

DRAFT

ORDINANCE NO.

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING
CHAPTER 5.08 OF THE SAN JOSE MUNICIPAL CODE TO
(1) UPDATE AFFORDABILITY LEVELS; (2) REFINE
COMPLIANCE OPTIONS (INCLUDING SURPLUS
CREDITS); (3) ALIGN THE AFFORDABILITY TERM FOR
INCLUSIONARY UNITS WITH STATE PRACTICE; AND (4)
CLARIFY TREATMENT OF 100% AFFORDABLE
DEVELOPMENTS**

WHEREAS, pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code (collectively, “CEQA”), the Director of Planning, Building and Code Enforcement has determined that the provisions of this Ordinance do not constitute a project, under File No. PP17-008 General Procedures & Policy Making resulting in no changes to the physical environment; and

WHEREAS, the Inclusionary Housing Ordinance, Chapter 5.08 of the San Jose Municipal Code (“IHO”), has produced much affordable housing across San José; and

WHEREAS, historically, less than 10% of projects subject to IHO requirements have advanced from application to construction, with 43 completed projects delivering 1,442 inclusionary units - 43% at 50% AMI and 56% at 60-110% AMI.; and

WHEREAS, since the March 2021 update, the Housing Department has received over 260 development applications; and

WHEREAS, only about 28% of initial applications filed since 2021 are still active, reflecting the impact of high land costs, construction costs that are roughly double national averages, and interest rates near 7%, all of which have made it significantly

harder for projects feasible in 2021 to remain viable in 2025; and

WHEREAS, because the current IHO was not built for today's market conditions and can constrain market-rate feasibility, the Mayor's March Budget Message for Fiscal Year 2025–26 directs staff to streamline requirements, encourage on-site homes affordable to roughly 60% to 120% AMI, and eliminate arduous regulatory processes for 100% affordable projects at or below 100% AMI; and

WHEREAS, these proposed changes are intended to (1) keep more projects financially feasible so they do not drop out of the pipeline, and (2) make it easier for those projects to deliver on-site, income-restricted workforce units rather than default to fee payment; and

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

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

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

SECTION 1. Section 5.08.105 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.105 Affordable Housing Cost

"Affordable Housing Cost" means the housing cost for Dwelling Units as defined by California Health & Safety Code section 50052.5 for owner-occupied housing and the

affordable rent for rental units as defined by California Health & Safety Code section 50053, as applicable, except that: (a) the affordable rent for Moderate Income Rental Inclusionary Units that are located within the Market Rate Residential Development or provided pursuant to Section 5.08.590 shall be no more than thirty percent (30%) of one hundred ten percent (110100%) of Area Median Income; (b) the affordable rent for Moderate Income Households in Rental Inclusionary Units that are not located upon the same site as the Market Rate Residential Development or Moderate Income Households in Rental Inclusionary Units that are located on the same site but are geographically concentrated shall be no more than thirty percent (30%) of eighty one hundred ten percent (80110%) of Area Median Income; (c) the affordable rent for Lower Income Households in a Rental Inclusionary Unit, as specified below, is either sixty percent (60%) of Area Median Income or eighty percent (80%) of Area Median Income; and (d)e that the affordable rent for Dwelling Units that do not include private cooking and/or bathroom facilities shall be ninety percent (90%) of the otherwise applicable affordable rent for studio (0-bedroom) Dwelling Units.

SECTION 2. Section 5.08.107 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.107 Affordable Housing Developer

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

SECTION 3. Section 5.08.110 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.110 Affordable Housing Development

“Affordable Housing Development” means, for a rental Residential Development, a development that has a recorded affordability restriction that: (a) has a term of at least fifty-five (55) years; (b) limits the rental of all dwelling units except the manager's units, such that the rent of the restricted income units is in not excess of Affordable Housing Cost for Lower Income Households at thirty percent (30%) of ~~sixty-eighty~~ percent (~~6080~~) of the Area Median Income or as otherwise restricted at a substantially similar level as allowed under the Inclusionary Housing GuidelinesRegulations; (c) restricts at least ten percent (10%) of the units to very low income households at incomes up to fifty percent (50%) of Area Median Income; and (d) is made for the benefit of and enforceable by the City, Santa Clara County or a State or Federal Agency. “Affordable Housing Development” means, for a for-sale Residential Development, a development that has a recorded affordability restriction with a term of at least forty-five (45) years that limits the sale of all dwelling units to households with an income not exceeding one hundred ten percent (110%) of the Area Median Income at a price not exceeding Affordable Housing Cost and is made for the benefit of and enforceable by the City, Santa Clara County or a State or Federal Agency.

SECTION 4. Section 5.08.115 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.115 Affordable Housing Siting Policy

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

SECTION 5. Section 5.08.120 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.120 Affordable Housing Plan

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

SECTION 6. Section 5.08.175 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.175 Dwelling Unit

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

SECTION 7. Section 5.08.185 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.185 First Approval

“First Approval” means the first of the following approvals to occur with respect to a

Residential Development: development agreement, ~~general plan amendment, specific or area plan adoption or amendment~~, zoning, rezoning, pre-zoning, annexation, planned development permit, tentative map, parcel map, conditional use permit, special use permit, or building permit.

