dwelling Unit prior to the acceptance of any offer to purchase, and shall obtain executed acknowledgement of the receipt of such notice, that purchaser shall not have any right to occupy the Dwelling Unit until such time as all in lieu fees owing for the Residential Development are paid to the City.
- H. All in lieu fees collected under this Section shall be deposited in the Inclusionary Fee Fund established pursuant to this Chapter.
- I. An updated determination of the in lieu fees for this option shall be commenced no later than five (5) years after the prior determination was adopted in the City Council's resolution establishing the Schedule of Fees and Charges. The Council may adopt in lieu fee amounts that are less than those determined under this Section.

**5.08.525 Mixed Compliance with Rental Inclusionary Units On-Site**

- A. The inclusionary housing requirement for Rental Residential Developments in Section 5.08.400 may be satisfied by the providing of at least five percent (5%) of the total Dwelling Units in the Residential Development as on-site Inclusionary Units in at least one income category in Section 5.08.400 together with the

payment of an adjusted in lieu fee reduced for the Inclusionary Units provided consistent with this Section and the Inclusionary Housing Guidelines.

- B. An updated determination of the adjusted in lieu fees for this option shall be commenced no later than five (5) years after the prior determination was adopted in the City Council's resolution establishing the Schedule of Fees and Charges. The determination shall be updated as follows: the adjusted in lieu fee applicable to this Section 5.08.525 will be determined consistent with the procedures provided in Section 5.08.520.B.2 and Section 5.08.520.D, however the income categories, the percentages and rents applicable under Section 5.08.400.A.2(i) shall be used, rather than those provided under Section 5.08.510.B. The Affordability Gap will be calculated and made applicable on a square footage basis for each such income category consistent with the procedures provided in Section 5.08.520.B.2. A further reduction for on-site compliance shall be determined for each category and Market Area pursuant to the Inclusionary Housing Guidelines based on a review of factors including the rate of utilization of this Section to produce on-site Inclusionary Units and the affordability of the Inclusionary Units provided (the "On-Site Adjuster").
- C. When the Applicant restricts five percent (5%) or ten percent (10%) of the total Dwelling Units in the Rental Residential Development so that they are made available for rent at an Affordable Housing Cost to one or two of the following income categories: Moderate Income Households, Low Income Households, or Very Low Income Households consistent with Section 5.08.400.A.2(i), the in lieu fee amount determined under this Section for the Rental Residential Development shall be reduced based on the amount of the adjusted in lieu fee otherwise applicable to the Rental Residential Development based on the on-site Inclusionary Units in the income category provided and then by the applicable On-Site Adjuster.

- D. The provisions of Subsections C through F of Section 5.08.520 applicable to rental in lieu fees shall also apply to the adjusted in lieu fees established under this Section.

**5.08.530 Dedication of Land In Lieu of Construction of Inclusionary Units**

- A. The inclusionary housing requirement in Section 5.08.400 may be satisfied by the dedication of land in lieu of constructing Inclusionary Units within the Residential Development if the City Manager determines that all of the following criteria, as implemented by in the Inclusionary Housing Guidelines, have been met:
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 value of the site upon the date of dedication is equal to or greater than the in lieu fee in effect at the date of dedication multiplied by the number of otherwise required Inclusionary Units within the Residential Development.
  7. The dedicated site complies with the City's Affordable Housing Siting Policy, or meets other City General Plan policies such as being located near transit.
- B. With respect to sites dedicated pursuant to Subsection A, 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 City of San José Inclusionary Fee Fund and used in accordance with the provisions of Section 5.08.700.
- C. The inclusionary housing requirement in Section 5.08.400 may also be satisfied by the dedication of land in lieu of constructing Inclusionary Units within the Residential Development if the City Manager determines that all of the following criteria, as implemented by the Inclusionary Housing Guidelines, have been met:
1. The land to be dedicated (the "site") is in located within the City of San Jose and the land meets all of the criteria required under Government

Code section 65913.4 for SB 35 permit streamlining and Government  
Code section 65913.4 is still in effect.

2. The requirements listed in Subsections A(1) and A(3)-(7) are met for the site.
- D. With respect to sites dedicated pursuant to Subsection C., the City shall solicit proposals from Affordable Housing Developers to construct restricted income units on the site dedicated to the City, but if the City is unable to obtain a qualified affordable housing developer to construct a viable leasehold affordable housing development on the property within two years of its solicitation or to commence construction within five years, the City may sell, transfer, lease, or otherwise dispose of the dedicated site for any purpose. 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 Fee Fund and used in accordance with the provisions of Section 5.08.700.

