

**From:** [Phan, Johnny](#)  
**To:** [Downtown West Project](#)  
**Subject:** FW: Google - Diridon/DW - Reg Agreement  
**Date:** Tuesday, May 18, 2021 11:24:54 AM  
**Attachments:** [Redline CPDB 5-3-21 - Reg Agreement City Comments 5-6-21 - CPDB 5-6-21 Comments to City 5-6-21 Comments - Reg Agreement.docx](#)  
[CPDB 5-6-21 Comments to City 5-6-21 Comments - Reg Agreement.docx](#)

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**From:** Miller, Gregg <[gmliller@coblentzlaw.com](mailto:gmliller@coblentzlaw.com)>  
**Sent:** Thursday, May 6, 2021 5:16 PM  
**To:** Phan, Johnny <[Johnny.Phan@sanjoseca.gov](mailto:Johnny.Phan@sanjoseca.gov)>  
**Subject:** Google - Diridon/DW - Reg Agreement

[External Email]

Johnny: redlined (vs the draft from the City this morning) and clean versions of the Reg Agreement, revised per discussions with Rachel. Thanks,

**Gregg Miller**

**Coblentz Patch Duffy & Bass LLP**

One Montgomery Street, Suite 3000

San Francisco, CA 94104

Cell: 415-939-3142 | Direct Dial 415-772-5736 | Office 415-391-4800

[gmliller@coblentzlaw.com](mailto:gmliller@coblentzlaw.com)

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This message is from outside the City email system. Do not open links or attachments from untrusted sources.

RECORDING REQUESTED BY:  
WHEN RECORDED MAIL TO:

City of San José  
Housing Department  
200 East Santa Clara Street, T-12  
San José, CA 95113  
Attention: Inclusionary Housing  
Project: \_\_\_\_\_

APN: \_\_\_\_\_

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No fee for recording pursuant to Government Code Section 27383  
*(Space above for Recorder's Use)*

***FORM OF***  
**INCLUSIONARY HOUSING AGREEMENT**  
*[to be modified to conform to specifics of a particular building or buildings]*

**(Covenant for the Benefit of the City of San José)**  
***[Insert name of Project]***

NOTICE: THIS AGREEMENT CONTAINS SUBORDINATION REQUIREMENTS TO  
PRESERVE THE PRIORITY OF LAND USE AND AFFORDABLE HOUSING  
REGULATORY COVENANTS RESTRICTING SALE OR RENTAL OF DWELLING UNITS

This INCLUSIONARY HOUSING AGREEMENT ("Agreement") is entered into as of this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between the CITY OF SAN JOSE, a municipal corporation (the "City"), and \_\_\_\_\_, a \_\_\_\_\_ [Insert Name and entity type] (the "**Developer**"), with reference to the following facts:

A. This is a form of agreement to be recorded in connection with the implementation of the Developer's Inclusionary Housing Program under the Development Agreement.

B. The Developer is the only owner of the fee interest in certain real property located at \_\_\_\_\_ [Insert addresses or if none, reference to cross streets] in the City of San José, California and more particularly described in the attached **Exhibit A** (the "**Property**") that is the subject of this Agreement. If the Developer is not the only owner of the Property, both the Developer and the Owner (as defined in Section 1 below) must execute and record this Agreement.

C. The Property is located within the boundaries of the Downtown West Planned Development Permit. The Property is subject to the terms and conditions of the Development Agreement during the term of the Development Agreement, as recorded in the Official Records of the County of Santa Clara as document number \_\_\_\_\_.

D. Exhibit D of the Development Agreement is the Affordable Housing Program to which the Developer and the City have agreed as the affordable housing requirements applicable to the Project (the "**Affordable Housing Program**") and is a hybrid program based on the City's Inclusionary Housing Ordinance, San José Municipal Code Chapter 5.08 in effect on the Effective Date, a copy of which is attached to the Development Agreement at Schedule D5 ("**Chapter 5.08**" or the "**Ordinance**"), and sets forth the Developer's inclusionary housing obligations and the methods for satisfying those obligations, including by means of on-site inclusionary units, land dedication, and payment of in-lieu fees (the "**Inclusionary Obligation**").

E. The Affordable Housing Program includes implementation Development Agreement IHO Guidelines at Schedule D2 of the Development Agreement (the "**Development Agreement IHO Guidelines**").

F. This Agreement, including the attached Exhibits, is intended to set forth the terms and conditions for the implementation of the Developer's agreement to meet the Inclusionary Obligation in accordance with the Development Agreement's Exhibit D.

G. The Developer is developing a project requiring a planning permit that creates \_\_\_\_\_ (\_\_\_\_\_) new, additional or modified rental or for-sale dwelling units on the Property ("**Total Dwelling Units**"). The project has obtained planning permits designated \_\_\_\_\_ and \_\_\_\_\_ [list type of permit, permit number] which were approved by the City of San Jose on \_\_\_\_\_, 20\_\_\_\_. The Developer's residential project (the "**Project**" or "**Residential Development**") is described in more detail on the approved Affordable Housing Compliance Plan ("**Compliance Plan**") dated \_\_\_\_\_, 20\_\_\_\_ and approved on \_\_\_\_\_, 20\_\_\_\_, on file with the City Housing Department a summary of which is attached as **Exhibit B**

including the project's permit information, the total number of dwelling units, whether the units are rental or for-sale, the Developer's Inclusionary Obligation compliance option election, any exemptions claimed, any contiguous property under common ownership or control, timing of construction, and any requested project phasing.

H. This Agreement must be executed and recorded against the Property prior to the issuance of the first Building Permit needed for vertical construction of the Project. This Agreement must be senior to all deeds of trust or other documents with a power of sale, all mortgages, all judgment liens, and any other liens not in favor of the City (except for liens for property taxes and assessments not yet payable).

I. This Agreement includes a restriction on the Sale or Rental of new, additional or modified rental or for-sale dwelling units on the Property.

### **COVENANTS**

NOW, THEREFORE, it is mutually agreed by and between the Developer and the City (the "**Parties**") as follows:

**Section 1. Definitions.** All capitalized terms used in this Agreement but not defined shall have the meanings provided in the Ordinance or the Development Agreement IHO Guidelines adopted for its implementation. For the purpose of this Agreement, the following terms have the following meanings:

- a) "Affordable Housing Compliance Plan" means Compliance Plan as defined below.
- b) "Affordable Housing Cost" shall have the meaning provided by California Health & Safety Code section 50052.5 for owner-occupied housing.
- c) "Affordable Rent" means rent, which including a reasonable utility allowance, does not exceed:
  - 1. for very low-income households, the product of 30 percent times 50 percent of the area median income adjusted for family size appropriate for the unit;
  - 2. for lower income households rents shall be set at an affordable rent as defined in Section 50053 of the Health & Safety Code (the product of 30 percent of 60 percent of the area median income adjusted for family size appropriate for the unit);
  - 3. Effective May 1, 2021, for on-site moderate income Inclusionary Units rents shall be set at no more than thirty percent (30%) of one hundred percent (100%) of Area Median Income adjusted for family size appropriate for the unit.
- d) "Building Permit" includes full structural building permits as well as partial permits such as foundation-only permits.

e) “Compliance Plan” means a plan prepared in connection with Developer’s Vertical Conformance Review Application pursuant to Section III.D.1 of Exhibit D of the Development Agreement and the Compliance Plan requirements in the Development Agreement IHO Guidelines.

f) “Dwelling Unit” shall have the meaning provided in the Ordinance.

g) “For-Sale Development” means a Residential Development with a tentative map, final map, parcel map, condominium plan, or other similar documentation allowing for the creation of separately conveyable dwelling units or interests (such as condominiums, stock cooperatives, or community apartments), and demonstrating compliance with Subdivided Lands Act, including the formation of a Homeowner’s Association prior to issuance of its Certificate of Occupancy.

h) “Development Agreement IHO Guidelines” has the meaning set forth in the Recitals above.

i) “H1, H5 and H6 Property” shall have the respective meanings given each term in the Affordable Housing Program.

j) “IHO Fee Credit” shall have the meaning provided in the Affordable Housing Program.

k) “Inclusionary Unit” shall have the meaning provided in the Ordinance.

l) “In Lieu Fee” means the fee that the Developer may elect to pay to the City in lieu of constructing the Inclusionary Units within the Residential Development consistent with the Affordable Housing Program and the Ordinance.

m) “Ordinance” or “Chapter 5.08” shall have the meaning set forth in the Recitals above for so long as the Development Agreement applies to the Property or Project and thereafter shall mean San José Municipal Code Chapter 5.08.

n) “Owner” includes all persons and entities having fee ownership of the Property.

o) “Rental Development” means any Residential Development that is not a For-Sale Development.

p) “Residential Development” shall have the meaning provided in Section 5.08.250 of the Ordinance.

q) “Surplus Inclusionary Units” shall have the meaning provided in Section 5.08.255 of the Ordinance.

r) “Transfer Agreement” shall mean the applicable Property Transfer Agreement between the City and the Developer (or their respective assignees) for the H1, H5 or H6 Property as applicable.