SECTION 8. Section 5.08.190 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.190 For-Sale

“For-Sale” means and refers to any separately conveyable Dwelling Unit, including a condominium, stock cooperative, community apartment, or attached or detached single-family home, for which a parcel or tentative and final map is required for the lawful subdivision of the parcel upon which the Dwelling Unit is located or for the creation of the unit in accordance with the Subdivision Map Act (California Government Code section 66410 et seq.) after compliance with the applicable requirements of the Subdivided Lands Act (California Business and Professions Code section 11000 et seq.) listed in the Inclusionary Housing GuidelinesRegulations or any Residential Development including such For-Sale Dwelling Units.

SECTION 9. Section 5.08.200 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.200 Inclusionary Housing guidelinesRegulations

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

SECTION 10. Section 5.08.220 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.220 Moderate Income Household

“Moderate Income Household” shall have the definition given in California Health & Safety Code section 50093(b), except that for the purposes of moderate income rental Inclusionary Units that are located upon the same site as the Market Rate Residential Development rental units, “Moderate Income Household” means a household earning no more than one hundred ten percent (100110%) of Area Median Income and for the purposes of moderate income rental Inclusionary Units that are not located upon the same site as the Market Rate Residential Development rental units or are geographically concentrated except as allowed under Section 5.08.590, Partnership for Clustered Units, “Moderate Income Household” means a household earning no more than eighty-one hundred ten percent (80110%) of Area Median Income.

SECTION 11. Section 5.08.230 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.230 Physical Needs Assessment

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

SECTION 12. Section 5.08.235 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.235 Planning Permit

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

SECTION 13. Section 5.08.250 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.250 Residential Development

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

- A. Would create ten (10) or more new, additional, or modified Dwelling Units by:
 1. The construction or alteration of structures,
 2. The conversion of a use to residential from any other use, or
 3. The conversion of a use to For-Sale residential from Rental residential use.

B. Is contiguous to property under Common Ownership or Control where the combined residential capacity of all of the Applicant's property pursuant to the General Plan designation or zoning at the time of the Planning Permit application for the Residential Development is ten (10) or more residential units.

SECTION 14. Section 5.08.255 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.255 Surplus Inclusionary Unit

"Surplus Inclusionary Unit" means any Inclusionary Unit constructed in connection with Residential Development without any City subsidy which exceeds the numerical requirement for Inclusionary Units for that Residential Development pursuant to this Chapter and satisfies all other requirements in the Inclusionary Housing Regulations.

SECTION 15. Section 5.08.400 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.400 Inclusionary Housing Requirement

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

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

1. For-Sale Residential Development:

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

2. Rental Residential Development:

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

3. Affordable Housing Development:

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

B. Limited Waiver. Excepted from the requirements of this Section is any Dwelling Unit that would otherwise be required to be a Moderate Income Inclusionary Unit for which an application for waiver of the terms of the subordinate shared appreciation documents or other documents implementing for-sale inclusionary provisions required by Section 5.08.600 A herein has been granted by the City Manager. Such an application shall be granted when the Affordable Housing Cost is within five percent (5%) of the appraised unrestricted market value of the unit. The approval of any application pursuant to this Subsection 5.08.400 B shall terminate upon the earlier of the sale in accordance with Subsections 1 through 3 herein of the Inclusionary Unit for which the limited waiver has been granted pursuant to this Section, or six (6) months following approval of the limited waiver by the City Manager, unless such term is extended by the City Manager because the unit continues to qualify for the waiver in accordance with the requirements of this Section. An Inclusionary Unit that is subject to such approved limited waiver shall:

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

SECTION 16. Section 5.08.420 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.420 Contiguous Property Under Common Ownership and Control

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

SECTION 17. Section 5.08.470 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.470 Standards for Inclusionary Units

A. Single-family detached Inclusionary Units shall be dispersed throughout the

Residential Development. Townhouse, row-house, multifamily Inclusionary Units and other unit types shall be located so as not to create a geographic concentration of Inclusionary Units within the Residential Development, except as provided for Residential Developments under Section 5.08.590.

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

2. Single-family detached Inclusionary Units may have smaller lots than single-family detached Market Rate Units in a manner consistent with Title 20 of this Code; and
3. Inclusionary Units made available for rent may consist of any Unit Type selected by the Applicant. Provided, however, Unit Types that do not include a private kitchen and/or bathroom may not be substituted for Unit Types that have a private kitchen and bathroom.

F. The Inclusionary Units shall have a comparable square footage and the same bedroom count and bedroom count ratio as the Market Rate Units.

