

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY OF SAN JOSE ADDING
CHAPTER 5.11 TO TITLE 5 OF THE SAN JOSE
MUNICIPAL CODE ENACTING A REQUIREMENT THAT
NEW NON-RESIDENTIAL DEVELOPMENT PAY A
COMMERCIAL LINKAGE FEE FOR THE PROVISION OF
AFFORDABLE HOUSING**

WHEREAS, the City Council of the City of San José ("Council") has a long-established policy and practice of recognizing the need to facilitate the availability of housing products at different levels of affordability in order to address the housing needs of the entire community; and

WHEREAS, the Council desires to adopt a fee to help address the increased need for affordable housing generated by the development of new non-residential development ("Commercial Linkage Fee"); and

WHEREAS, the Council has caused a study to be prepared that establishes the reasonable relationship between new non-residential development and the need to increase the supply of new affordable housing; and

WHEREAS, that study, prepared by Keyser Marston and Associates, entitled "Nexus Analysis of Proposed Commercial Linkage Fees" dated July 2020 ("Nexus Study"), which has been made available for public review on the City's website, evaluates the need for affordable housing generated by various types of non-residential uses in the City, demonstrates that such a nexus exists and that the use of a Commercial Linkage Fee for the purpose of increasing the supply of affordable housing in the City of San José ("City") is justified, and determines the maximum impact fee

amount for the various types of non-residential uses based upon the generation of affordable housing needs; and

WHEREAS, the Commercial Linkage Fee amounts specified in the Nexus Study are intended to support the provision of affordable housing by the City by contributing to the funding of the City's existing affordable housing programs that do not provide for the full funding of local housing needs; and

WHEREAS, the Council has also caused a study, prepared by Keyser Marston and Associates, entitled "Feasibility Analysis of Proposed Commercial Linkage Fees" dated July 2020 ("Feasibility Study"), which has also been made available for public review on the City's website, to inform the Council of the economic effects of the fee evaluated in the Nexus Study which analyses the economics of a range of prototype non-residential projects in various geographic subareas of the City and their ability to sustain a new fee; and

WHEREAS, the Council has determined that the Commercial Linkage Fee should be established consistent with the requirements of California Government Code Section 66000 *et seq.*, commonly referred to as the "Mitigation Fee Act," without determining that it is required to do so; and

WHEREAS, the Council has, consistent with the Mitigation Fee Act, published twice in a 10-day period advance notice of the public hearing concerning the Commercial Linkage Fee and during that period made available for public review and comment both the Nexus Study and the Feasibility Study; and

WHEREAS, the Council has determined that the Commercial Linkage Fee is consistent with and implements the goals and policies of the City's General Plan entitled "Envision San José 2040"; and

WHEREAS, the Commercial Linkage Fee is authorized pursuant to Section 200 of the City Charter and Section 7, Article XI of the California Constitution as a police power measure to improve the public welfare of the City of San José; and

WHEREAS, consistent with the Mitigation Fee Act and the City Charter, the Commercial Linkage Fee may be established by Ordinance; and

WHEREAS, on September 1, 2020, the Council held a duly noticed public hearing at its regularly scheduled meeting in accordance with Government Code section 66016(a) to consider the acceptance of the Nexus Study, and the adoption of the Commercial Linkage Fee; and

WHEREAS, at the September 1, 2020 public hearing, all interested parties and members of the public were provided the opportunity to address the Council and provide written or oral comments on the adoption of the Commercial Linkage Fee; and

WHEREAS, notice of the time and place of the meeting was published in accordance with Government Code section 6062a, as required by Government Code section 66018(a); and

WHEREAS, the Commercial Linkage Fee is intended to create a funding mechanism to increase the supply of affordable housing in San José without reference to a specific development or property and the City will not expend funds from the Commercial Linkage Fee on any specific development prior to the completion of environmental

review for such specific development pursuant to the California Environmental Quality Act of 1970, as amended (“CEQA”); and

WHEREAS, this Ordinance is not a project subject to CEQA pursuant to Section 15378(b)(4) of the CEQA Guidelines which excludes the following from the definition of projects subject to the environmental review requirements: “The creation of a government funding mechanism or other government fiscal activities which do not involve any commitment to a specific project which may result in a potentially significant physical impact on the environment” (File No. PP17-004); and

WHEREAS, the Council has considered the Nexus Study, the Feasibility Study, and the relevant CEQA determination and desires to establish the commercial linkage fee.