#### **5.08.540 Credits and Transfers**

The inclusionary housing requirement in Section 5.08.400 may be satisfied by the purchase of credits for Inclusionary Units from a Developer of inclusionary housing in lieu of constructing Inclusionary Units within the Residential Development if the City Manager determines that all of the following criteria are met:

- A. A Developer who constructs a Surplus Inclusionary Unit may utilize such Surplus Inclusionary Unit to satisfy the inclusionary housing requirement for future Residential Development for a period of no more than five (5) years after issuance of the certificate of occupancy for the Surplus Inclusionary Unit.



- B. A Developer who constructs a Surplus Inclusionary Unit may sell or otherwise transfer the Surplus Inclusionary credit to another Developer in order to satisfy, or partially satisfy, the transferee Developer's inclusionary housing requirement.
- C. The inclusionary housing restrictions shall be recorded against the market rate Residential Development and the Inclusionary Unit pursuant to this Chapter and the Inclusionary Housing Guidelines. The restrictions on the Inclusionary Unit shall commence upon the initial sale or rental of the Inclusionary Unit at the Affordable Housing Cost occurring subsequently to the approval of the Affordable Housing Plan in which the Inclusionary Unit is offered to satisfy the requirements of this Chapter.
- D. The transferee Developer who utilizes any Surplus Inclusionary Housing credit shall comply with the timing requirements for Inclusionary Units to be made available for occupancy concurrently with the Market Rate Units in the Residential Development pursuant to Section 5.08.460.

**5.08.550 Acquisition and Rehabilitation of Existing Units**

The inclusionary housing requirement in Section 5.08.400 may be satisfied by the acquisition and rehabilitation of existing Market Rate Units for conversion to units affordable to Lower or Very Low Income Households only, in lieu of constructing Inclusionary Units within the Residential Development, if the City Manager determines that all of the following criteria are met:

- A. The value of the rehabilitation work is twenty five percent (25%) or more than the value of the Dwelling Unit prior to rehabilitation, inclusive of land value. The Inclusionary Housing Guidelines shall include criteria for the determination of value.

- B. Two (2) Dwelling Units shall be rehabilitated in lieu of each single Inclusionary Unit required pursuant to this Part 5.
- C. The Developer is providing all costs of notice to and relocation of existing residents in the residential units to be rehabilitated, and as further required by the Inclusionary Housing Guidelines.
- D. 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 rehabilitated units.
- E. The use of the site of the Dwelling Units to be rehabilitated shall not constitute a nonconforming use.
- F. The rehabilitated Dwelling Units shall comply with all current applicable Building and Housing Codes.
- G. A Physical Needs Assessment to the satisfaction of the City shall be performed on each Dwelling Unit to be acquired and rehabilitated, the property upon which it is located, and any associated common area, and all items identified in the Physical Needs Assessment needing repair, replacement and maintenance at the time of the Assessment or that will likely require repair or replacement within three (3) years of the Assessment shall be completed prior to the approval of the Dwelling Unit as an Inclusionary Unit. The Developer shall include in the Affordable Housing Plan the method by which a capital reserve for repair, replacement and maintenance shall be maintained for the term of the affordability restriction, with provision for sufficient initial capitalization and periodic contributions to the capital reserve.

- H. Environmental review of the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and is clear of all such hazards to the satisfaction of the City.
- I. The construction schedule for the units to be rehabilitated in lieu of providing Inclusionary Units shall be included in the Affordable Housing Plan.
- J. The rehabilitation of the Dwelling Units shall be completed prior to or concurrently with the Market Rate Residential Development pursuant to Section 5.08.460.
- K. The inclusionary housing restrictions shall be recorded against the Market Rate Residential Development and the rehabilitated Dwelling Units pursuant to this Chapter and the Inclusionary Housing Guidelines. The restrictions on the rehabilitated Dwelling Units shall commence upon the initial sale or rental of the rehabilitated Dwelling Unit at the Affordable Housing Cost occurring subsequent to the approval of the Affordable Housing Plan in which the rehabilitated units are offered to satisfy the requirements of this Chapter.
- L. Rehabilitated Dwelling Units shall be owner-occupied in lieu of the provision of Inclusionary Units for owner-occupied Residential Development; while rehabilitated Dwelling Units shall be rental units in lieu of the provision of Inclusionary Units for rental Residential Development.
- M. The bedroom count of the Dwelling Units to be rehabilitated shall be substantially the same as the Market Rate Residential Development, as set forth in the Inclusionary Housing Guidelines.
- N. The term of affordability of the Inclusionary Units to be provided pursuant to this Section 5.08.550 shall be as set forth in Section 5.08.600.B. and shall commence upon initial occupancy of the Inclusionary Units to the targeted income group at an Affordable Housing Cost.