**Section 2. Affirmative Covenants and Warranties.** The Developer warrants and covenants as follows:

a) All of the Developers statements and representations in the Compliance Plan and this Agreement are true and correct.

b) The Developer shall comply with the compliance option selected in the Compliance Plan (consistent with the Developer’s obligations under the Affordable Housing Plan) to meet the Inclusionary Housing Obligation.

c) The Developer shall record the notice of completion issued for the Residential Development in the Official Records of the County of Santa Clara.

d) If the Developer shall fail to comply with the requirements of that compliance option within the specified timing, then the Developer will satisfy its Inclusionary Obligations in the manner otherwise required in the Affordable Housing Program as defined in Section III of Exhibit D of the Development Agreement.

e) In the event that there is Contiguous Property under Common Ownership or Control, the Developer shall execute and record the City’s Covenant for Contiguous Property under Common Ownership or Control in the Official Records of the County of Santa Clara against such Contiguous Property concurrently herewith.

f) If the compliance option selected by the Developer includes off-site units, credits or otherwise includes commitments regarding other property, the Developer shall execute and record this Agreement in the Official Records of the County of Santa Clara concurrently herewith against all other property required for the specific compliance election made in the Compliance Plan.

**Section 3. Authority; Due Diligence Required Prior to Execution of the Agreement.** If the Developer is not the Owner of the Property, this Agreement must be executed by the Developer and the Owner, and the covenants hereunder shall apply to both such parties. Prior to the execution of this Agreement, ownership documentation satisfactory to the City is required and if the Developer or the Owner is not a natural person, documentation satisfactory to the City will be required to establish the existence of the entity, authority to operate in California and delegation of authority for the person(s) signing on behalf of the Developer or Owner.

**Section 4. Compliance Option.**

a) The Developer, by the signatures below affirms it has elected in its Compliance Plan to comply with the following Inclusionary Obligation by providing all three components as described below consistent with the Affordable Housing Program, the Ordinance

and the Development Agreement IHO Guidelines and summarized in **Exhibit B:**

1. **Onsite Units** - Provide 5.88% of Total Dwelling Units as moderate income rental Inclusionary Units on-site, consistent with the Affordability Restriction(s) attached hereto as **Exhibit C** and the Affordable Housing Program; and

2. **Land Dedication** - Close (or be deemed to have closed) the transfer to the City or the City's designee of the H6, H5 or H1 Property, as applicable, under the applicable Transfer Agreement; and **In-lieu Fees** - Apply the applicable unexpended IHO Fee Credits from the Transfers to satisfy any applicable remaining inclusionary housing requirements in accordance with the Affordable Housing Program; and 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, as applicable, then for any unsatisfied IHO Fee obligation, the Developer shall pay IHO Fees in the amount of \$18.70 per rentable square foot (rsf) for each residential unit (in addition to providing 5% on-site inclusionary units at 100% AMI), as more specifically set forth in the Affordable Housing Program, including the provisions regarding Annual Increases.

b) **Future Conversion and Relocation** - During the term of the Development Agreement, allow the Developer to request conversion of the 100% AMI rental units to units for sale at an affordable sales price based on 100% AMI, consistent with Exhibit D Section III of the Development Agreement.

c) The mere mapping of the units consistent with a For Sale Development shall not cause the units to be treated as a For Sale Development unless and until Developer provides notice of the City and residents, compliance with the Subdivided Lands Act and compliance with the applicable requirements of the City's Conversion Ordinance consistent with Section III of the Development Agreement.

**Section 5. Covenants to Run with the Land.** The Developer hereby subjects the Property and the Project to the covenants and restrictions set forth in this Agreement. Developer hereby declares its express intent that the covenants and restrictions set forth herein shall be deemed covenants running with the land and shall pass to and be binding upon the Developer's successors in interest. All provisions of this Agreement shall be binding upon and inure to the benefit of the heirs, administrators, executors, successors-in-interest, transferees, and assigns of Developer and the City, regardless of any voluntary or involuntary conveyance or transfer of the Property. Except as provided in any written agreement executed by City, each and every contract, deed, lease or other instrument covering, conveying or otherwise transferring the Property or improvements constructed on the Property or any portion thereof or interest therein (a "Contract") shall conclusively be held to have been executed, delivered and accepted subject to this Agreement regardless of whether the terms of this Agreement are set forth in such Contract and regardless of whether the other party or parties to such Contract have actual knowledge of this Agreement.

Developer and the City hereby declare their understanding and intent that:

- a) the covenants and restrictions contained in this Agreement shall be construed as covenants running with the land pursuant to California Civil Code section 1468 and not as conditions which might result in forfeiture of title by Developer; and
- b) the burden of the covenants and restrictions set forth in this Agreement touch and concern the Property in that the Developer's legal interest in the Property and all improvements thereon are rendered less valuable thereby; and
- c) the benefit of the covenants and restrictions set forth in this Agreement touch and concern the land by enhancing and increasing the potential enjoyment and use of the Property and Units by Moderate, Low and Very Low Income Households, the intended beneficiaries of such covenants and restrictions.

**Section 6. Release of Project Units from Agreement.** The covenants and conditions herein contained shall apply to and bind, during their respective periods of fee ownership, Developer and its heirs, executors, administrators, successors, transferees, and assignees having or acquiring any right, title or interest in or to any part of the Property and shall run with and burden such portions of the Property until rescinded in accordance with Section 12 below.

Except with respect to any portions of the Property which are released from the burdens of this Agreement by a rescission or partial rescission executed by the City; the Owner of the Property shall expressly make the conditions and covenants contained in this Agreement a part of any deed or other instrument conveying any interest in such property.

At any time following the expiration of this Agreement and upon Developer's written request, the City shall provide a release of this Agreement, in recordable form and otherwise reasonably acceptable to Developer, within thirty (30) days after such request.

**Section 7. Default.**

a) During Development Agreement. So long as the Property is subject to the terms of the Development Agreement, Article 9 (Enforcement of Agreement; Default; Remedies) of the Development Agreement regarding default and remedies shall apply and control with respect to any failure of the Developer to perform its obligations under this Agreement and Sections 7.b and 8 below shall not apply during such time. Notwithstanding the above, this limit shall not apply to the remedies in Exhibit C.

b) Following Development Agreement. Following the expiration or sooner termination of the Development Agreement or at such other time as the Development Agreement no longer applies to the Property, then the following provisions with respect to default shall control:

Failure of the Developer to cure any default in the Developer's obligations under the terms of this Agreement within thirty (30) days after the delivery of a notice of default from the



City will constitute a default under this Agreement and a failure to satisfy the Conditions of Approval with respect to the Project and Property and the requirements of the Ordinance and Development Agreement IHO Guidelines and, in addition to remedies for breach of this Agreement, the City may exercise any and all remedies available to it under the Subdivision Map Act, Chapter 5.08, or otherwise, with respect to the Developer's failure to satisfy the Conditions of Approval and the requirements of Chapter 5.08 including but not limited to:

- (a) withholding, conditioning, suspending or revoking any permit, license, subdivision approval or map, or other entitlement for the Project including without limitation final inspections for occupancy and/or certificates of occupancy;
- (b) instituting against the Developer, or other parties, a civil action for declaratory relief, injunction or any other equitable relief, or relief at law, including without limitation an action to rescind a transaction and/or to require repayment of any funds received in connection with such a violation;
- (c) where one or more persons have received financial benefit as a result of violation of this Agreement or of any requirement imposed under Chapter 5.08, the City may assess, and institute legal action to recover as necessary, a penalty in any amount up to and including the amount of financial benefit received, in addition to recovery of the benefit received;
- (d) prosecuting a misdemeanor against any person who has rented a residential unit at a rent exceeding the maximum allowed under this Agreement or to a household not qualified under this Agreement, or who has otherwise violated Chapter 5.08, or any other agreement, restriction or requirement authorized or imposed under Chapter 5.08;
- (e) remedies set forth in this Agreement (such as the remedies described in **Exhibit C**); or
- (f) any other means authorized by state law or the City's Municipal Code.

**Section 8. Remedies Cumulative.** No right, power, or remedy given to the City by the terms of this Agreement, the Regulatory Agreement or Chapter 5.08 is intended to be exclusive of any other right, power, or remedy; and each and every such right, power, or remedy shall be cumulative and in addition to every other right, power, or remedy given to the City by the terms of any such document, Chapter 5.08, or by any statute or otherwise against Developer and any other person. Neither the failure nor any delay on the part of the City to exercise any such rights and remedies shall operate as a waiver thereof, nor shall any single or partial exercise by the City of any such right or remedy preclude any other or further exercise of such right or remedy, or any other right or remedy.

**Section 9. Hold Harmless.** Developer will indemnify and hold harmless (without limit as to amount) City and its elected officials, officers, employees and agents in their official capacity (collectively, the "Indemnitees"), and any of them, from and against all loss, all risk of loss and all damage (including expense) and all liability sustained or incurred because of or by

reason of any and all claims, demands, suits, actions, judgments and executions for damages of any and every kind and by whomever and whenever made or obtained, allegedly caused by, arising out of or relating in any manner to the Project, the Inclusionary Units, or Developer's performance or non-performance under this Agreement, and shall protect and defend Indemnitees, and any of them with respect thereto, except to the extent arising from the gross negligence or willful misconduct of the City. The provisions of this section shall survive expiration or other termination of this Agreement or any release of part or all of the Property from the burdens of this Agreement, and the provisions of this section shall remain in full force and effect. Notwithstanding the foregoing, so long as the Property is subject to the term of the Development Agreement, Section 4.9 (Indemnification of City) of the Development Agreement (and not this Section 9) shall apply and control with respect to any obligation of the Developer to indemnify, reimburse or hold harmless the City and any City Parties with respect to any Losses (as such terms are defined in such Section 4.9).

**Section 10. Notices.** All notices required pursuant to this Agreement shall be in writing and may be given by reputable overnight delivery service for next business day delivery or by registered or certified mail, return receipt requested, to the party to receive such notice at the addressed set forth below:

TO THE CITY:

City of San José  
Department of Housing  
200 East Santa Clara Street, T-12  
San José, CA 95113  
Attn: Inclusionary Housing

cc:  
City of San José  
City Attorney's Office  
200 East Santa Clara Street, T-16  
San José, CA 95113  
Attn: Housing Attorney

TO THE DEVELOPER:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attn: \_\_\_\_\_

Any party may change the address to which notices are to be sent by notifying the other parties of the new address, in the manner set forth above.

**Section 11. Integration; Conflict with Development Agreement.** The Development Agreement; this Agreement with all of its recitals and exhibits, together with the Compliance Plan; any documents to be executed for the implementation of the Developer's Inclusionary Obligation including, but not limited to, documents to be recorded against any off-site property; and any covenant recorded on Contiguous Property under Common Ownership and Control embody the agreement between City and Developer for the Residential Development's compliance with the Affordable Housing Program, the Ordinance, the Development Agreement and their respective terms and conditions. No verbal agreements or conversations with any officer, agent or employee of City prior to the execution of this Agreement, shall affect or modify any of the terms or obligations contained in this Agreement. If there is an express conflict between the Development Agreement, including the Affordable Housing Program, and this Agreement, the Compliance Plan, or the Ordinance that prevents the implementation of the Development Agreement, then the Development Agreement shall control.

**Section 12. Duration and Amendment of Agreement; Rescission.** This Agreement shall remain in effect until the ninety-ninth (99<sup>th</sup>) anniversary date of the recording of the notice of completion for the Residential Development. After the fifty fifth (55<sup>th</sup>) anniversary of the notice of completion for a rental Residential Development, the Developer may request rescission of the Inclusionary Housing Agreement. The City shall not unreasonably refuse to rescind the Inclusionary Housing Agreement provided that the City has been provided evidence the Developer has complied with all of the noticing and relocation benefit requirements for the tenants in the Residential Development, has obtained a demolition permit for the entire Residential Development and has completed its demolition. All tenants shall have the benefits required under the City's tenant protection ordinance, San José Municipal Code Chapter 17.23, Part 12 as may be amended. Additionally, a relocation plan shall be provided to the City for the Inclusionary Unit tenants prior to the approval of the demolition permit, which plan shall reflect the requirement that the those tenants shall be provided the relocation benefits required for displaced tenants under California Relocation Assistance Law, Government Code Section 7260 *et seq* and its implementing regulations, as may be amended.

a) It may be rescinded by the City after Developer's compliance with the Inclusionary Obligation. This Agreement, and any section, subsection, or covenant contained herein, may be amended only upon the written consent of the City Manager who shall have authority to approve or disapprove minor or technical amendments on behalf of the City consistent with the Ordinance and Development Agreement IHO Guidelines . If the amendment makes a substantive or material change to this Agreement it shall be effective only if the change is consistent with the Ordinance and Development Agreement IHO Guidelines and following approval of the City authority that gave the First Approval for the Project and the City Manager. This Agreement shall not be amended without any necessary amendments to applicable Planning Permits and payment of any transaction fees.

b) If a unit becomes a For-Sale unit and, in connection therewith, a new form of Inclusionary Housing Agreement, Compliance Agreement or restrictive covenant is entered into and recorded with respect to such unit(s), then the amount of time such unit(s) was restricted as a rental Restricted Unit shall count toward the For-Sale restricted term as set forth in Section

III.B.1.g of Exhibit D to the Development Agreement. The term for such “converted” For-Sale unit will be the number of years then remaining under the ninety-nine (99) year term.

c) For a For-Sale Development the term will be forty-five (45) years consistent with the Ordinance.

**Section 13. Recitals and Exhibits Incorporated.** All of the above Recitals, all Exhibits, and the Compliance Plan are hereby incorporated in this Agreement and made a part hereof.

**Section 14. Applicable Law.** This Agreement shall be governed by the law of the State of California.

**Section 15. Waivers.** Any waiver by the City of any obligation or condition in this Agreement must be in writing. No waiver will be implied from any delay or failure by the City to take action on any breach or default of Developer or to pursue any remedy allowed under this Agreement or applicable law. Any extension of time granted to Developer by the City Manager to perform any obligation under this Agreement shall not operate as a waiver or release from any of its obligations under this Agreement. Consent by the City to any act or omission by the Developer shall not be construed to be a consent to any other or subsequent act or omission or to waive the requirement for the City's written consent to future waivers.

**Section 16. Title of Parts and Sections.** Any titles of the sections or subsections of this Agreement are inserted for convenience of reference only and shall be disregarded in interpreting any part of the Agreement's provisions.

**Section 17. Multiple Originals; Counterpart.** This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts.

**Section 18. Recording of Agreement.** The Developer shall cause this Agreement to be recorded against the Property and any other Property required for satisfaction of the compliance option in the Developer's Compliance Plan in the Official Records of the County of Santa Clara.

**Section 19. Severability.** In the event any limitation, condition, restriction, covenant, or provision contained in this Agreement is to be held invalid, void or unenforceable by any court of competent jurisdiction, the remaining portions of this Agreement shall nevertheless, be and remain in full force and effect.

**Section 20. Time of Essence.** Time is of the essence of every provision hereof in which time is a factor.

**Section 21. Exhibits.** The following exhibits are attached to this Agreement:

Exhibit A	Legal Description of the Property
Exhibit B	Summary of the Project and Compliance Plan

Exhibit C      Affordability Restrictions ([Rental](#))  
[Exhibit D      Affordability Restrictions \(For-Sale\)](#)

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed

Developer:

\_\_\_\_\_,  
a \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

If the Developer is not the sole owner, the Owner consents to the recording of the Agreement:

Owner: *[List all parties on title]*

a \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_,  
a \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

Signatures must be notarized. Signatures continue on following page(s)

**City of San José**, a municipal corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

Approved as to form:

\_\_\_\_\_  
Senior Deputy City Attorney

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

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Line spacing: Multiple 1.01 li, No widow/orphan control, Tab  
stops: Not at -0.5"

State of \_\_\_\_\_

County of \_\_\_\_\_

On \_\_\_\_\_ before me, \_\_\_\_\_, Notary Public, personally

DATE

NAME OF NOTARY

appeared \_\_\_\_\_

NAME(S) OF SIGNER(S)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledge to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal

\_\_\_\_\_  
SIGNATURE OF NOTARY



**EXHIBIT A**

**LEGAL DESCRIPTION OF THE PROPERTY**

**EXHIBIT B  
SUMMARY OF PROJECT AND  
COMPLIANCE PLAN**

This Exhibit summarizes and provides notice of the Compliance Plan executed by the Developer and on file with the Housing Department.

1. The Project's permit numbers, permit types, permit application and approval dates:  
\_\_\_\_\_
  2. The total number of dwelling units: \_\_\_\_\_
  3. Whether the project is anticipated to be rental or for-sale: \_\_\_\_\_
  4. The Developer's Inclusionary Housing Ordinance Obligation compliance option election:  
\_\_\_\_\_
  5. Any requirements that apply to other property based on the Developer's Inclusionary Housing Ordinance Obligation compliance option election:  
\_\_\_\_\_
  6. List of any exemptions from the Inclusionary Housing Ordinance claimed in the Compliance Plan, any evidence submitted and whether the exemption was approved by City Manager.  
\_\_\_\_\_
  7. List of any contiguous property under common ownership or control by address and APN  
\_\_\_\_\_
  8. List any existing structures on the property, if the residential project includes any conversion or demolition \_\_\_\_\_
9. Summarize the timetable submitted showing timing of construction. \_\_\_\_\_  
\_\_\_\_\_

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9. **EXHIBIT C**

**AFFORDABILITY RESTRICTION**

**1. Affordability Restriction (Rental).**

(a) Restriction to Affordable Rent. For a period commencing upon the recordation of this Agreement and ending on the 99th anniversary of the recordation of the Notice of Completion for the Project, or, if no Notice of Completion is recorded on the Project, until the sixtieth (60th) anniversary of the recording of this Agreement, not less than five percent (5.88%) of the Total Dwelling Units shall be rented or otherwise made available at Affordable Rent to Moderate Income Households.

(b) A person or family shall be determined to be eligible (an "Eligible Household") to rent an Inclusionary Unit if the household income does not exceed on the maximum income level for a Moderate Income Household as required for that specific Inclusionary Unit.

(c) In adjusting for unit size to determine the maximum Affordable Rent, the following adjustments to the Area Median Income shall be made based on the number of bedrooms in the Inclusionary Unit: studio - one person, one bedroom - two persons, two bedrooms - three persons, three bedrooms - four persons, and four bedrooms - five persons. In the event that the Residential Development has or obtains Low Income Housing Tax Credits, after notice to the City these adjustments for assumed household size may be modified for new tenants to reflect federal unit size adjustments based on 1-1/2 persons per bedroom consistent with Health and Safety Code Section 50053. **EXHIBIT C-1** attached hereto and incorporated herein by this reference contain illustrations of the calculation of Affordable Rent for a rental unit for Moderate Income Households.

(d) Developer shall prohibit any person or family who has not been determined to be an Eligible Household at the time of taking possession, renting or occupying any Inclusionary Unit and shall cause any such person or family to vacate any Inclusionary Unit so rented or occupied. When an Inclusionary Unit is vacated, for any reason whatsoever, the Inclusionary Unit shall then again be rented or otherwise made available at Affordable Rent to Moderate Income as specified for the unit. For the purposes of this Agreement, "vacate" shall include, without limitation, departure from an Inclusionary Unit at the termination (whether at the end of a term or upon default) of the lease pursuant to which the Inclusionary Unit was occupied ("Lease"), abandonment of the Inclusionary Unit, sublease or assignment of an Inclusionary Unit (whether or not such sublease or assignment complied with the terms and conditions of the Lease).

(e) Recertification of Income. On an annual basis, Developer shall submit a report (the "Annual Report") to the City, which contains, with respect to each Inclusionary Unit, the rental rate and income and family size of the tenant household. The Annual Report shall be

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based on information supplied by the tenant or occupant of each Inclusionary Unit in a certified statement on a form provided or previously approved by the City.

2. **Definitions.** The definitions of Area Median Income, Lower (or Low) Income Household, Very Low Income Household, and Extremely Low Income Household shall have the definitions given these terms in Health and Safety Code Sections 50052.5, 50053, 50079.5, 50105, 50106 and 50093, as amended from time to time.

3. **Default and Remedies.**

a) **Non-Complying Units.** In addition to and without limitation of any other rights and remedies set forth in this Agreement or otherwise available to any party legally entitled to enforce this Agreement, in the event of any Default (as defined below), after thirty (30) day notice by City to Developer, and Developer's failure to cure within such thirty (30)-day period City shall have the right to lease and Developer shall lease to City on demand for a rental of \$1.00 per Inclusionary Unit per year any and all of the "Non-Complying Inclusionary Units" (as defined below) at such time as the Non-Complying Inclusionary Unit(s) is vacated. "Non-Complying Inclusionary Units" shall mean an Inclusionary Unit which is occupied and/or leased in violation of this Agreement. Determination of such a violation may be based on information provided in the Annual Report or determined by City in its reasonable discretion based on information otherwise available to it. Notwithstanding any term or condition of the lease under which the City leases a Non-Complying Inclusionary Unit pursuant to this subsection, Developer hereby consents to and grants City the right to assign such lease or sublet such Inclusionary Unit(s) to a Moderate Income Household, as appropriate, at Affordable Rent or to any non-profit housing provider (a "Provider") in the community for \$1.00 per year on the condition that such Provider subleases such Inclusionary Unit(s) or assigns such lease(s) to Moderate Income Household, as appropriate, at Affordable Rent. If the City assigns or sublets to any Provider, the Developer hereby consents to and grants such Provider the right to assign such lease or sublet such Inclusionary Unit to any Eligible Household at an Affordable Rent. If the City leases any Inclusionary Unit(s) or a Provider subleases any Inclusionary Unit(s) or is the assignee of any lease(s) from the City, the City or Provider, as the case may be, to the extent necessary to ensure compliance with this Agreement, shall sublease such Inclusionary Unit(s) or assign such lease(s) to any Eligible Household at Affordable Rent. Any rent paid under such a sublease or assignment shall be paid to the Developer after the City or Provider, as the case may be, has been reimbursed for any expenses incurred by it in connection with exercising the rights and remedies set forth in this subsection; provided, that if the Developer is in default under any loan documents in connection with the financing of the Property or any improvements thereon, such rent shall be paid to the party legally entitled thereto.

b) **Excess Rent.** In the event that and to the extent that the Developer receives rents or other payments from the operation of the Inclusionary Units or other improvements constructed on the Property in excess of what is permitted to charge and receive pursuant to this Agreement, after thirty (30) day notice by City to Developer, Developer agrees and covenants to pay to the City the full amount of such excess immediately on demand by the City. Developer and the City agree and intend that the payment of such excess, absent other remedies described in this Agreement to ensure for the term hereof that rents or other payments do not exceed those Developer is permitted to charge and receive pursuant to this Agreement, shall not alone be an

adequate remedy to accomplish the purposes of this Agreement

c) **All Remedies Available and Cumulative.** In the event of any breach of any of the covenants or restrictions set forth in this Exhibit C (a “Default”), the City or members of the community (as defined in the Health and Safety Code) shall have the right to exercise all the rights and remedies, and to maintain any action at law or suits in equity or other real property proceedings, including without limitation, specific performance, to enforce the covenants and restrictions and the curing of any breach or violation thereof. No delay in enforcing the provisions hereof as to any breach or violation shall impair, damage or waive the right of the City to enforce the provisions hereof in the future for any continuing or new breach or violation of any of the covenants or restrictions contained in this Agreement. All rights and remedies, including without limitation those set forth in paragraphs 3(a) through (c) above, of any party legally entitled to enforce this Agreement shall be cumulative and the exercise of any such right or remedy shall not impair or prejudice and shall not be a waiver of the right to exercise any other such rights and remedies.

4. **Reporting.** In addition to the Annual Report, Developer shall provide all information reasonably requested by the City (not more frequently than once per calendar quarter) with respect to the number of Units in the Property and the income levels of the persons or families renting or otherwise occupying the Units.

5. **Restriction to be Attached.** Developer shall attach a copy of this Exhibit C to any lease or purchase and sale contract with respect to any Inclusionary Unit.

6. **Transfer of Inclusionary Units.** During the term of this Agreement, Developer must give written notice to the City at least 90 days in advance of any sale, agreement to sell, assignment, conveyance, lease (other than the rental or lease of Inclusionary Units to Eligible Households), or transfer of the Inclusionary Units or any part thereof, including the sale of any general partnership interests, the removal of any general partner, or any substantial change in operational or management control over the Inclusionary Units.

7. **Monitoring.** The City shall have the right to take such actions to monitor compliance with this Agreement as it deems necessary, including but not limited to reasonable requests for documents.

8. **Monitoring Fees.** Developer shall pay annual monitoring fees to the City in advance on or prior to July 1 consistent with the amount set forth in the City’s Schedule of Fees and Charges. As of 2020-2021, the fee is \$41.65 per Inclusionary Unit to City.

9. **Property Damage or Destruction.** If any of the Inclusionary Units or access thereto is damaged or destroyed, Developer must notify the City within 30 days and must at its own cost and expense, repair or restore the Inclusionary Units. Such work shall be commenced within 120 days after the damage or loss occurs and shall be completed within one year thereafter. All insurance proceeds collected for such damage or destruction shall be applied to the cost of such repairs or restoration. In the event that the Inclusionary Units are not rentable during this time, the term of this Agreement shall be extended by the period of time that any of the Inclusionary Units

were not rented to and occupied by eligible households.

**10. No Discrimination.** The Developer covenants and agrees for itself, its heirs, successors, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the Property. The foregoing covenants shall run with the land.

All deeds, leases, and contracts for the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the Property, or any portion thereof made or entered into by Developer, its successors or assigns, shall contain therein the following language:

(a) In Deeds:

"The grantee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the premises herein conveyed. The foregoing covenants shall run with the land."

(b) In Leases:

"The lessee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through him or her, and this lease is made and accepted upon and subject to the following conditions that there shall be no discrimination against or segregation of any person or group of persons, on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the premises herein leased nor shall the lessee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy, of tenants, lessees, sublessees, subtenants, or vendees in the premises herein leased."

(c) In Contracts:

"The contractor herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through it, and this contract is made and accepted upon and subject to the conditions that there shall be no discrimination against or segregation of any person or of a group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure or enjoyment of the property herein transferred nor shall the contractor or any person claiming under or through it establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sublessees, subtenants, or vendees in the Property. The foregoing provisions shall be binding upon and shall obligate the contractor and any subcontracting parties, successors, assigns and other transferees under the contract."

### **EXHIBIT C-1**

The following hypothetical illustrates the calculation of Affordable Rent **for a Moderate Income Households** (as defined in the Ordinance) who are **Renting** a Moderate Income Inclusionary one-bedroom unit with an assumed family size of 2 persons in Santa Clara County.

#### **Assumptions.**

1. Inclusionary Unit to be made available to Moderate Income Households.
2. Family Size = 2 Persons (for purposes of this example)

Person or Family need not have the maximum income for a Person or Family in the income category (adjusted for family size).

3. Electricity charges are separately metered and directly billed to the tenants by PG&E. A reasonable allowance for such charges based on the Utility Allowance Schedule published by the County of Santa Clara Housing Authority ("Allowance") is deducted.

As of April 2020, per 25 California Code of Regulations ("CCR") Section 6932, median income for a family of 2 is \$113,300 ("Area Median Income adjusted for family size") and the maximum income level for a Moderate Income Household with a family size of 2 in Santa Clara County is \$135,900 (100% of the Area Median Income adjusted for family size).

Pursuant to 25 CCR Section 6918, rent (for the purposes of this Exhibit defined as "Rent") includes, among other things, payment for use or occupancy of a housing unit and charges or fees charged or passed through by the landlord other than security deposits). Pursuant to Section 50053 of the Health and Safety Code and this Restriction, the Rent paid by a Moderate Income Household for a Moderate Income Inclusionary Unit shall not exceed 30% of 100% of the Area Median Income adjusted for family size.

#### **CALCULATION OF RENT CHARGEABLE:**

\$135,900	[100% of the area median income adjusted for family size (2 persons)]
<u>X .30</u>	[Rent cannot exceed 30% of 100% of area median income]
\$40,770.00	

\$ 3,397.50	divided by 12 [to calculate the maximum <u>monthly</u> Rent]
<u>-\$ 74.00</u>	[ Assumed allowance for an all-electric 1 bedroom apartment.]

\$ 3,323.50 [Maximum Rent after reasonable allowance for electric charges.]

As this hypothetical illustrates, as of April 2020, no Moderate Income Household with a family size of 2 that pays its own electric bill should be charged or pay Rent in excess of \$3,397.50 per month minus less the approved utility allowance; this amount may be adjusted as the CCR Sections above are amended or the reasonable allowance amount is adjusted.



EXHIBIT D  
AFFORDABILITY RESTRICTIONS  
(For Sale)

RECORDING REQUESTED BY:  
WHEN RECORDED MAIL TO:

City of San José  
Housing Department  
200 East Santa Clara Street, T-12  
San José, CA 95113  
Attention: Inclusionary Housing  
Project: \_\_\_\_\_

APN: \_\_\_\_\_

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No fee for recording pursuant to Government Code Section 27383  
*(Space above for Recorder's Use)*

***FORM OF***  
**INCLUSIONARY HOUSING AGREEMENT**  
*[to be modified to conform to specifics of a particular building or buildings]*

**(Covenant for the Benefit of the City of San José)**  
***[Insert name of Project]***

NOTICE: THIS AGREEMENT CONTAINS SUBORDINATION REQUIREMENTS TO  
PRESERVE THE PRIORITY OF LAND USE AND AFFORDABLE HOUSING  
REGULATORY COVENANTS RESTRICTING SALE OR RENTAL OF DWELLING UNITS

This INCLUSIONARY HOUSING AGREEMENT ("Agreement") is entered into as of this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between the CITY OF SAN JOSE, a municipal corporation (the "**City**"), and \_\_\_\_\_, a \_\_\_\_\_ [Insert Name and entity type] (the "**Developer**"), with reference to the following facts:

A. This is a form of agreement to be recorded in connection with the implementation of the Developer's Inclusionary Housing Program under the Development Agreement.

B. The Developer is the only owner of the fee interest in certain real property located at \_\_\_\_\_ [Insert addresses or if none, reference to cross streets] in the City of San José, California and more particularly described in the attached **Exhibit A** (the "**Property**") that is the subject of this Agreement. If the Developer is not the only owner of the Property, both the Developer and the Owner (as defined in Section 1 below) must execute and record this Agreement.

C. The Property is located within the boundaries of the Downtown West Planned Development Permit. The Property is subject to the terms and conditions of the Development Agreement during the term of the Development Agreement, as recorded in the Official Records of the County of Santa Clara as document number \_\_\_\_\_.

D. Exhibit D of the Development Agreement is the Affordable Housing Program to which the Developer and the City have agreed as the affordable housing requirements applicable to the Project (the "**Affordable Housing Program**") and is a hybrid program based on the City's Inclusionary Housing Ordinance, San José Municipal Code Chapter 5.08 in effect on the Effective Date, a copy of which is attached to the Development Agreement at Schedule D5 ("**Chapter 5.08**" or the "**Ordinance**"), and sets forth the Developer's inclusionary housing obligations and the methods for satisfying those obligations, including by means of on-site inclusionary units, land dedication, and payment of in-lieu fees (the "Inclusionary Obligation").

E. The Affordable Housing Program includes implementation Development Agreement IHO Guidelines at Schedule D2 of the Development Agreement (the "**Development Agreement IHO Guidelines**").

F. This Agreement, including the attached Exhibits, is intended to set forth the terms and conditions for the implementation of the Developer's agreement to meet the Inclusionary Obligation in accordance with the Development Agreement's Exhibit D.

G. The Developer is developing a project requiring a planning permit that creates \_\_\_\_\_ ( \_\_\_\_\_ ) new, additional or modified rental or for-sale dwelling units on the Property ("**Total Dwelling Units**"). The project has obtained planning permits designated \_\_\_\_\_ and \_\_\_\_\_ [list type of permit, permit number] which were approved by the City of San Jose on \_\_\_\_\_, 20\_\_\_\_. The Developer's residential project (the "**Project**" or "**Residential Development**") is described in more detail on the approved Affordable Housing Compliance Plan ("**Compliance Plan**") dated \_\_\_\_\_, 20\_\_\_\_ and approved on \_\_\_\_\_, 20\_\_\_\_, on file with the City Housing Department a summary of which is attached as **Exhibit B**

including the project's permit information, the total number of dwelling units, whether the units are rental or for-sale, the Developer's Inclusionary Obligation compliance option election, any exemptions claimed, any contiguous property under common ownership or control, timing of construction, and any requested project phasing.

H. This Agreement must be executed and recorded against the Property prior to the issuance of the first Building Permit needed for vertical construction of the Project. This Agreement must be senior to all deeds of trust or other documents with a power of sale, all mortgages, all judgment liens, and any other liens not in favor of the City (except for liens for property taxes and assessments not yet payable).

I. This Agreement includes a restriction on the Sale or Rental of new, additional or modified rental or for-sale dwelling units on the Property.

### **COVENANTS**

NOW, THEREFORE, it is mutually agreed by and between the Developer and the City (the "**Parties**") as follows:

**Section 1. Definitions.** All capitalized terms used in this Agreement but not defined shall have the meanings provided in the Ordinance or the Development Agreement IHO Guidelines adopted for its implementation. For the purpose of this Agreement, the following terms have the following meanings:

- a) "Affordable Housing Compliance Plan" means Compliance Plan as defined below.
- b) "Affordable Housing Cost" shall have the meaning provided by California Health & Safety Code section 50052.5 for owner-occupied housing.
- c) "Affordable Rent" means rent, which including a reasonable utility allowance, does not exceed:
  - 1. for very low-income households, the product of 30 percent times 50 percent of the area median income adjusted for family size appropriate for the unit;
  - 2. for lower income households rents shall be set at an affordable rent as defined in Section 50053 of the Health & Safety Code (the product of 30 percent of 60 percent of the area median income adjusted for family size appropriate for the unit);
  - 3. Effective May 1, 2021, for on-site moderate income Inclusionary Units rents shall be set at no more than thirty percent (30%) of one hundred percent (100%) of Area Median Income adjusted for family size appropriate for the unit.
- d) "Building Permit" includes full structural building permits as well as partial permits such as foundation-only permits.

e) “Compliance Plan” means a plan prepared in connection with Developer’s Vertical Conformance Review Application pursuant to Section III.D.1 of Exhibit D of the Development Agreement and the Compliance Plan requirements in the Development Agreement IHO Guidelines.

f) “Dwelling Unit” shall have the meaning provided in the Ordinance.

g) “For-Sale Development” means a Residential Development with a tentative map, final map, parcel map, condominium plan, or other similar documentation allowing for the creation of separately conveyable dwelling units or interests (such as condominiums, stock cooperatives, or community apartments), and demonstrating compliance with Subdivided Lands Act, including the formation of a Homeowner’s Association prior to issuance of its Certificate of Occupancy.

h) “Development Agreement IHO Guidelines” has the meaning set forth in the Recitals above.

i) “H1, H5 and H6 Property” shall have the respective meanings given each term in the Affordable Housing Program.

j) “IHO Fee Credit” shall have the meaning provided in the Affordable Housing Program.

k) “Inclusionary Unit” shall have the meaning provided in the Ordinance.

l) “In Lieu Fee” means the fee that the Developer may elect to pay to the City in lieu of constructing the Inclusionary Units within the Residential Development consistent with the Affordable Housing Program and the Ordinance.

m) “Ordinance” or “Chapter 5.08” shall have the meaning set forth in the Recitals above for so long as the Development Agreement applies to the Property or Project and thereafter shall mean San José Municipal Code Chapter 5.08.

n) “Owner” includes all persons and entities having fee ownership of the Property.

o) “Rental Development” means any Residential Development that is not a For-Sale Development.

p) “Residential Development” shall have the meaning provided in Section 5.08.250 of the Ordinance.

q) “Surplus Inclusionary Units” shall have the meaning provided in Section 5.08.255 of the Ordinance.

r) “Transfer Agreement” shall mean the applicable Property Transfer Agreement between the City and the Developer (or their respective assignees) for the H1, H5 or H6 Property as applicable.

**Section 2. Affirmative Covenants and Warranties.** The Developer warrants and covenants as follows:

a) All of the Developers statements and representations in the Compliance Plan and this Agreement are true and correct.

b) The Developer shall comply with the compliance option selected in the Compliance Plan (consistent with the Developer’s obligations under the Affordable Housing Plan) to meet the Inclusionary Housing Obligation.

c) The Developer shall record the notice of completion issued for the Residential Development in the Official Records of the County of Santa Clara.

d) If the Developer shall fail to comply with the requirements of that compliance option within the specified timing, then the Developer will satisfy its Inclusionary Obligations in the manner otherwise required in the Affordable Housing Program as defined in Section III of Exhibit D of the Development Agreement.

e) In the event that there is Contiguous Property under Common Ownership or Control, the Developer shall execute and record the City’s Covenant for Contiguous Property under Common Ownership or Control in the Official Records of the County of Santa Clara against such Contiguous Property concurrently herewith.

f) If the compliance option selected by the Developer includes off-site units, credits or otherwise includes commitments regarding other property, the Developer shall execute and record this Agreement in the Official Records of the County of Santa Clara concurrently herewith against all other property required for the specific compliance election made in the Compliance Plan.