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

SECTION 1. Chapter 5.11 is hereby added to Title 5 of the San José Municipal Code to read as follows:

Chapter 5.11 COMMERCIAL LINKAGE FEE

5.11.010 Purpose and Findings

- A. The purpose of this Chapter is to facilitate the development and availability of housing affordable to a broad range of households with varying income levels within the City of San José by adopting a Commercial Linkage Fee that will supplement other public funding sources for Affordable Housing in the City of San José.

B. The City's Envision San José 2040 General Plan recognizes that Affordable Housing is a critical component to the City's economic and social health. Establishing a Commercial Linkage Fee to assist in financing Affordable Housing production is consistent with and will implement the General Plan's Housing goals and policies for Affordable Housing, which include the following:

- Facilitating the provision of housing across location, type, price and status as rental or ownership that respond to the needs of all economic and demographic segments of the community (Policy H-1.2).
- Encourage purchase assistance programs for "starter" housing (Policy H-1.6).
- Facilitate the production of extremely low-, very low-, low-, and moderate-income housing by maximum use of resources at the federal, state and local levels (Policy H-2.1).
- Preserve and improve San José's existing affordable housing stock and increase its supply such that 15% of all new housing stock developed is affordable to low-, very low-, and extremely low-income households (Goal H-2).
- Facilitate the production of affordable and safe housing for workers who provide goods and services to San José residents and businesses (Policy H-12.8).
- Facilitate housing that is affordable to those employed in population-serving, business-support, and driving industries. (Policy H-1.10).
- Provision of affordable moderate-income housing (Policy H-2.1).
- Encouragement of purchase assistance programs for starter housing (H-1.6).

- C. Providing Affordable Housing for new employees in lower- and moderate- income jobs locally (rather than leaving those employees to obtain housing in lower cost areas far from San José employment centers and transit corridors) helps implement the General Plan policy aimed at minimizing housing's contribution to greenhouse gas emissions and locating housing to reduce vehicle miles traveled and auto dependency. If the increased demand for Affordable Housing is not addressed within San José it will cause such housing to be built elsewhere, in areas with lower land values that are far from City employment centers and transit corridors, and the resulting commuting will cause increased traffic and transit demands and consequent noise and air pollution.
- D. If the increased demand for Affordable Housing is not addressed within San José it may also impact economic growth in that businesses within the City may find it more difficult to attract and retain the variety of workers that they need.
- E. Development of Affordable Housing using Commercial Linkage Fee funds to increase the supply of Affordable Housing also implements policies of the State of California to: (1) provide sufficient capacity for new housing affordable at all income levels necessary to accommodate the State's future economic growth; and (2) by providing housing for lower- and moderate- income retail and service workers, long commutes from less expensive housing markets can be avoided and thus contribute to the implementing the Global Warming Solutions Act of 2006 and the Sustainable Communities and Climate Protection Act of 2008.
- F. State housing policy requires the City to assist in the development of adequate housing to meet the needs of extremely low-, very low-, low- and moderate-income households. There is a significant shortage of housing affordable to low- and moderate- income households, which will only increase as the finite number

of residentially zoned parcels within the City are purchased and developed for market rate residential developments. This loss of residential land available for Affordable Housing is another impact of market rate residential development.