- O. Inclusionary Units provided pursuant to this Section 5.08.550 shall not be eligible for use for credits and transfers pursuant to Section 5.08.540.

**5.08.560 HUD Restricted Units**

The inclusionary housing requirement in Section 5.08.400 may be satisfied through the provision of units that are restricted to Affordable Housing Cost for Lower or Very Low Income Households by agreement between the Applicant and the U.S. Department of Housing and Urban Development (HUD) in lieu of constructing Inclusionary Units within the Residential Development, if the City Manager determines that all of the following criteria are met:

- A. The agreement between the Applicant and HUD for the provision at the Affordable Housing Cost of the residential unit to Lower or Very Low Income Households shall expire after the Operative Date of this Chapter.
- B. Two (2) HUD-restricted Dwelling Units shall be provided in lieu of each single Inclusionary Unit required pursuant to this Part 5.
- C. The use of the site of any unit proposed to be provided as an Inclusionary Unit pursuant to this Section 5.08.560 shall not constitute a nonconforming use.
- D. The Dwelling Units shall comply with all current applicable Building and Housing Codes.
- E. The Affordable Housing Plan and Inclusionary Housing Agreement shall include provision for a Physical Needs Assessment to be performed to the satisfaction of the City no more than six (6) months prior to the termination of the agreement between the Applicant and HUD. Such an assessment shall be performed on each Dwelling Unit to be occupied as an Inclusionary Unit, the property upon

which it is located, and any associated common area. All items identified in the Physical Needs Assessment needing repair, replacement and maintenance at the time of the Assessment or that will likely require repair or replacement within three (3) years of the Assessment shall be completed prior to the acceptance of the Dwelling Unit as an Inclusionary Unit. The Developer shall include in the Affordable Housing Plan and the Inclusionary Housing Agreement the method by which a capital reserve for repair, replacement and maintenance shall be maintained for the term of the affordability restriction, with provision for sufficient initial capitalization and periodic contributions to the capital reserve.

- F. Environmental review of the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and is clear of all such hazards to the satisfaction of the City.
- G. The units to be provided as Inclusionary Units shall be included in the Affordable Housing Plan.
- H. The inclusionary housing restrictions shall be recorded against the Market Rate Residential Development and the Inclusionary Units to be provided pursuant to this Section 5.08.560 in accordance with this Chapter and the Inclusionary Housing Guidelines. Unless otherwise specified in this Section 5.08.560, the restrictions on the Inclusionary Units shall be for forty (40) years and shall commence upon the initial sale or rental of the first Market Rate Unit in the Residential Development subsequent to the approval of the Affordable Housing Plan in which the Inclusionary Units are offered to satisfy the requirements of this Chapter.
- I. The restrictions on the Inclusionary Units to be provided pursuant to this Section 5.08.560 shall run concurrently with the agreement between the Applicant and HUD providing the unit at an Affordable Housing Cost to Lower or Very Low Income Household. However, if the agreement between the Applicant and HUD

terminates prior to the forty (40) year term required by Subsection 5.08.560.H, then the Developer shall provide the Inclusionary Units for the balance of the term in accordance with the requirements of this Chapter, unless the agreement between the Applicant and HUD terminates because federal funding for the program is no longer available in which event the Developer shall provide the Inclusionary Units for five (5) years after the termination of the HUD agreement.

- J. Inclusionary Units provided pursuant to this Section 5.08.560 shall not be eligible for use for credits and transfers pursuant to Section 5.08.540.