SECTION 18. Section 5.08.500 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.500 Developers' Compliance Options

A. On-Site. A Developer may construct on-site inclusionary rental units where the Developer would otherwise be required by this Chapter to construct on-site inclusionary for-sale units. If a Developer desires to construct on-site inclusionary rental units in lieu of on-site inclusionary for-sale units, the requirement for such on-site rental inclusionary units shall be: (i) Five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Moderate Income Households earning no more than one hundred ten (110%) of Area Median Income, five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Lower Income Households earning no more than eighty percent (80%) of Area Median Income, and five percent (5%) of

the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Very Lower Income Households earning no more than sixty percent (60%) of Area Median Income, or (ii) ten percent (10%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Extremely Low Income Households.

B. Off-Site. As an alternative to providing Inclusionary Units upon the same site as the Market Rate Residential Development required by Part 4 of this Chapter, the Developer may select any of the compliance options in Sections 5.08.510 through 5.08.590 of this Chapter. If the Developer selects any of the compliance options in Sections 5.08.510, 5.08.520, and 5.08.530 through 5.08.580 of this Chapter, the basis for the inclusionary housing requirement shall be that no less than twenty twenty-five percent (2025%) of the total of all units in the Residential Development shall be Inclusionary Units, in a for-sale project and thirty percent (30%) in a rental project, unless otherwise specified.

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

such Inclusionary Units shall be constructed upon a site approved by the City.

SECTION 19. Section 5.08.510 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.510 Off-Site Construction

The inclusionary housing requirement in Section 5.08.400 may be satisfied by the construction of affordable housing on a site different from the site of the Residential Development in lieu of constructing the affordable units within the Residential Development as follows:

A. For-Sale Residential Development:

1. Off-site for-sale inclusionary units numbering no less than ~~twenty twenty-five~~ percent (~~2025~~) of the total dwelling units in the Residential Development shall be made available for purchase at an Affordable Housing Cost to those households earning no more than one hundred ten percent (110%) of the Area Median Income; or

2. Off-site rental inclusionary units numbering no less than ~~five ten~~ percent (~~510~~) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Moderate Income Households earning no more than ~~eighty one hundred~~ percent (~~80100~~) of the Area Median Income, off-site rental inclusionary units numbering no less than ~~five ten~~ percent (~~510~~) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Lower Income Households earning no more than ~~sixty eighty~~ percent (~~6080~~) of the Area Median Income, and off-site rental

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

B. Rental Residential Development: Off-site rental inclusionary units numbering no less than ~~five ten~~ percent (~~510~~%) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Moderate Income Households earning no more than ~~eighty one hundred~~ percent (~~80100~~%) of the Area Median Income, off-site rental inclusionary units numbering no less than ~~five ten~~ percent (~~510~~%) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Lower Income Households earning no more than ~~sixty eighty~~ percent (~~6080~~%) of the Area Median Income, and off-site rental inclusionary units numbering no less than ten percent (10%) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to those ~~Very~~ Low Income Households earning no more than sixty percent (60%) of the Area Median Income.

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

1. The site of the inclusionary housing conforms to the City's Affordable Housing Siting Policy.
2. The site has a General Plan designation that authorizes residential uses and is zoned for Residential Development at a density to accommodate at least the number of otherwise required Inclusionary Units within the

Residential Development.

3. The site is suitable for development of the Inclusionary Units in terms of configuration, physical characteristics, location, access, adjacent uses, and other relevant planning and development criteria.
4. Environmental review for the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and all such hazards are or shall be mitigated to the satisfaction of the City prior to acceptance of the site by the City.
5. The construction schedule for the off-site Inclusionary Units shall be included in the Affordable Housing Plan and the Inclusionary Housing Agreement.
6. Construction of the off-site Inclusionary Units shall be completed prior to or concurrently with the Market Rate Residential Development pursuant to Section 5.08.460, as further defined in the Regulations.

SECTION 20. Section 5.08.520 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.520 In Lieu Fee

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

Development.

B. In lieu fees shall be determined as follows:

1. For-Sale Residential Development: The in lieu fee for For-Sale Residential Developments shall be established as specified in the Inclusionary Housing [Guidelines](#)[Regulations](#) based on the amount by which the average sales price of an attached Market Rate Unit exceeds the affordable sales price for an average-sized attached unit ("Affordability Gap - For Sale"). The average size, number of bedrooms, and sales price of an attached Market Rate Unit shall be based on units completed in the prior sixty (60) month reporting period and sold within the prior twenty-four (24) month period. The affordable sales prices for an average-sized attached unit shall be determined consistent with this Section and the Inclusionary Housing [Guidelines](#)[Regulations](#) based on the Affordable Housing Cost for a household earning no more than one hundred ten percent (110%) of the Area Median Income. The Affordability Gap - For Sale shall be multiplied by the percentage of Inclusionary Units required by Section 5.08.510 A. and divided by the average square footage of the Market Rate Units reflected in the sales data to determine the per square foot in lieu fee.
2. Rental Residential Development: The in lieu fee for Rental Residential Developments shall be established based on the difference between market rate rents and affordable rents as described in this Section and the Inclusionary Housing [Guidelines](#)[Regulations](#). Market rate rents shall be based on rents charged for the most recently built three thousand (3,000) market rate rental units, excluding affordable units and projects for special populations such as seniors. Average affordable rents for each income

category (Moderate, Low and Very Low) shall be determined based on the maximum rents allowed pursuant to Section 5.08.510 B, minus an allowance for utilities, weighted to reflect the average number of bedrooms in the three thousand (3,000) market rate rental units used to determine market rate rents. The amount by which the annualized market rate rent exceeds the annualized affordable rent for each income category shall then be capitalized using a current published capitalization rate for Class A urban multifamily housing in San José to obtain the affordability gap for a single unit in that income category ("Affordability Gap – Rental"). The in lieu fee shall then be made applicable on a square footage basis by multiplying the Affordability Gap - Rental for each income category by the percentage of Inclusionary Units required for that income category under Section 5.08.510 B. and then dividing the result by the average square footage of the three thousand (3,000) market rate rental units used to determine market rate rents. The total in lieu fee shall be the sum of the fees for each of the individual income categories.

3. Less Than 19 Units. The in lieu fee for Residential Developments with up to nineteen (19) dwelling units that provide ninety percent (90%) or more of maximum residential density permitted for the site by the San José General Plan shall be half of the amount otherwise due under this Section.

C. The in lieu fee for each For-Sale Residential Development shall be determined based on the net square footage of the For-Sale Residential Development as calculated by the City. The in lieu fee for each Rental Residential Development shall be determined based on the rentable square footage of the Rental Residential Development as calculated by the City. To account for inflation in affordable housing development costs the in lieu fee shall be increased on July 1 of each year by the Engineering News Record ("ENR") Construction Cost Index

for the San Francisco area published by McGraw Hill on January 1 of every year, or its successor publication, for the preceding twelve (12) months until such time that a new in lieu fee is determined pursuant to this Section.

- D. The Council may by resolution based on findings, designate defined Market areas or other geographical areas as Strong Market Areas or Moderate Market Areas, and specify different in lieu fees which apply in those defined geographical areas which do not exceed the fees that do not exceed the fees which otherwise apply pursuant to this Section.
- E. The amount of in lieu fees shall be established in accordance with the provisions of this Section 5.08.520 by the City Council's annual resolution establishing the Schedule of Fees and Charges, or as established otherwise by resolution of the City Council, and may include in the fee the actual estimated costs of administration and the estimated cost of increases in the price of housing and construction from the time of payment of the in lieu fee to the estimated time of provision of the affordable units by the City. The amount of the in lieu fee shall be updated periodically, as required.
- F. The in lieu fee pursuant to this Section 5.08.520 may be reduced for: 1) Residential Development of ten (10) or more floors or stories in height not including any non-residential uses where the highest occupied floor has a floor level elevation is at least one hundred fifty (150) feet above street level (High Rise Residential Development) in any specified area of the City by City Council resolution or policy providing incentives for the provision of high rise Residential Development; 2) any other program reducing the in-lieu fee adopted by Resolution of the City Council. The reduction of in lieu fees pursuant to this Subsection 5.08.520 F. shall only apply through the adoption by the City Council of a resolution or policy for all such development and shall not apply to individual

High Rise Residential Development projects.

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

SECTION 21. Section 5.08.525 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.525 Mixed Compliance with Rental Inclusionary Units On-Site

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

Units in at least one income category in Section 5.08.400 together with the payment of an adjusted in lieu fee reduced for the Inclusionary Units provided consistent with this Section and the Inclusionary Housing [GuidelinesRegulations](#).

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

On-Site Adjuster.

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

SECTION 22. Section 5.08.530 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.530 Dedication of Land In Lieu of Construction of Inclusionary Units

A. The inclusionary housing requirement in Section 5.08.400 may be satisfied by the dedication of land in lieu of constructing Inclusionary Units within the Residential Development if the City Manager determines that all of the following criteria, as implemented by in the Inclusionary Housing GuidelinesRegulations, have been met:

1. Marketable title to the site is transferred to the City, or an affordable housing Developer approved by the City, prior to the commencement of construction of the Residential Development pursuant to an agreement between the Developer and the City and such agreement is in the best interest of the City.
2. The site has a General Plan designation that authorizes residential uses and is zoned for Residential Development at a density to accommodate at least the number of otherwise required Inclusionary Units within the Residential Development, and conforms to City development standards.
3. The site is suitable for development of the Inclusionary Units in terms of

configuration, physical characteristics, location, access, adjacent uses, and other relevant planning and development criteria including, but not limited to, factors such as the cost of construction or development arising from the nature, condition, or location of the site.

4. Infrastructure to serve the dedicated site, including, but not limited to, streets and public utilities, must be available at the property line and have adequate capacity to serve the maximum allowable residential development pursuant to zoning regulations.
5. Environmental review of the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and all such hazards are or will be mitigated to the satisfaction of the City prior to acceptance of the site by the City.
6. The value of the site upon the date of dedication is equal to or greater than the in lieu fee in effect at the date of dedication multiplied by the number of otherwise required Inclusionary Units within the Residential Development.
7. The dedicated site complies with the City's Affordable Housing Siting Policy, or meets other City General Plan policies such as being located near transit.

B. With respect to sites dedicated pursuant to Subsection A, the City shall not be required to construct restricted income units on the site dedicated to the City, but may sell, transfer, lease, or otherwise dispose of the dedicated site. Any funds collected as the result of a sale, transfer, lease, or other disposition of sites dedicated to the City shall be deposited into the City of San José Inclusionary

Fee Fund and used in accordance with the provisions of Section 5.08.700.

C. The inclusionary housing requirement in Section 5.08.400 may also be satisfied by the dedication of land in lieu of constructing Inclusionary Units within the Residential Development if the City Manager determines that all of the following criteria, as implemented by the Inclusionary Housing [Guidelines](#)[Regulations](#), have been met:

1. The land to be dedicated (the “site”) is located within the City of San José and the land meets all of the criteria required under Government Code section 65913.4 for SB 35 permit streamlining and Government Code section 65913.4 is still in effect.
2. The requirements listed in Subsections A(1) and A(3)-(7) are met for the site.

D. With respect to sites dedicated pursuant to Subsection C., the City shall solicit proposals from Affordable Housing Developers to construct restricted income units on the site dedicated to the City, but if the City is unable to obtain a qualified affordable housing developer to construct a viable leasehold affordable housing development on the property within two years of its solicitation or to commence construction within five years, the City may sell, transfer, lease, or otherwise dispose of the dedicated site for any purpose. Any funds collected as the result of a sale, transfer, lease, or other disposition of sites dedicated to the City shall be deposited into the Inclusionary Fee Fund and used in accordance with the provisions of Section 5.08.700.

SECTION 23. Section 5.08.540 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.540 Credits and Transfers

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

- A. A Developer who constructs a Surplus Inclusionary Unit may utilize such Surplus Inclusionary Unit to satisfy the inclusionary housing requirement for future Residential Development for a period of no more than five (5) years after issuance of the certificate of occupancy for the Surplus Inclusionary Unit.
- B. A Developer who constructs a Surplus Inclusionary Unit may sell or otherwise transfer the Surplus Inclusionary credit to another Developer in order to satisfy, or partially satisfy, the transferee Developer's inclusionary housing requirement.
- C. The inclusionary housing restrictions shall be recorded against the market rate Residential Development and the Inclusionary Unit pursuant to this Chapter and the Inclusionary Housing GuidelinesRegulations. The restrictions on the Inclusionary Unit shall commence upon the initial sale or rental of the Inclusionary Unit at the Affordable Housing Cost occurring subsequently to the approval of the Affordable Housing Plan in which the Inclusionary Unit is offered to satisfy the requirements of this Chapter.
- D. ~~The transferee Developer who utilizes any Surplus Inclusionary Housing credit shall comply with the timing requirements for Inclusionary Units to be made available for occupancy concurrently with the Market Rate Units in the Residential Development pursuant to Section 5.08.460. Any additional~~

requirements set forth in the Inclusionary Housing Regulations are satisfied.

SECTION 24. Section 5.08.550 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.550 Acquisition and Rehabilitation of Existing Units

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

- A. The value of the rehabilitation work is twenty five percent (25%) or more than the value of the Dwelling Unit prior to rehabilitation, inclusive of land value. The Inclusionary Housing GuidelinesRegulations shall include criteria for the determination of value.
- B. Two (2) Dwelling Units shall be rehabilitated in lieu of each single Inclusionary Unit required pursuant to this Part 5.
- C. The Developer is providing all costs of notice to and relocation of existing residents in the residential units to be rehabilitated, and as further required by the Inclusionary Housing GuidelinesRegulations.
- D. The site has a General Plan designation that authorizes residential uses and is zoned for Residential Development at a density to accommodate at least the number of rehabilitated units.

- E. The use of the site of the Dwelling Units to be rehabilitated shall not constitute a nonconforming use.
- F. The rehabilitated Dwelling Units shall comply with all current applicable Building and Housing Codes.
- G. A Physical Needs Assessment to the satisfaction of the City shall be performed on each Dwelling Unit to be acquired and rehabilitated, the property upon which it is located, and any associated common area, and all items identified in the Physical Needs Assessment needing repair, replacement and maintenance at the time of the Assessment or that will likely require repair or replacement within three (3) years of the Assessment shall be completed prior to the approval of the Dwelling Unit as an Inclusionary Unit. The Developer shall include in the Affordable Housing Plan the method by which a capital reserve for repair, replacement and maintenance shall be maintained for the term of the affordability restriction, with provision for sufficient initial capitalization and periodic contributions to the capital reserve.
- H. Environmental review of the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and is clear of all such hazards to the satisfaction of the City.
- I. The construction schedule for the units to be rehabilitated in lieu of providing Inclusionary Units shall be included in the Affordable Housing Plan.
- J. The rehabilitation of the Dwelling Units shall be completed prior to or concurrently with the Market Rate Residential Development pursuant to Section 5.08.460.
- K. The inclusionary housing restrictions shall be recorded against the Market Rate

Residential Development and the rehabilitated Dwelling Units pursuant to this Chapter and the Inclusionary Housing [GuidelinesRegulations](#). The restrictions on the rehabilitated Dwelling Units shall commence upon the initial sale or rental of the rehabilitated Dwelling Unit at the Affordable Housing Cost occurring subsequent to the approval of the Affordable Housing Plan in which the rehabilitated units are offered to satisfy the requirements of this Chapter.

- L. Rehabilitated Dwelling Units shall be owner-occupied in lieu of the provision of Inclusionary Units for owner-occupied Residential Development; while rehabilitated Dwelling Units shall be rental units in lieu of the provision of Inclusionary Units for rental Residential Development.
- M. The bedroom count of the Dwelling Units to be rehabilitated shall be substantially the same as the Market Rate Residential Development, as set forth in the Inclusionary Housing [GuidelinesRegulations](#).
- N. The term of affordability of the Inclusionary Units to be provided pursuant to this Section 5.08.550 shall be as set forth in Section 5.08.600 B. and shall commence upon initial occupancy of the Inclusionary Units to the targeted income group at an Affordable Housing Cost.
- O. Inclusionary Units provided pursuant to this Section 5.08.550 shall not be eligible for use for credits and transfers pursuant to Section 5.08.540.

SECTION 25. Section 5.08.560 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.560 HUD Restricted Units

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

- A. The agreement between the Applicant and HUD for the provision at the Affordable Housing Cost of the residential unit to Lower or Very Low Income Households shall expire after the Operative Date of this Chapter.
- B. Two (2) HUD-restricted Dwelling Units shall be provided in lieu of each single Inclusionary Unit required pursuant to this Part 5.
- C. The use of the site of any unit proposed to be provided as an Inclusionary Unit pursuant to this Section 5.08.560 shall not constitute a nonconforming use.
- D. The Dwelling Units shall comply with all current applicable Building and Housing Codes.
- E. The Affordable Housing Plan and Inclusionary Housing Agreement shall include provision for a Physical Needs Assessment to be performed to the satisfaction of the City no more than six (6) months prior to the termination of the agreement between the Applicant and HUD. Such an assessment shall be performed on each Dwelling Unit to be occupied as an Inclusionary Unit, the property upon which it is located, and any associated common area. All items identified in the Physical Needs Assessment needing repair, replacement and maintenance at the time of the Assessment or that will likely require repair or replacement within three (3) years of the Assessment shall be completed prior to the acceptance of

the Dwelling Unit as an Inclusionary Unit. The Developer shall include in the Affordable Housing Plan and the Inclusionary Housing Agreement the method by which a capital reserve for repair, replacement and maintenance shall be maintained for the term of the affordability restriction, with provision for sufficient initial capitalization and periodic contributions to the capital reserve.

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

term in accordance with the requirements of this Chapter, unless the agreement between the Applicant and HUD terminates because federal funding for the program is no longer available in which event the Developer shall provide the Inclusionary Units for five (5) years after the termination of the HUD agreement.

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

SECTION 26. Section 5.08.570 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.570 Combination of Methods to Provide Inclusionary Housing

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

SECTION 27. Section 5.08.580 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.580 Option to Purchase

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

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

hazards and is clear of all such hazards (or such hazards have been reviewed and are remediable) to the satisfaction of the City and do not present undue risk or liability to the City as determined by the City Manager.

- D. The site has a General Plan designation that authorizes residential uses and is zoned for Residential Development at a density to accommodate at least the number of otherwise required Inclusionary Units within the Residential Development, and conforms to City development standards.
- E. The site is suitable for development of the Inclusionary Units in terms of configuration, physical characteristics, location, access, adjacent uses, and other relevant planning and development criteria including, but not limited to, factors such as the cost of construction or development arising from the nature, condition, or location of the site.

SECTION 28. Section 5.08.590 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.590 Partnership for Clustered Units

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

- A. Location and Proximity. The clustered Inclusionary Units shall be located in close proximity to the Residential Development building envelope, either on the same site or a contiguous site. ~~If the Inclusionary Units are separated from the~~

~~Residential Development by a street or road, the width of the road shall not exceed sixty (60) feet and shall include a crosswalk to facilitate pedestrian travel between the Residential Development and the Inclusionary Units.~~

- B. The clustered Inclusionary Units shall be included in an Affordable Housing Development with financing that requires that they be located on a separate legal parcel from the Market Rate Units.
- C. Minimum Contribution Agreement. If the Applicant is not an Affordable Housing Developer, the Applicant shall enter into an agreement with an Affordable Housing Developer and City, consistent with the Inclusionary Housing GuidelinesRegulations which provides for a minimum contribution by the Applicant ~~not less than seventy five percent (75%)~~ of the Residential Development's projected in lieu fee amount and a timeline for obtaining and closing construction financing and commencing construction prior to the earlier of the issuance of the first Certificate of Occupancy for the Residential Development or five (5) years.
- CD. Collateralized In Lieu Fee Security. In the event that the Affordable Housing Developer and the Applicant wish to execute an agreement that allows for the closing of construction financing and commencing of construction ~~after the time periods in Subsection C or such that timeline is not met~~, the Applicant shall secure its obligations to the City by means of a letter of credit or escrow account in the amount of the in lieu fee of the Residential Project, acceptable to the City in form and substance.
- DE. Standards. The clustered Inclusionary Units shall comply with standards of Section 5.08.470, except the standard prohibiting geographical concentration. If the clustered Inclusionary Units are provided on contiguous property, they may

be provided with equivalent amenities and open space in lieu of access to the amenities and open space in the Residential Development required by Section 5.08.470.

EF. Percentage of Inclusionary Units and Affordability. The affordability mix shall match at a minimum the affordability percentages (in unit count and Area Median Income levels) of a Developer's on-site compliance option under subsection A. of section 5.08.500. Either (i) Five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Moderate Income Households earning up to one hundred percent (100%) of Area Median Income, five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Lower Income Households and five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Very Low Income Households or (ii) ten percent (10%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Extremely Low Income Households.

SECTION 29. Section 5.08.600 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.600 Continuing Affordability and Initial Occupancy

A. The Inclusionary Housing GuidelinesRegulations shall include standard documents, in a form approved by the City Attorney, to ensure the continued affordability of the Inclusionary Units approved for each Residential Development. The documents may include, but are not limited to, Inclusionary Housing Agreements, regulatory agreements, promissory notes, deeds of trust,

resale restrictions, rights of first refusal, options to purchase, and/or other documents, and shall be recorded against the Residential Development, all Inclusionary Units, and any site subject to the provisions of this Chapter. Affordability documents for For-Sale owner-occupied Inclusionary Units shall also include subordinate shared appreciation documents, including but not limited to promissory notes, deeds of trust, and affordability restrictions, permitting the City to capture at resales (the difference between the market rate value of the Inclusionary Unit and the Affordable Housing Cost) in such amounts as deemed necessary by the City to replace the Inclusionary Unit.

- B. Unless otherwise specified by the Chapter, all Inclusionary Units shall remain affordable to the targeted income group for no less than fifty-five ninety-nine (55 99) years or as prescribed in the Inclusionary Housing GuidelinesRegulations. In no event may the period of affordability be less than the applicable period set forth in California Health and Safety Code sections 33413(c)(1) and (2). The Inclusionary Housing GuidelinesRegulations shall provide procedures for the termination of the Affordable Housing Agreement in the event of the involuntary demolition or destruction of the Residential Development, and for termination in connection with the voluntary demolition or destruction of the Residential Development once the affordability has been provided for the minimum period hereunder after relocation benefits are provided for the occupants of the Inclusionary Units.
- C. Unless otherwise required by law, all promissory note repayments, shared appreciation payments, or other payments collected under this Section shall be deposited in the City of San José Inclusionary Fee Fund established pursuant to Section 5.08.700 of this Chapter.
- D. Any household that occupies an Inclusionary Unit must occupy that unit as its

principal residence, unless otherwise approved in writing by the City Manager for rental to a third party for a limited period of time due to household hardship, as specified in the Inclusionary Housing GuidelinesRegulations.

- E. Nonprofit affordable housing providers and government agencies may apply to the City for purchase of Inclusionary Housing Units for the purpose of sale or rental to eligible households so long as all of the terms of the Inclusionary Housing Agreement apply.
- F. No household may begin occupancy of an Inclusionary Unit until the household has been determined to be eligible to occupy that unit. Rental inclusionary units shall continue to be rented to income eligible households at an Affordable Housing Cost for the entire term of the inclusionary housing restriction. The Inclusionary Housing GuidelinesRegulations shall establish standards for determining household income, maximum occupancy, Affordable Housing Cost, provisions for continued monitoring of tenant eligibility, and other eligibility criteria.
- G. Officials, employees, or consultants of the City and members of Boards and Commissions thereof, shall comply with all applicable laws, regulations, and policies relating to conflicts of interest as to their eligibility to develop, construct, sell, rent, lease, occupy, or purchase an Inclusionary Unit. The Inclusionary Housing GuidelinesRegulations may include conflict of interest provisions relating to the administration of this Chapter and the eligibility of persons to occupy Inclusionary Units pursuant to this Chapter.

SECTION 30. Section 5.08.610 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.610 Affordable Housing Plan Submittal and Inclusionary Housing Agreement

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

Inclusionary Units;

6. Specific methods to be used to verify tenant incomes, when applicable, and to maintain the affordability of the Inclusionary Units;
7. A reliable financing mechanism for the ongoing administration and monitoring of rental Inclusionary Units;
8. The Physical Needs Assessment where applicable, the manner in which repairs shall be made in compliance with this Chapter, and the manner by which a capital reserve for repair, replacement and maintenance shall be maintained for the term of the affordability restriction, with provision for sufficient initial capitalization and periodic contributions to the capital reserve; and
9. Any other information that is reasonably necessary to evaluate the compliance of the Affordable Housing Plan with the requirements of this Chapter and the Inclusionary Housing GuidelinesRegulations.