- G. The requirements of this Chapter are based on a number of factors including, but not limited to, the City's long-standing commitment to economic diversity; the serious need for Affordable Housing as reflected in local and State housing laws, regulations, and policies; the demand for Affordable Housing created by Non-Residential Development; and the impact that the lack of Affordable Housing production has on the health, safety, and welfare of the City's residents including its impacts on traffic, transit and related air quality impacts, and the demands placed on the regional transportation infrastructure. Imposing a fee that is reasonably related to the burdens created by new Non-Residential Development on the City's need for Affordable Housing will enable the City to fund development of Affordable Housing units that will contribute to addressing these impacts and fulfilling these goals.
- H. The City has prepared a Nexus Study which shows, and the City Council finds, that there is a reasonable relationship between the purpose for which the fees established by this Chapter are to be used and the type of development projects on which the fees are imposed, between the need for affordable housing and nonresidential development and between the amount of the fees and the cost of the Affordable Housing units or portion of the units attributable to the development on which the fees are imposed. The Nexus Study complies with the requirements of California Government Code section 66001(A)(4) by establishing the reasonable relationship between the need for affordable housing and non-residential development.

- I. It is the intent of the City Council that the fee required by this Chapter shall be supplementary to any conditions imposed upon a development project pursuant to other provisions of the Municipal Code, the City Charter, the Subdivision Map Act, the California Environmental Quality Act, and other state and local laws, which may authorize the imposition of project specific conditions on development.

5.11.020 Definitions

The definitions set forth in this Section shall govern the application and interpretation of this Chapter:

- A. “Affordable Housing” means housing that is provided at an Affordable Housing Cost to households of Extremely Low Income, Very Low Income, Lower Income, and Moderate Income. “Affordable Housing Cost” is as defined by California Health & Safety Code section 50052.5 for owner-occupied housing and as defined by California Health & Safety Code section 50053 for rental units, as applicable. “Extremely Low Income Household” is as defined in California Health & Safety Code section 50106. “Very Low Income Household” is as defined in California Health & Safety Code section 50105. “Lower Income Household” is as defined in California Health & Safety Code section 50079.5. “Moderate Income Household” is as defined in California Health & Safety Code section 50093(b).
- B. “Applicant” means any person or entity who is an applicant, developer, owner, or appellant with a property interest in a Non-Residential Project subject to the terms of this Chapter, and the authorized representative of any such person or entity.

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

DC. “Certificate of Occupancy” means the permit issued by the City Building Division authorizing the initial occupancy of one or more buildings and includes final inspections and temporary certificate of occupancy permits.

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

EE. “Commercial Linkage Fee” means the fee adopted by the City Council pursuant to this Chapter to be paid to the City pursuant to Section 5.11.030 of this Chapter in connection with approval of a Development Permit to contribute to the creation of Affordable Housing production or preservation to offset additional need for Affordable Housing generated by new Non-Residential development.

GF. “Development Permit” includes any rezoning, tentative subdivision map, vesting tentative subdivision map, parcel map, conditional use permit, special use permit, building permit, or other entitlement for a Non-Residential Project.

HG. “Geographic Subarea” means one or more of the following geographic areas within the corporate limits of the City of San José and more specifically described as follows:

1. “Downtown” means the subarea encompassing approximately three square miles generally bounded by Taylor Street to the north for areas west of State Route 87, and Julian Street for areas east of State Route 87, San José State University and City Hall to the east, Interstate 280 to the south, and the Diridon Station Area to the west (Downtown Growth Area) encompassing

approximately 250 acres generally bounded by Lenzen Avenue and the Union Pacific Railroad tracks to the north, Interstate 280 to the south, the Guadalupe River and Delmas Avenue to the east, and Sunol Avenue and the Diridon Station commuter rail tracks to the west; and

2. “Rest of City” means any subarea not including the Downtown subarea described in Section 5.11.020.G.1 above.

I.H. “Nexus Study” means the fee study entitled: “Nexus Analysis of Proposed Commercial Linkage Fees” prepared by Keyser Marston Associates, dated July 2020, and accepted by the City Council on September 1, 2020. The Nexus Analysis of Proposed Commercial Linkage Fees is maintained for public review in the Asset Management Division of the Department of Housing.