#### **5.08.570 Combination of Methods to Provide Inclusionary Housing**

The Developer of a Residential Development may propose any combination of basic inclusionary options pursuant to Section 5.08.400 and/or in lieu options pursuant to Part 5 of this Chapter in order to comply with the provisions of this Chapter. Such proposals shall be made in the Affordable Housing Plan, shall be considered by the City in accordance with this Chapter and the Inclusionary Housing Guidelines, and approved by the City if the combined in lieu methods of compliance provide substantially the same or greater level of affordability and the amount of affordable housing is as required pursuant to Section 5.08.400 where all affordable housing will be provided on-site of the Residential Development or pursuant to Part 5 where the affordable housing will be provided both on-site and off-site or entirely off-site of the Residential Development.

#### **5.08.580 Option to Purchase**

The inclusionary housing requirement in Section 5.08.400 may be satisfied by the execution of an option to purchase real property and the recording of a memorandum of option, in lieu of constructing Inclusionary Units within the Residential Development, if the City Manager determines that all of the following criteria, as implemented by the Inclusionary Housing Guidelines, are met:

- A. An option agreement to purchase property within the City of San José (the “site”) for one dollar with a term of at least five (5) years is executed by the City and the Developer along with an attached approved form of purchase and sale agreement or transfer agreement and the City Manager has determined that such agreements are in the best interest of the City. The option or transfer agreement provides that marketable title to the site will be transferred to the City, or an Affordable Housing Developer approved by the City prior to the commencement of construction of the Residential Development and requires that the infrastructure to serve the dedicated site, including but not limited to streets and public utilities, must be made available by the Developer at the property line prior to the commencement of construction of the Residential Development and have adequate capacity to serve the maximum allowable residential development pursuant to the zoning regulations. The option agreement and the Affordable Housing Agreement provide that the City may terminate the option prior to the commencement of construction of the Residential Development and in that event the Developer shall comply with a specified alternative option under this Part 5.
- B. A memorandum of option is recorded on the property senior to all liens with a power of foreclosure.
- C. Environmental review of the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and is clear of all such hazards (or such hazards have been reviewed and are remediable) to the satisfaction of the City and do not present undue risk or liability to the City as determined by the City Manager.
- D. 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.

- E. 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.

#### **5.08.590 Partnership for Clustered Units**

The inclusionary housing requirement in Section 5.08.400 may be satisfied by the construction of clustered rental affordable housing on the site of the Residential Development in lieu of constructing the affordable units within the Residential Development, if the City Manager determines that all of the following criteria, as implemented by in the Inclusionary Housing Guidelines, are met:

- A. Location and Proximity. The clustered Inclusionary Units shall be located in close proximity to the Residential Development building envelope, either on the same site or a contiguous site. If the Inclusionary Units are separated from the Residential Development by a street or road, the width of the road shall not exceed sixty (60) feet and shall include a crosswalk to facilitate pedestrian travel between the Residential Development and the Inclusionary Units.
- B. The clustered Inclusionary Units shall be included in an Affordable Housing Development with financing that requires that they be located on a separate legal parcel from the Market Rate Units.
- C. Minimum Contribution Agreement. If the Applicant is not an Affordable Housing Developer, the Applicant shall enter into an agreement with an Affordable Housing Developer and City, consistent with the Inclusionary Housing Guidelines which provides for a minimum contribution by the Applicant not less than seventy-five percent (75%) of the Residential Development's projected in lieu fee amount and a timeline for obtaining and closing construction financing and



commencing construction prior to the earlier of the issuance of the first Certificate of Occupancy for the Residential Development or five (5) years.

- D. Collateralized In Lieu Fee Security. In the event that the Affordable Housing Developer and the Applicant wish to execute an agreement that allows for the closing of construction financing and commencing of construction after the time periods in Subsection C or such that timeline is not met, the Applicant shall secure its obligations to the City by means of a letter of credit or escrow account in the amount of the in lieu fee, acceptable to the City in form and substance.
- E. Standards. The clustered Inclusionary Units shall comply with standards of Section 5.08.470, except the standard prohibiting geographical concentration. If the clustered Inclusionary Units are provided on contiguous property, they may be provided with equivalent amenities and open space in lieu of access to the amenities and open space in the Residential Development required by Section 5.08.470.
- F. Percentage of Inclusionary Units and Affordability. Either (i) Five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Moderate Income Households earning up to one hundred percent (100%) of Area Median Income, five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Lower Income Households and five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Very Low Income Households or (ii) ten percent (10%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Extremely Low Income Households.

**Part 6**  
**Continuing Affordability**

**5.08.600 Continuing Affordability and Initial Occupancy**

- A. The Inclusionary Housing Guidelines shall include standard documents, in a form approved by the City Attorney, to ensure the continued affordability of the Inclusionary Units approved for each Residential Development. The documents may include, but are not limited to, Inclusionary Housing Agreements, regulatory agreements, promissory notes, deeds of trust, resale restrictions, rights of first refusal, options to purchase, and/or other documents, and shall be recorded against the Residential Development, all Inclusionary Units, and any site subject to the provisions of this Chapter. Affordability documents for For-Sale owner-occupied Inclusionary Units shall also include subordinate shared appreciation documents permitting the City to capture at resales (the difference between the market rate value of the Inclusionary Unit and the Affordable Housing Cost) in such amounts as deemed necessary by the City to replace the Inclusionary Unit.
- B. Unless otherwise specified by the Chapter, all Inclusionary Units shall remain affordable to the targeted income group for no less than ninety-nine (99) years or as prescribed in the Inclusionary Housing Guidelines. In no event may the period of affordability be less than the applicable period set forth in California Health and Safety Code sections 33413(c)(1) and (2). The Inclusionary Housing Guidelines shall provide procedures for the termination of the Affordable Housing Agreement in the event of the involuntary demolition or destruction of the Residential Development, and for termination in connection with the voluntary demolition or destruction of the Residential Development once the affordability has been provided for the minimum period hereunder after relocation benefits are provided for the occupants of the Inclusionary Units.

- C. Unless otherwise required by law, all promissory note repayments, shared appreciation payments, or other payments collected under this Section shall be deposited in the City of San José Inclusionary Fee Fund established pursuant to Section 5.08.700 of this Chapter.
- D. Any household that occupies an Inclusionary Unit must occupy that unit as its principal residence, unless otherwise approved in writing by the City Manager for rental to a third party for a limited period of time due to household hardship, as specified in the Inclusionary Housing Guidelines.
- E. Nonprofit affordable housing providers and government agencies may apply to the City for purchase of Inclusionary Housing Units for the purpose of sale or rental to eligible households so long as all of the terms of the Inclusionary Housing Agreement apply.
- F. No household may begin occupancy of an Inclusionary Unit until the household has been determined to be eligible to occupy that unit. Rental inclusionary units shall continue to be rented to income eligible households at an Affordable Housing Cost for the entire term of the inclusionary housing restriction. The Inclusionary Housing Guidelines shall establish standards for determining household income, maximum occupancy, Affordable Housing Cost, provisions for continued monitoring of tenant eligibility, and other eligibility criteria.
- G. Officials, employees, or consultants of the City and members of Boards and Commissions thereof, shall comply with all applicable laws, regulations, and policies relating to conflicts of interest as to their eligibility to develop, construct, sell, rent, lease, occupy, or purchase an Inclusionary Unit. The Inclusionary Housing Guidelines may include conflict of interest provisions relating to the administration of this Chapter and the eligibility of persons to occupy Inclusionary Units pursuant to this Chapter.

**5.08.610 Affordable Housing Plan Submittal and Inclusionary Housing Agreement**

- A. An Affordable Housing Plan shall be submitted as part of the application for First Approval of any Residential Development. No application for a First Approval for a Residential Development may be deemed complete unless an Affordable Housing Plan is submitted in conformance with the provisions of this Chapter.
- B. For each Construction Phase, the Affordable Housing Plan shall specify, at the same level of detail as the application for the Residential Development, all of the following information including, but not limited to:
  - 1. Whether the development is for sale or rental;
  - 2. How the inclusionary housing requirement will be satisfied pursuant to this Chapter;
  - 3. The number, Unit Type, tenure, number of bedrooms and baths, approximate location, size and design, construction and completion schedule of all Inclusionary Units;
  - 4. Phasing of Inclusionary Units in relation to Market Rate Units including the specific timing required by Section 5.08.460;
  - 5. Marketing plan, including (i) the manner in which Inclusionary Units will be offered to the public in a nondiscriminatory and equitable manner, or (ii) the manner in which Inclusionary Units will be offered in a nondiscriminatory manner intended to further the City's fair housing goals and accompanied by an anti-displacement policy applicable to the Inclusionary Units;