C. Upon submittal, the City Manager shall determine if the Affordable Housing Plan is complete and conforms to the provisions of this Chapter and the Inclusionary Housing GuidelinesRegulations. The decision of the City Manager may be appealed to the City Council in accordance with procedures for notice and hearing contained in Title 20 of the San José Municipal Code.

D. The Affordable Housing Plan shall be reviewed as part of the First Approval of any Residential Development. The Affordable Housing Plan shall be approved if it conforms to the provisions of this Chapter and the Inclusionary Housing GuidelinesRegulations. A condition shall be attached to the First Approval of any

Residential Development to require recordation of the Inclusionary Housing Agreement described in Subsection G of this Section prior to the approval of any final or parcel map or building permit for the Residential Development.

- E. A request for a minor modification of an approved Affordable Housing Plan may be granted by the City Manager if the modification is substantially in compliance with the original Affordable Housing Plan and conditions of approval. Other modifications to the Affordable Housing Plan shall be processed in the same manner as the original plan.
- F. An Applicant may propose an alternative method of meeting inclusionary housing requirements that does not strictly comply with the requirements of this Chapter.
Additional terms, limitations, and requirements may be set forth in the Inclusionary Housing Regulations. The City Manager may approve such an alternative if he or she determines, based on substantial evidence, and which determination shall be specified in the Affordable Housing Plan, that the alternative will provide as much or more affordable housing at the same or lower income levels, and of the same or superior quality of design and construction, and will otherwise provide greater public benefit, than compliance with the express requirements of this Chapter and the Inclusionary Housing GuidelinesRegulations.
- G. Following the First Approval of a Residential Development, the City shall prepare an Inclusionary Housing Agreement providing for implementation of the Affordable Housing Plan and consistent with the Inclusionary Housing GuidelinesRegulations. Prior to the approval of any final or parcel map or issuance of any building permit for a Residential Development subject to this Chapter, the Inclusionary Housing Agreement shall be executed by the City and the Applicant and recorded against the entire Residential Development property

and any other property used for the purposes of providing Inclusionary Housing pursuant to this Chapter to ensure that the agreement will be enforceable upon any successor in interest. The Inclusionary Housing Agreement shall not be amended without the prior written consent of the City and shall also not be amended prior to any necessary amendments to applicable Planning Permits.

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

SECTION 31. Section 5.08.620 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.620 Inclusionary Housing Agreements for Affordable Housing Developments

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

SECTION 32. Section 5.08.740 of Chapter 5.08 of Title 5 of the San José Municipal Code is amended to read as follows:

5.08.740 Transition Period Procedures and Fees

- A. In Lieu Fees. In connection with the amendments to this Chapter adopted in 2021 by Ordinance No. 30538, in lieu fees that were applicable to Residential Developments with unexpired Planning Permit approvals (or otherwise deemed final pursuant to State law) prior to May 1, 2021 shall remain at the rates provided in the City's Schedule of Fees and Charges provided that such fees shall be increased pursuant to the Schedule of Fees and Charges on July 1 of each year by the Engineering News Record ("ENR") Construction Cost Index for the San Francisco Urban area published by McGraw Hill on January 1 of every year, or its successor publication, for the preceding twelve (12) months.
- B. Election to Comply with the Amended Ordinance. Residential Developments subject to this Chapter with unexpired Planning Permit approvals (or otherwise deemed final pursuant to State law) prior to May 1, 2021 that have not paid the In Lieu Fee, recorded an Inclusionary Housing Agreement or been issued a building permit, may elect to comply with the amendments to this Chapter adopted in 2021 by Ordinance No. 30538 by completion of a replacement Affordable Housing Plan and Acknowledgement, provision of all required submittals consistent with this Chapter as amended and the Inclusionary Housing Guidelines, and the approval of the replacement Affordable Housing Plan.

- C. Election to Comply with the 2026 Amended Ordinance. Residential Developments subject to this Chapter with unexpired Planning Permit approvals (or otherwise deemed final pursuant to State law) prior to January 27, 2026 that have not paid the In Lieu Fee, recorded an Inclusionary Housing Agreement or been issued a building permit, may elect to comply with the amendments to this Chapter adopted on February 3, 2026 by this Ordinance by completion of a replacement Affordable Housing Plan and Acknowledgement, provision of all

required submittals consistent with this Chapter as amended and the Inclusionary Housing Guidelines, and the approval of the replacement Affordable Housing Plan.

CD. Operative Date for the Amendments. The amendments to this Chapter adopted in 2021 by Ordinance No. 30538 are intended to be operative on May 1, 2021.

PASSED FOR PUBLICATION of title this _____ day of _____, 2026, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

MATT MAHAN
Mayor

ATTEST:

TONI J. TABER, MMC
City Clerk