J. “Non-Residential” includes all of the following land use categories with the respective correlating land uses from the Zoning Ordinance (Title 20) for each category:

1. “Office” includes:

- (a) social services agencies;
- (b) health and veterinary services;
- (c) health services;
- (d) offices and financial services; and
- (e) television/radio services.

2. “Retail” includes:

- (a) recreation, commercial indoor;
- (b) cannabis sales;
- (c) poolroom/billiards;

- (d) arcade;
- (e) amusement games;
- (f) card room;
- (g) alcohol sales;
- (h) pawn shop/broker;
- (i) bail bond establishment;
- (j) dining facilities;
- (k) drinking establishment;
- (l) drive-through uses;
- (m) food service;
- (n) fuel service station;
- (o) general retail;
- (p) general services;
- (q) health recreation;
- (r) public eating establishment;
- (s) selling or leasing of vehicles; and
- (t) photo processing, printing and publishing in retail structures.

3. "Hotel" includes hotel/inn.

4. "Industrial" includes:

- (a) photo processing, printing, publishing in industrial facilities;
- (b) recycling uses (not including outdoor storage areas);
- (c) cleaning establishment;
- (d) industry;
- (e) installation or selling of vehicle accessories or services; and
- (f) manufacturing and industrial services.

5. "Research and Development" or "R&D" includes:

- (a) research and development;
- (b) lab; and
- (c) processing.

6. "Warehouse" includes:

- (a) animal boarding;
- (b) stockyard;
- (c) warehouse; and
- (d) wholesale (not including outdoor storage areas);
- (e) waste/hazardous material storage (not including outdoor storage areas);
- (f) common carrier depot (not including outdoor storage areas); and
- (g) construction/corporation yard (not including outdoor storage areas).

7. "Residential Care" includes residential care/service facility for seven (7) or more persons.

8. For any use in a Project that is not included in a Non-Residential land use category in Subsections 1 through 7 herein, the Director of Planning Building and Code Enforcement shall determine which listed use is most similar and the use category for the similar use shall apply to the use that is not included above.

K. "Non-Residential Project" means any development having a Non-Residential use component and gross new or additional floor area of five thousand square feet or more or that applies for a permit to change an existing use to a different Non-Residential use category that increases the demand for Affordable Housing. Gross floor area excludes parking area.

5.11.030. Commercial Linkage Fee Requirement

- A. The Commercial Linkage Fee shall be specified by resolution of the City Council, which may vary by applicable Subarea and type of Non-Residential Project.
- B. To account for inflation in Affordable Housing development costs, the Commercial Linkage Fee specified in subsection A above shall be increased by the Engineering News Record (ENR) Construction Cost Index for the San Francisco Urban area published by McGraw Hill on January 1 of every year, or its successor publication, for the preceding twelve (12) months.
- C. Compliance with this Chapter shall be a condition of approval of all Development Permits for Non-Residential Projects, whether or not the condition of approval is expressly included in the Development Permit.
- D. The Commercial Linkage Fee shall be paid prior to the issuance of any Certificate of Occupancy for new Non-Residential Project in the City. The Applicant shall pay the amount of the fees in effect at the time of issuance of the Building Permit according to the resolution specifying the schedule of fees in place on the date the fees are paid as automatically adjusted in accordance with Section 5.11.030.B through the date of payment.; ~~except that the Applicant for a vesting tentative map for a Non-Residential Project shall pay the fees in effect on the date the application for the vesting tentative subdivision map is deemed complete as automatically adjusted in accordance with section 5.11.030.B.~~
- E. Failure to pay the Commercial Linkage Fee within the time specified in this Chapter shall result in the imposition of additional charges as set forth by resolution of the City Council.