6. Specific methods to be used to verify tenant incomes, when applicable, and to maintain the affordability of the Inclusionary Units;
  7. A reliable financing mechanism for the ongoing administration and monitoring of rental Inclusionary Units;
  8. The Physical Needs Assessment where applicable, the manner in which repairs shall be made in compliance with this Chapter, and the manner by which a capital reserve for repair, replacement and maintenance shall be maintained for the term of the affordability restriction, with provision for sufficient initial capitalization and periodic contributions to the capital reserve; and
  9. Any other information that is reasonably necessary to evaluate the compliance of the Affordable Housing Plan with the requirements of this Chapter and the Inclusionary Housing Guidelines.
- C. Upon submittal, the City Manager shall determine if the Affordable Housing Plan is complete and conforms to the provisions of this Chapter and the Inclusionary Housing Guidelines. The decision of the City Manager may be appealed to the City Council in accordance with procedures for notice and hearing contained in Title 20 of the San José Municipal Code.
- D. The Affordable Housing Plan shall be reviewed as part of the First Approval of any Residential Development. The Affordable Housing Plan shall be approved if it conforms to the provisions of this Chapter and the Inclusionary Housing Guidelines. A condition shall be attached to the First Approval of any Residential Development to require recordation of the Inclusionary Housing Agreement described in Subsection G of this Section prior to the approval of any final or parcel map or building permit for the Residential Development.

- E. A request for a minor modification of an approved Affordable Housing Plan may be granted by the City Manager if the modification is substantially in compliance with the original Affordable Housing Plan and conditions of approval. Other modifications to the Affordable Housing Plan shall be processed in the same manner as the original plan.
- F. An Applicant may propose an alternative method of meeting inclusionary housing requirements that does not strictly comply with the requirements of this Chapter. The City Manager may approve such an alternative if he or she determines, based on substantial evidence, and which determination shall be specified in the Affordable Housing Plan, that the alternative will provide as much or more affordable housing at the same or lower income levels, and of the same or superior quality of design and construction, and will otherwise provide greater public benefit, than compliance with the express requirements of this Chapter and the Inclusionary Housing Guidelines.
- G. Following the First Approval of a Residential Development, the City shall prepare an Inclusionary Housing Agreement providing for implementation of the Affordable Housing Plan and consistent with the Inclusionary Housing Guidelines. Prior to the approval of any final or parcel map or issuance of any building permit for a Residential Development subject to this Chapter, the Inclusionary Housing Agreement shall be executed by the City and the Applicant and recorded against the entire Residential Development property and any other property used for the purposes of providing Inclusionary Housing pursuant to this Chapter to ensure that the agreement will be enforceable upon any successor in interest. The Inclusionary Housing Agreement shall not be amended without the prior written consent of the City and shall also not be amended prior to any necessary amendments to applicable Planning Permits.

- H. The City Council, by resolution, may establish fees for the ongoing administration and monitoring of the Inclusionary Units, which fees may be updated periodically, as required.

**5.08.620 Inclusionary Housing Agreements for Affordable Housing Developments**

- A. An Applicant with an Affordable Housing Development that is intending to provide units on-site pursuant to Section 5.08.400 may request to have the provisions required under this Chapter incorporated into any density bonus agreement required pursuant to San Jose Municipal Code Chapter 20.190 or for affordable housing streamlining pursuant to state law in accordance with procedures in the Inclusionary Housing Guidelines.
- B. Affordable Housing Developments may request a term of affordability of less than ninety-nine (99) years, but not less than fifty-five (55) years in accordance with procedures in the Inclusionary Housing Guidelines.

**Part 7**

**Implementation, Waiver, and Enforcement**

**5.08.700 Inclusionary Fee Fund**

- A. Unless otherwise required by law, all in lieu fees, fees, promissory note repayments, shared appreciation payments, or other funds collected under this Chapter shall be deposited into a separate account to be designated as the City of San José Inclusionary Fee Fund.
- B. The moneys in the Inclusionary Fee Fund and all earnings from investment of the moneys in the Inclusionary Fee Fund shall be expended to provide housing affordable to Extremely Low Income, Very Low Income, Lower Income, and Moderate Income Households in the City of San José ongoing administrative

costs including housing production, program management and inclusionary compliance monitoring.