**Section 3. Authority; Due Diligence Required Prior to Execution of the Agreement.** If the Developer is not the Owner of the Property, this Agreement must be executed by the Developer and the Owner, and the covenants hereunder shall apply to both such parties. Prior to the execution of this Agreement, ownership documentation satisfactory to the City is required and if the Developer or the Owner is not a natural person, documentation satisfactory to the City will be required to establish the existence of the entity, authority to operate in California and delegation of authority for the person(s) signing on behalf of the Developer or Owner.

**Section 4. Compliance Option.**

a) The Developer, by the signatures below affirms it has elected in its Compliance Plan to comply with the following Inclusionary Obligation by providing all three components as described below consistent with the Affordable Housing Program, the Ordinance and the Development Agreement IHO Guidelines and summarized in **Exhibit B:**

1. Onsite Units - Provide 5.88% of Total Dwelling Units as moderate income rental Inclusionary Units on-site, consistent with the Affordability Restriction(s) attached hereto as **Exhibit C** and the Affordable Housing Program; and

2. Land Dedication - Close (or be deemed to have closed) the transfer to the City or the City's designee of the H6, H5 or H1 Property, as applicable, under the applicable Transfer Agreement; and In-lieu Fees - Apply the applicable unexpended IHO Fee Credits from the Transfers to satisfy any applicable remaining inclusionary housing requirements in accordance with the Affordable Housing Program; and 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, as applicable, then for any unsatisfied IHO Fee obligation, the Developer shall pay IHO Fees in the amount of \$18.70 per rentable square foot (rsf) for each residential unit (in addition to providing 5% on-site inclusionary units at 100% AMI), as more specifically set forth in the Affordable Housing Program, including the provisions regarding Annual Increases.

b) Future Conversion and Relocation - During the term of the Development Agreement, allow the Developer to request conversion of the 100% AMI rental units to units for-sale at an affordable sales price based on 100% AMI, consistent with Exhibit D Section III of the Development Agreement.

c) The mere mapping of the units consistent with a For Sale Development shall not cause the units to be treated as a For Sale Development unless and until Developer provides notice of the City and residents, compliance with the Subdivided Lands Act and compliance with the applicable requirements of the City's Conversion Ordinance consistent with Section III of the Development Agreement.

**Section 5. Covenants to Run with the Land.** The Developer hereby subjects the Property and the Project to the covenants and restrictions set forth in this Agreement. Developer hereby declares its express intent that the covenants and restrictions set forth herein shall be deemed covenants running with the land and shall pass to and be binding upon the Developer's successors in interest. All provisions of this Agreement shall be binding upon and inure to the benefit of the heirs, administrators, executors, successors-in-interest, transferees, and assigns of Developer and the City, regardless of any voluntary or involuntary conveyance or transfer of the Property. Except as provided in any written agreement executed by City, each and every contract, deed, lease or other instrument covering, conveying or otherwise transferring the Property or improvements constructed on the Property or any portion thereof or interest therein (a "Contract") shall conclusively be held to have been executed, delivered and accepted subject to this Agreement regardless of whether the terms of this Agreement are set forth in such Contract and regardless of whether the other party or parties to such Contract have actual knowledge of this Agreement.

Developer and the City hereby declare their understanding and intent that:

a) the covenants and restrictions contained in this Agreement shall be construed as covenants running with the land pursuant to California Civil Code section 1468 and not as conditions which might result in forfeiture of title by Developer; and

b) the burden of the covenants and restrictions set forth in this Agreement touch and concern the Property in that the Developer's legal interest in the Property and all improvements thereon are rendered less valuable thereby; and

c) the benefit of the covenants and restrictions set forth in this Agreement touch and concern the land by enhancing and increasing the potential enjoyment and use of the Property and Units by Moderate, Low and Very Low Income Households, the intended beneficiaries of such covenants and restrictions.

**Section 6. Release of Project Units from Agreement.** The covenants and conditions herein contained shall apply to and bind, during their respective periods of fee ownership, Developer and its heirs, executors, administrators, successors, transferees, and assignees having or acquiring any right, title or interest in or to any part of the Property and shall run with and burden such portions of the Property until rescinded in accordance with Section 12 below.

Except with respect to any portions of the Property which are released from the burdens of this Agreement by a rescission or partial rescission executed by the City; the Owner of the Property shall expressly make the conditions and covenants contained in this Agreement a part of any deed or other instrument conveying any interest in such property.

At any time following the expiration of this Agreement and upon Developer's written request, the City shall provide a release of this Agreement, in recordable form and otherwise reasonably acceptable to Developer, within thirty (30) days after such request.

**Section 7. Default.**

a) During Development Agreement. So long as the Property is subject to the terms of the Development Agreement, Article 9 (Enforcement of Agreement; Default; Remedies) of the Development Agreement regarding default and remedies shall apply and control with respect to any failure of the Developer to perform its obligations under this Agreement and Sections 7.b and 8 below shall not apply during such time. Notwithstanding the above, this limit shall not apply to the remedies in Exhibit C.

b) Following Development Agreement. Following the expiration or sooner termination of the Development Agreement or at such other time as the Development Agreement no longer applies to the Property, then the following provisions with respect to default shall control:

Failure of the Developer to cure any default in the Developer's obligations under the terms of this Agreement within thirty (30) days after the delivery of a notice of default from the City will constitute a default under this Agreement and a failure to satisfy the Conditions of Approval with respect to the Project and Property and the requirements of the Ordinance and Development Agreement IHO Guidelines and, in addition to remedies for breach of this Agreement, the City may exercise any and all remedies available to it under the Subdivision Map Act, Chapter 5.08, or otherwise, with respect to the Developer's failure to satisfy the Conditions of Approval and the requirements of Chapter 5.08 including but not limited to:



(a) withholding, conditioning, suspending or revoking any permit, license, subdivision approval or map, or other entitlement for the Project including without limitation final inspections for occupancy and/or certificates of occupancy;

(b) instituting against the Developer, or other parties, a civil action for declaratory relief, injunction or any other equitable relief, or relief at law, including without limitation an action to rescind a transaction and/or to require repayment of any funds received in connection with such a violation;

(c) where one or more persons have received financial benefit as a result of violation of this Agreement or of any requirement imposed under Chapter 5.08, the City may assess, and institute legal action to recover as necessary, a penalty in any amount up to and including the amount of financial benefit received, in addition to recovery of the benefit received;

(d) prosecuting a misdemeanor against any person who has rented a residential unit at a rent exceeding the maximum allowed under this Agreement or to a household not qualified under this Agreement, or who has otherwise violated Chapter 5.08, or any other agreement, restriction or requirement authorized or imposed under Chapter 5.08;

(e) remedies set forth in this Agreement (such as the remedies described in **Exhibit C**); or

(f) any other means authorized by state law or the City's Municipal Code.

**Section 8. Remedies Cumulative.** No right, power, or remedy given to the City by the terms of this Agreement, the Regulatory Agreement or Chapter 5.08 is intended to be exclusive of any other right, power, or remedy; and each and every such right, power, or remedy shall be cumulative and in addition to every other right, power, or remedy given to the City by the terms of any such document, Chapter 5.08, or by any statute or otherwise against Developer and any other person. Neither the failure nor any delay on the part of the City to exercise any such rights and remedies shall operate as a waiver thereof, nor shall any single or partial exercise by the City of any such right or remedy preclude any other or further exercise of such right or remedy, or any other right or remedy.

**Section 9. Hold Harmless.** Developer will indemnify and hold harmless (without limit as to amount) City and its elected officials, officers, employees and agents in their official capacity (collectively, the "**Indemnitees**"), and any of them, from and against all loss, all risk of loss and all damage (including expense) and all liability sustained or incurred because of or by reason of any and all claims, demands, suits, actions, judgments and executions for damages of any and every kind and by whomever and whenever made or obtained, allegedly caused by, arising out of or relating in any manner to the Project, the Inclusionary Units, or Developer's performance or non-performance under this Agreement, and shall protect and defend Indemnitees, and any of them with respect thereto, except to the extent arising from the gross negligence or willful misconduct of the City. The provisions of this section shall survive

expiration or other termination of this Agreement or any release of part or all of the Property from the burdens of this Agreement, and the provisions of this section shall remain in full force and effect. Notwithstanding the foregoing, so long as the Property is subject to the term of the Development Agreement, Section 4.9 (Indemnification of City) of the Development Agreement (and not this Section 9) shall apply and control with respect to any obligation of the Developer to indemnify, reimburse or hold harmless the City and any City Parties with respect to any Losses (as such terms are defined in such Section 4.9).

**Section 10. Notices.** All notices required pursuant to this Agreement shall be in writing and may be given by reputable overnight delivery service for next business day delivery or by registered or certified mail, return receipt requested, to the party to receive such notice at the addressed set forth below:

TO THE CITY:

City of San José  
Department of Housing  
200 East Santa Clara Street, T-12  
San José, CA 95113  
Attn: Inclusionary Housing

cc:

City of San José  
City Attorney's Office  
200 East Santa Clara Street, T-16  
San José, CA 95113  
Attn: Housing Attorney

TO THE DEVELOPER:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attn: \_\_\_\_\_

Any party may change the address to which notices are to be sent by notifying the other parties of the new address, in the manner set forth above.

**Section 11. Integration; Conflict with Development Agreement.** The Development Agreement; this Agreement with all of its recitals and exhibits, together with the Compliance Plan; any documents to be executed for the implementation of the Developer's Inclusionary Obligation including, but not limited to, documents to be recorded against any off-site property; and any covenant recorded on Contiguous Property under Common Ownership and Control

embody the agreement between City and Developer for the Residential Development's compliance with the Affordable Housing Program, the Ordinance, the Development Agreement and their respective terms and conditions. No verbal agreements or conversations with any officer, agent or employee of City prior to the execution of this Agreement, shall affect or modify any of the terms or obligations contained in this Agreement. If there is an express conflict between the Development Agreement, including the Affordable Housing Program, and this Agreement, the Compliance Plan, or the Ordinance that prevents the implementation of the Development Agreement, then the Development Agreement shall control.

**Section 12. Duration and Amendment of Agreement; Rescission.** This Agreement shall remain in effect until the ninety-ninth (99<sup>th</sup>) anniversary date of the recording of the notice of completion for the Residential Development. After the fifty fifth (55<sup>th</sup>) anniversary of the notice of completion for a rental Residential Development, the Developer may request rescission of the Inclusionary Housing Agreement. The City shall not unreasonably refuse to rescind the Inclusionary Housing Agreement provided that the City has been provided evidence the Developer has complied with all of the noticing and relocation benefit requirements for the tenants in the Residential Development, has obtained a demolition permit for the entire Residential Development and has completed its demolition. All tenants shall have the benefits required under the City's tenant protection ordinance, San José Municipal Code Chapter 17.23, Part 12 as may be amended. Additionally, a relocation plan shall be provided to the City for the Inclusionary Unit tenants prior to the approval of the demolition permit, which plan shall reflect the requirement that the those tenants shall be provided the relocation benefits required for displaced tenants under California Relocation Assistance Law, Government Code Section 7260 *et seq* and its implementing regulations, as may be amended.

a) It may be rescinded by the City after Developer's compliance with the Inclusionary Obligation. This Agreement, and any section, subsection, or covenant contained herein, may be amended only upon the written consent of the City Manager who shall have authority to approve or disapprove minor or technical amendments on behalf of the City consistent with the Ordinance and Development Agreement IHO Guidelines . If the amendment makes a substantive or material change to this Agreement it shall be effective only if the change is consistent with the Ordinance and Development Agreement IHO Guidelines and following approval of the City authority that gave the First Approval for the Project and the City Manager. This Agreement shall not be amended without any necessary amendments to applicable Planning Permits and payment of any transaction fees.

b) If a unit becomes a For-Sale unit and, in connection therewith, a new form of Inclusionary Housing Agreement, Compliance Agreement or restrictive covenant is entered into and recorded with respect to such unit(s), then the amount of time such unit(s) was restricted as a rental Restricted Unit shall count toward the For-Sale restricted term as set forth in Section III.B.1.g of Exhibit D to the Development Agreement. The term for such "converted" For-Sale unit will be the number of years then remaining under the ninety-nine (99) year term.

c) For a For-Sale Development the term will be forty-five (45) years consistent with the Ordinance.

**Section 13. Recitals and Exhibits Incorporated.** All of the above Recitals, all Exhibits, and the Compliance Plan are hereby incorporated in this Agreement and made a part hereof.

**Section 14. Applicable Law.** This Agreement shall be governed by the law of the State of California.

**Section 15. Waivers.** Any waiver by the City of any obligation or condition in this Agreement must be in writing. No waiver will be implied from any delay or failure by the City to take action on any breach or default of Developer or to pursue any remedy allowed under this Agreement or applicable law. Any extension of time granted to Developer by the City Manager to perform any obligation under this Agreement shall not operate as a waiver or release from any of its obligations under this Agreement. Consent by the City to any act or omission by the Developer shall not be construed to be a consent to any other or subsequent act or omission or to waive the requirement for the City's written consent to future waivers.

**Section 16. Title of Parts and Sections.** Any titles of the sections or subsections of this Agreement are inserted for convenience of reference only and shall be disregarded in interpreting any part of the Agreement's provisions.

**Section 17. Multiple Originals; Counterpart.** This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts.

**Section 18. Recording of Agreement.** The Developer shall cause this Agreement to be recorded against the Property and any other Property required for satisfaction of the compliance option in the Developer's Compliance Plan in the Official Records of the County of Santa Clara.

**Section 19. Severability.** In the event any limitation, condition, restriction, covenant, or provision contained in this Agreement is to be held invalid, void or unenforceable by any court of competent jurisdiction, the remaining portions of this Agreement shall nevertheless, be and remain in full force and effect.

**Section 20. Time of Essence.** Time is of the essence of every provision hereof in which time is a factor.

**Section 21. Exhibits.** The following exhibits are attached to this Agreement:

Exhibit A	Legal Description of the Property
Exhibit B	Summary of the Project and Compliance Plan
Exhibit C	Affordability Restrictions (Rental)
Exhibit D	Affordability Restrictions (For-Sale)

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed

Developer:

\_\_\_\_\_ ,

a \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

If the Developer is not the sole owner, the Owner consents to the recording of the Agreement:

Owner: *[List all parties on title]*

a \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_ ,

a \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

Signatures must be notarized. Signatures continue on following page(s)

**City of San José**, a municipal corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

Approved as to form:

\_\_\_\_\_  
Senior Deputy City Attorney

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of \_\_\_\_\_

County of \_\_\_\_\_

On \_\_\_\_\_ before me, \_\_\_\_\_, Notary Public, personally

DATE

NAME OF NOTARY

appeared \_\_\_\_\_

NAME(S) OF SIGNER(S)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledge to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal

\_\_\_\_\_  
SIGNATURE OF NOTARY

**EXHIBIT A**

**LEGAL DESCRIPTION OF THE PROPERTY**



**EXHIBIT B**  
**SUMMARY OF PROJECT AND**  
**COMPLIANCE PLAN**

This Exhibit summarizes and provides notice of the Compliance Plan executed by the Developer and on file with the Housing Department.

1. The Project's permit numbers, permit types, permit application and approval dates:  
\_\_\_\_\_
2. The total number of dwelling units: \_\_\_\_\_
3. Whether the project is anticipated to be rental or for-sale: \_\_\_\_\_
4. The Developer's Inclusionary Housing Ordinance Obligation compliance option election:  
\_\_\_\_\_
5. Any requirements that apply to other property based on the Developer's Inclusionary Housing Ordinance Obligation compliance option election:  
\_\_\_\_\_
6. List of any exemptions from the Inclusionary Housing Ordinance claimed in the Compliance Plan, any evidence submitted and whether the exemption was approved by City Manager.  
\_\_\_\_\_
7. List of any contiguous property under common ownership or control by address and APN  
\_\_\_\_\_
8. List any existing structures on the property, if the residential project includes any conversion or demolition \_\_\_\_\_
9. Summarize the timetable submitted showing timing of construction. \_\_\_\_\_

## EXHIBIT C

### AFFORDABILITY RESTRICTION

#### 1. Affordability Restriction (Rental).

(a) Restriction to Affordable Rent. For a period commencing upon the recordation of this Agreement and ending on the 99th anniversary of the recordation of the Notice of Completion for the Project, or, if no Notice of Completion is recorded on the Project, until the sixtieth (60th) anniversary of the recording of this Agreement, not less than five percent (5.88%) of the Total Dwelling Units shall be rented or otherwise made available at Affordable Rent to Moderate Income Households.

(b) A person or family shall be determined to be eligible (an “Eligible Household”) to rent an Inclusionary Unit if the household income does not exceed on the maximum income level for a Moderate Income Household as required for that specific Inclusionary Unit.

(c) In adjusting for unit size to determine the maximum Affordable Rent, the following adjustments to the Area Median Income shall be made based on the number of bedrooms in the Inclusionary Unit: studio - one person, one bedroom - two persons, two bedrooms - three persons, three bedrooms - four persons, and four bedrooms - five persons. In the event that the Residential Development has or obtains Low Income Housing Tax Credits, after notice to the City these adjustments for assumed household size may be modified for new tenants to reflect federal unit size adjustments based on 1-1/2 persons per bedroom consistent with Health and Safety Code Section 50053. EXHIBIT C-1 attached hereto and incorporated herein by this reference contain illustrations of the calculation of Affordable Rent for a rental unit for Moderate Income Households.

(d) Developer shall prohibit any person or family who has not been determined to be an Eligible Household at the time of taking possession, renting or occupying any Inclusionary Unit and shall cause any such person or family to vacate any Inclusionary Unit so rented or occupied. When an Inclusionary Unit is vacated, for any reason whatsoever, the Inclusionary Unit shall then again be rented or otherwise made available at Affordable Rent to Moderate Income as specified for the unit. For the purposes of this Agreement, “vacate” shall include, without limitation, departure from an Inclusionary Unit at the termination (whether at the end of a term or upon default) of the lease pursuant to which the Inclusionary Unit was occupied (“Lease”), abandonment of the Inclusionary Unit, sublease or assignment of an Inclusionary Unit (whether or not such sublease or assignment complied with the terms and conditions of the Lease).

(e) Recertification of Income. On an annual basis, Developer shall submit a report (the “Annual Report”) to the City, which contains, with respect to each Inclusionary Unit, the rental rate and income and family size of the tenant household. The Annual Report shall be based on information supplied by the tenant or occupant of each Inclusionary Unit in a certified statement on a form provided or previously approved by the City.

2. **Definitions.** The definitions of Area Median Income, Lower (or Low) Income Household, Very Low Income Household, and Extremely Low Income Household shall have the definitions given these terms in Health and Safety Code Sections 50052.5, 50053, 50079.5, 50105, 50106 and 50093, as amended from time to time.

3. **Default and Remedies.**

a) **Non-Complying Units.** In addition to and without limitation of any other rights and remedies set forth in this Agreement or otherwise available to any party legally entitled to enforce this Agreement, in the event of any Default (as defined below), after thirty (30) day notice by City to Developer, and Developer's failure to cure within such thirty (30)-day period City shall have the right to lease and Developer shall lease to City on demand for a rental of \$1.00 per Inclusionary Unit per year any and all of the "Non-Complying Inclusionary Units" (as defined below) at such time as the Non-Complying Inclusionary Unit(s) is vacated. "Non-Complying Inclusionary Units" shall mean an Inclusionary Unit which is occupied and/or leased in violation of this Agreement. Determination of such a violation may be based on information provided in the Annual Report or determined by City in its reasonable discretion based on information otherwise available to it. Notwithstanding any term or condition of the lease under which the City leases a Non-Complying Inclusionary Unit pursuant to this subsection, Developer hereby consents to and grants City the right to assign such lease or sublet such Inclusionary Unit(s) to a Moderate Income Household, as appropriate, at Affordable Rent or to any non-profit housing provider (a "Provider") in the community for \$1.00 per year on the condition that such Provider subleases such Inclusionary Unit(s) or assigns such lease(s) to Moderate Income Household, as appropriate, at Affordable Rent. If the City assigns or sublets to any Provider, the Developer hereby consents to and grants such Provider the right to assign such lease or sublet such Inclusionary Unit to any Eligible Household at an Affordable Rent. If the City leases any Inclusionary Unit(s) or a Provider subleases any Inclusionary Unit(s) or is the assignee of any lease(s) from the City, the City or Provider, as the case may be, to the extent necessary to ensure compliance with this Agreement, shall sublease such Inclusionary Unit(s) or assign such lease(s) to any Eligible Household at Affordable Rent. Any rent paid under such a sublease or assignment shall be paid to the Developer after the City or Provider, as the case may be, has been reimbursed for any expenses incurred by it in connection with exercising the rights and remedies set forth in this subsection; provided, that if the Developer is in default under any loan documents in connection with the financing of the Property or any improvements thereon, such rent shall be paid to the party legally entitled thereto.

b) **Excess Rent.** In the event that and to the extent that the Developer receives rents or other payments from the operation of the Inclusionary Units or other improvements constructed on the Property in excess of what is permitted to charge and receive pursuant to this Agreement, after thirty (30) day notice by City to Developer, Developer agrees and covenants to pay to the City the full amount of such excess immediately on demand by the City. Developer and the City agree and intend that the payment of such excess, absent other remedies described in this Agreement to ensure for the term hereof that rents or other payments do not exceed those Developer is permitted to charge and receive pursuant to this Agreement, shall not alone be an

adequate remedy to accomplish the purposes of this Agreement

c) **All Remedies Available and Cumulative.** In the event of any breach of any of the covenants or restrictions set forth in this Exhibit C (a “Default”), the City or members of the community (as defined in the Health and Safety Code) shall have the right to exercise all the rights and remedies, and to maintain any action at law or suits in equity or other real property proceedings, including without limitation, specific performance, to enforce the covenants and restrictions and the curing of any breach or violation thereof. No delay in enforcing the provisions hereof as to any breach or violation shall impair, damage or waive the right of the City to enforce the provisions hereof in the future for any continuing or new breach or violation of any of the covenants or restrictions contained in this Agreement. All rights and remedies, including without limitation those set forth in paragraphs 3(a) through (c) above, of any party legally entitled to enforce this Agreement shall be cumulative and the exercise of any such right or remedy shall not impair or prejudice and shall not be a waiver of the right to exercise any other such rights and remedies.

4. **Reporting.** In addition to the Annual Report, Developer shall provide all information reasonably requested by the City (not more frequently than once per calendar quarter) with respect to the number of Units in the Property and the income levels of the persons or families renting or otherwise occupying the Units.

5. **Restriction to be Attached.** Developer shall attach a copy of this Exhibit C to any lease or purchase and sale contract with respect to any Inclusionary Unit.

6. **Transfer of Inclusionary Units.** During the term of this Agreement, Developer must give written notice to the City at least 90 days in advance of any sale, agreement to sell, assignment, conveyance, lease (other than the rental or lease of Inclusionary Units to Eligible Households), or transfer of the Inclusionary Units or any part thereof, including the sale of any general partnership interests, the removal of any general partner, or any substantial change in operational or management control over the Inclusionary Units.

7. **Monitoring.** The City shall have the right to take such actions to monitor compliance with this Agreement as it deems necessary, including but not limited to reasonable requests for documents.

8. **Monitoring Fees.** Developer shall pay annual monitoring fees to the City in advance on or prior to July 1 consistent with the amount set forth in the City’s Schedule of Fees and Charges. As of 2020-2021, the fee is \$41.65 per Inclusionary Unit to City.

9. **Property Damage or Destruction.** If any of the Inclusionary Units or access thereto is damaged or destroyed, Developer must notify the City within 30 days and must at its own cost and expense, repair or restore the Inclusionary Units. Such work shall be commenced within 120 days after the damage or loss occurs and shall be completed within one year thereafter. All insurance proceeds collected for such damage or destruction shall be applied to the cost of such repairs or restoration. In the event that the Inclusionary Units are not rentable during this time, the

term of this Agreement shall be extended by the period of time that any of the Inclusionary Units were not rented to and occupied by eligible households.

**10. No Discrimination.** The Developer covenants and agrees for itself, its heirs, successors, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the Property. The foregoing covenants shall run with the land.

All deeds, leases, and contracts for the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the Property, or any portion thereof made or entered into by Developer, its successors or assigns, shall contain therein the following language:

(a) In Deeds:

"The grantee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the premises herein conveyed. The foregoing covenants shall run with the land."

(b) In Leases:

"The lessee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through him or her, and this lease is made and accepted upon and subject to the following conditions that there shall be no discrimination against or segregation of any person or group of persons, on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the premises herein leased nor shall the lessee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy, of tenants, lessees, sublessees, subtenants, or vendees in the premises herein leased."

(c) In Contracts:

"The contractor herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through it, and this contract is made and accepted upon and subject to the conditions that there shall be no discrimination against or segregation of any person or of a group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure or enjoyment of the property herein transferred nor shall the contractor or any person claiming under or through it establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sublessees, subtenants, or vendees in the Property. The foregoing provisions shall be binding upon and shall obligate the contractor and any subcontracting parties, successors, assigns and other transferees under the contract."

## **EXHIBIT C-1**

The following hypothetical illustrates the calculation of Affordable Rent **for a Moderate Income Households** (as defined in the Ordinance) who are **Renting** a Moderate Income Inclusionary one-bedroom unit with an assumed family size of 2 persons in Santa Clara County.

### Assumptions.

1. Inclusionary Unit to be made available to Moderate Income Households.
2. Family Size = 2 Persons (for purposes of this example)

Person or Family need not have the maximum income for a Person or Family in the income category (adjusted for family size).

3. Electricity charges are separately metered and directly billed to the tenants by PG&E. A reasonable allowance for such charges based on the Utility Allowance Schedule published by the County of Santa Clara Housing Authority ("Allowance") is deducted.

As of April 2020, per 25 California Code of Regulations ("CCR") Section 6932, median income for a family of 2 is \$113,300 ("Area Median Income adjusted for family size") and the maximum income level for a Moderate Income Household with a family size of 2 in Santa Clara County is \$135,900 (100% of the Area Median Income adjusted for family size).

Pursuant to 25 CCR Section 6918, rent (for the purposes of this Exhibit defined as "Rent") includes, among other things, payment for use or occupancy of a housing unit and charges or fees charged or passed through by the landlord other than security deposits). Pursuant to Section 50053 of the Health and Safety Code and this Restriction, the Rent paid by a Moderate Income Household for a Moderate Income Inclusionary Unit shall not exceed 30% of 100% of the Area Median Income adjusted for family size.

### CALCULATION OF RENT CHARGEABLE:

\$135,900 [100% of the area median income adjusted for family size (2 persons)]

X .30 [Rent cannot exceed 30% of 100% of area median income]

\$40,770.00

\$ 3,397.50 divided by 12 [to calculate the maximum monthly Rent]

-\$ 74.00 [ Assumed allowance for an all-electric 1 bedroom apartment.]

\$ 3,323.50 [Maximum Rent after reasonable allowance for electric charges.]

As this hypothetical illustrates, as of April 2020, no Moderate Income Household with a family size of 2 that pays its own electric bill should be charged or pay Rent in excess of \$3,397.50 per month minus less the approved utility allowance; this amount may be adjusted as the CCR Sections above are amended or the reasonable allowance amount is adjusted.

EXHIBIT D  
AFFORDABILITY RESTRICTIONS  
(For Sale)