5.11.040. Applicability of Fee to Mixed or Changed Uses

The regulations, requirements, and provisions of this Chapter and Council resolutions adopted pursuant to this Chapter shall apply to any Non-Residential **Project or** portion of any **new Non-Residential Project** for which **an application for** a Development Permit was **determined complete or an approved** or an application for a change in existing use(s) was made:

~~A. On or after October 1, 2019 and the Development Permit includes a condition of approval requiring the payment of the Commercial Linkage Fee; or any Non-Residential portion of any new Project for which an application for a Development Permit was determined complete or an application for change(s) in existing use(s) was made~~

~~A. B. On or after the effective date of this Chapter.~~

5.11.050 Exceptions

A. The following projects or portions of projects shall not be subject to the requirements of this Chapter because the City has determined that such uses do not create a need or create a minimal need for Affordable Housing:

1. Shelter/hotel supportive housing;
2. Agriculture;
3. Aquaculture; aquaponics, and hydroponics;
4. Stadiums, arenas, performing arts venues, and rehearsal space;
5. Cemetery;
6. Certified farmer's market and neighborhood agriculture;
7. Assembly uses;
8. Commercial vehicle storage;

9. Data center;
10. Day Care;
11. Education and training;
12. Energy generation facility;
13. Mineral extraction;
14. Museums, libraries, parks, playgrounds, community centers public or private;
15. Outdoor vending;
16. Parking;
17. Peaking power plant;
18. Public and quasi-public;
19. Stand-by/backup facilities;
20. Public storage/mini-storage;
21. Utilities/electric power generation;
22. Utilities/power generation;
23. Utility facilities;
24. Wireless communication antenna;
25. A project or the portion of a project that is required to comply with the Inclusionary Housing Ordinance (Chapter 5.08) or the Housing Impact Fee Resolution (Resolution No. 77218 as amended);
26. Any resident-serving Non-Residential portion of a multi-family rental housing project (including child care, employment, social, and counselling services, and the like) developed by a nonprofit housing provider if the Applicant is receiving financial assistance through a public agency, so long as the multi-family rental housing project is an Affordable Housing project meeting the requirements of state or local law and the project's Affordable Housing

obligations are secured by a recorded regulatory agreement, recorded memorandum of agreement, or recorded covenant with a public agency for a minimum period of fifty-five (55) years; and

27. Re-occupancy of square footage in an existing building or structure if there is no change of use;

- B. If a development is exempt from the Commercial Linkage Fee at the time the initial building permit is issued, but later converts to a Non-Residential use subject to this Chapter, the converted square footage will be deemed net new Non-Residential square footage and the commercial linkage fee shall be paid prior to issuance of the Certificate of Occupancy for the converted square footage.

5.11.060 Fee Adjustments and Waivers

- A. An Applicant for any Non-Residential Project subject to the fee described in section 5.11.030 may request that the requirements of this Chapter be waived, adjusted, or reduced based on a showing that applying the requirements of this Chapter would effectuate an unconstitutional taking of property or otherwise have an unconstitutional application to the property.
- B. To receive an adjustment or waiver, the Applicant must submit an application in writing to the City Manager at the time the Applicant files a discretionary project application for the Non-Residential Project, or if no such project application is required, at the time of filing the building permit application. The Applicant shall bear the burden of presenting substantial evidence to support the request and set forth in detail the factual and legal basis for the claim, including all supporting documentation.

- C. The City Manager shall render a written decision within ninety (90) days after a complete application with supporting documentation is filed. The City Manager's decision shall be the final determination of the City on the application for fee adjustment or waiver.
- D. If the City Manager, upon legal advice provided by or at the behest of the City Attorney, determines that applying the requirements of this Chapter would effectuate an unconstitutional taking of property or otherwise have an unconstitutional application to the property, the City Manager shall adopt written findings therefor based on substantial evidence supporting the determinations required by this Section. The Commercial Linkage Fee requirements shall only be adjusted or waived to reduce the obligations under this Chapter to the extent necessary to avoid an unconstitutional result. If the City Manager determines that no violation of the United States or California Constitutions would occur through application of this Chapter, the requirements of this Chapter remain fully applicable.
- E. If an adjustment or waiver is granted, any change in use from the approved project shall invalidate the adjustment or waiver.