#### **5.08.710 Monitoring of Compliance**

The Inclusionary Housing Guidelines and each Inclusionary Housing Agreement shall include provisions for the monitoring by the City of each Residential Development and each Inclusionary Unit for compliance with the terms of this Chapter, the Inclusionary Housing Guidelines, the applicable Inclusionary Housing Agreement, and, for Residential Development within a Redevelopment Project Area, the City shall also monitor and submit compliance reports to governmental agencies as required by law. Such provisions shall require compliance reports to be submitted to the City by the owner on at least a biennial basis and the City shall conduct periodic on-site audits to insure compliance with all applicable laws, policies, and agreements. The Council may adopt fees for the costs of monitoring and compliance by the City, which shall be deposited into the Inclusionary Fee Fund for that purpose.

#### **5.08.720 Waiver**

- A. Notwithstanding any other provision of this Chapter, the requirements of this Chapter may be waived, adjusted, or reduced if an Applicant 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.
- B. 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 5.08.610 of this Chapter. The request for a waiver, adjustment, or reduction shall set forth in detail the factual and legal basis for the claim.



- C. 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 for Affordable Housing Plans in Section 5.08.610.C.
- D. In making a determination on an application for waiver, adjustment, or reduction, the Applicant shall bear the burden of presenting substantial evidence to support the claim. The City may assume each of the following when applicable:
  - 1. That the Applicant will provide the most economical Inclusionary Units feasible, meeting the requirements of this Chapter and the Inclusionary Housing Guidelines.
  - 2. That the Applicant is likely to obtain housing subsidies when such funds are reasonably available.
- E. 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.

**5.08.730 Implementation and Enforcement**

- A. The City Manager shall adopt guidelines to assist in the implementation and administration of all aspects of this Chapter.
- B. The City shall evaluate the effectiveness of the ordinance codified in this Chapter, for review by the City Council, five (5) years after the Operative Date of this Chapter.

- C. The City Attorney shall be authorized to enforce the provisions of this Chapter and all Inclusionary Housing Agreements, regulatory agreements, covenants, resale restrictions, promissory notes, deed of trust, and other requirements placed on Inclusionary Units by civil action and any other proceeding or method permitted by law. The City may, at its discretion, take such enforcement action as is authorized under this Code and/or any other action authorized by law or by any regulatory document, restriction, or agreement executed under this Chapter.
- D. Failure of any official or agency to fulfill the requirements of this Chapter shall not excuse any Applicant or owner from the requirements of this Chapter. No permit, license, map, or other approval or entitlement for a Residential Development shall be issued, including without limitation a final inspection or certificate of occupancy, until all applicable requirements of this Chapter have been satisfied.
- E. 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 otherwise would be entitled under law or equity.

#### **5.08.740 Transition Period Procedures and Fees**

- A. In Lieu Fees. In connection with the amendments to this Chapter adopted in 2021 by Ordinance No. 30538, in lieu fees that were applicable to Residential Developments with unexpired Planning Permit approvals (or otherwise deemed final pursuant to State law) prior to May 1, 2021 shall remain at the rates provided in the City's Schedule of Fees and Charges provided that such fees shall be increased pursuant to the Schedule of Fees and Charges on July 1 of each year by the Engineering News Record ("ENR") Construction Cost Index for the San Francisco Urban area published by McGraw Hill on January 1 of every year, or its successor publication, for the preceding twelve (12) months.

- B. Election to Comply with the Amended Ordinance. Residential Developments subject to this Chapter with unexpired Planning Permit approvals (or otherwise deemed final pursuant to State law) prior to May 1, 2021 that have not paid the In Lieu Fee, recorded an Inclusionary Housing Agreement or been issued a building permit, may elect to comply with the amendments to this Chapter adopted in 2021 by Ordinance No. 30538 by completion of a replacement Affordable Housing Plan and Acknowledgement, provision of all required submittals consistent with this Chapter as amended and the Inclusionary Housing Guidelines, and the approval of the replacement Affordable Housing Plan.
- C. Operative Date for the Amendments. The amendments to this Chapter adopted in 2021 by Ordinance No. 30538 are intended to be operative on May 1, 2021.

PASSED FOR PUBLICATION of title this 23<sup>rd</sup> day of February, 2021, by the following vote:

AYES: ARENAS, CARRASCO, COHEN, DAVIS, FOLEY, JONES, JIMENEZ, MAHAN, PERALEZ, LICCARDO.

NOES: NONE.

ABSENT: ESPARZA.

DISQUALIFIED: NONE.



---

SAM LICCARDO  
Mayor

ATTEST: 

---

TONI J. TABER, CMC  
City Clerk