5.11.070 Fee Refunds

- A. If a commercial linkage fee is collected on a Non-Residential Project and the permit for that Project later expires, is vacated, or voided before commencement of construction, the Applicant shall, upon request, be entitled to a refund of the unexpended housing commercial linkage fee paid, less a portion of the fee sufficient to cover costs of collection, accounting for and administration of the fee paid. Any request for a refund shall be submitted in writing to the Director of Housing within one (1) year of the date that the permit expires or is vacated or

voided. Failure to timely submit a request for refund shall constitute a waiver of any right to a refund.

- B. Fees collected pursuant to this Chapter which remain unexpended or uncommitted for five (5) or more fiscal years after deposit into the Commercial Linkage Fee Fund shall be accounted for or may be refunded as provided by State law.

5.11.080 Fee Revenue Fund

- A. There is hereby created and established the Commercial Linkage Fee Fund
- B. The fees paid to the City pursuant to the provisions of this Chapter shall be deposited into the Commercial Linkage Fee Fund and used solely for the purpose described in this Chapter.
- C. All interest which accrues from monies in the Commercial Linkage Fee Fund shall be credited to this fund.
- D. Any repayments of loans made from the Commercial Linkage Fee Fund shall be deposited into the Commercial Linkage Fee Fund.
- E. The Commercial Linkage Fee Fund, shall be subject to the all of the applicable provisions of California Government Code section 66000 *et seq.*

5.11.090 Expenditure of Commercial Linkage Fee Fund

All monies in the Commercial Linkage Fee Reserve Fund shall be expended solely on the production or refurbishment of Affordable Housing to help fulfill the need identified in the Nexus Study to increase the supply of housing affordable to households of

extremely low, very low, low, or moderate income, or such other report as may be prepared from time to time to document the reasonable fair share of the costs to mitigate the increased need for Affordable Housing that is created by new Non-Residential development. Such expenditures may include, but are not necessarily limited to the following:

- A. Reimbursement of or payment for, for all direct and indirect costs incurred by the City to fund the production of Affordable Housing pursuant to this Chapter, including but not limited to, the cost of land and right-of-way acquisition, planning, legal advice, engineering, design, construction, construction management, materials and equipment, or issuing loans to nonprofit Affordable Housing developers to acquire land and/or to rehabilitate existing buildings or build new developments to increase the supply of Affordable Housing units.
- B. Costs of issuance or debt service associated with bonds, notes or other security instruments issued to fund Affordable Housing.
- C. Reimbursement for the reasonable and necessary administrative costs incurred by the City in establishing or maintaining the Commercial Linkage Fee Fund, including but not limited to the cost of studies to establish the requisite nexus between the fee amount and the use of fee proceeds and yearly accounting and reports.

No portion of the Commercial Linkage Fee Fund may be diverted to other purposes by way of loan or otherwise.

5.11.100 Fee Revision by Resolution

The amount of the Commercial Linkage Fee and the formula for the automatic annual adjustment established by this Chapter may be reviewed and revised periodically by

resolution of the City Council. This Chapter shall be considered enabling and directive in this regard.

5.11.110 Regulations

The City Manager is authorized to adopt written administrative regulations or guidelines that are consistent with and that further the terms and requirements set forth in this Chapter.

5.11.120 Enforcement

- A. Failure of any official or agency to fulfill the requirements of this Chapter shall not excuse any Applicant from the requirements of this Chapter. No permit, license, map, or other approval or entitlement for a Non-Residential Project shall be issued, including without limitation a final inspection or Certificate of Occupancy, until all applicable requirements of this Chapter have been satisfied.

- B. The City may, at its discretion, take such enforcement action as is authorized under this Code and/or any other action authorized by law.

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

5.11.130. Interpretation

Any references to a State statute in this Chapter is deemed to include any successor or amended version of the referenced statute.”

SECTION 2. In accordance with California Government Code Section 66017, this ordinance shall take effect 60 days following its final adoption.

PASSED FOR PUBLICATION of title this _____ day of _____, 2020, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk