

ORDINANCE NO.

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

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

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

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

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

WHEREAS, according to the 2015-2023 regional housing needs allocation (“RHNA”) determined by the Association of Bay Area Governments (“ABAG”), the City of San

José has a total housing need of 35,080 units through the year 2023, out of which nearly sixty percent (60%) is for housing affordable to Lower- and Moderate-Income Households (20,849 units). Of those affordable units, 9,233 units are for Very Low Income Households; 5,428 units are for Lower Income Households; and 6,188 units are for Moderate Income Households; and

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

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

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

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

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

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

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

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

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

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

WHEREAS, California Government Code Section 65850 was amended, effective January 1, 2018 to make a change in state law superseding the limitations discussed in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2nd Dist. 2009) 175 Cal.App.4th 1396 and confirming that the legislative body of any county or city may adopt ordinances to require, as a condition of the development of residential rental units, that the development include a certain percentage of residential rental units affordable to, and occupied by, households with incomes that do not exceed the limits for moderate-income, lower income, very low income, or extremely low income households specified in Sections 50079.5, 50093, 50105, and 50106 of the Health and Safety Code; and

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

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

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

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

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

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

**CHAPTER 5.08
INCLUSIONARY HOUSING**

**Part 1
Purpose and Findings**

5.08.010 Findings and Declarations

The City Council finds and declares as follows:

- A. Rental and owner-occupied housing in San José has become steadily more expensive. Although San José has historically provided much of the housing affordable to Santa Clara County's workforce, in recent years housing costs have escalated sharply, increasing faster than incomes for many groups in the community. As a result, there is a severe shortage of adequate, affordable housing for Extremely Low, Very Low, Lower, and Moderate Income Households, as evidenced by the following:
 - 1. The 2000-2007 Regional Housing Needs Plan for Santa Clara County, mandated by California Government Code section 65584 and prepared by the Association of Bay Area Governments, shows that fifty-six percent (56%) of new housing in San José should be affordable to Extremely Low, Very Low, Lower, and Moderate Income Households.

2. According to the most recent 2007-2014 regional housing needs allocation (RHNA) determined by the Association of Bay Area Governments (ABAG), the City of San José has a total housing need of 34,721 units through the year 2014, out of which nearly sixty percent (60%) is for Lower- and Moderate-Income Households (19,271 units). Of the affordable units: 3,876 units (20%) are for Extremely Low Income Households; 3,875 units (20%) for Very Low Income Households; 5,322 units (28%) for Lower Income Households; and 6,198 units (32%) for Moderate Income Households. These housing needs represent substantial increases from the previous RHNA. In particular, the Lower Income and Very Low Income housing need increased by forty-five percent (45%) and one hundred twenty-one percent (121%) respectively. Yet, as described below, these goals fall far short of the actual need for households in these income categories.

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

conditions, or both. Providing decent housing at affordable costs allows households to utilize their resources for other necessary pursuits, such as education, food, investment, and saving for retirement. Providing decent rental housing at affordable costs allows households to save money to purchase a home.

- B. As stated in the City of San José 2020 General Plan (Appendix 3), it is the City's policy to enhance the public welfare by encouraging a variety of housing prices throughout the City to give households of all income levels the opportunity to find suitable housing. It is also the City's policy to identify adequate sites for the City's existing and projected housing needs (Appendix 3) and to encourage the geographic dispersal of affordable housing throughout the City to enhance the social and economic well-being of all residents (Appendix 3). The City can achieve its goals of providing more affordable housing and achieving an economically balanced community only if part of the new housing built in the City is affordable to households with limited incomes.
- C. In order to meet the needs of San José households, dwelling units will need to house a variety of household types, incomes, and age groups. Pursuant to the San José 2020 General Plan, new homes should be located where adequate transportation, sanitation, water, and other infrastructure is available, and within reasonable proximity of education, recreation, and other amenities.
- D. The San José 2020 General Plan also includes a policy that affordable housing be distributed throughout the City of San José, and not concentrated in any particular area or areas. To further this goal, this Chapter provides incentives for affordable housing to be constructed on the same site as the Market Rate Units in a development project.

- E. The inclusionary ordinance codified in this Chapter will substantially advance the City's legitimate interest in providing additional housing affordable to all income levels and dispersed throughout the City because Inclusionary Units required by the ordinance codified in this Chapter, including both rental and ownership units, must be affordable to either Very Low, Lower, and Moderate Income Households.
- F. The ordinance codified in this Chapter is being adopted pursuant to the City's police power authority to protect the public health, safety, and welfare. Requiring affordable units within each development is consistent with the community's housing element goals of protecting the public welfare by fostering an adequate supply of housing for persons at all economic levels and maintaining both economic diversity and geographically dispersed affordable housing. Requiring builders of new market rate housing to provide some housing affordable to Very Low, Lower, and Moderate Income Households is also reasonably related to the impacts of their projects, because:
1. Rising land prices have been a key factor in preventing development of new affordable housing. New market-rate housing uses available land and drives up the price of remaining land. New development without affordable units reduces the amount of land development opportunities available for the construction of affordable housing.
 2. New residents of market-rate housing place demands on services provided by both public and private sectors, creating a demand for new employees. Some of these public and private sector employees needed to meet the needs of the new residents earn incomes only adequate to pay for affordable housing. Because affordable housing is in short supply in the City, such employees may be forced to live in less than adequate

housing within the City, pay a disproportionate share of their incomes to live in adequate housing in the City, or commute ever increasing distances to their jobs from housing located outside the City. These circumstances harm the City's ability to attain employment and housing goals articulated in the City's General Plan and place strains on the City's ability to accept and service new market-rate housing development.

5.08.020 Purpose

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

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

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

The City Council also desires to provide the residential development community with alternatives to construction of the Inclusionary Units on the same site as the market rate

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

Part 2

Definitions

5.08.100 Definitions

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

5.08.105 Affordable Housing Cost

"Affordable Housing Cost" means the housing cost for Dwelling Units as defined by California Health & Safety Code section 50052.5 for owner-occupied housing and the affordable rent for rental units as defined by California Health & Safety Code section 50053, as applicable, except that: (a) the affordable rent for Moderate Income Rental Inclusionary Units that are located within the Market Rate Residential Development or provided pursuant to Section 5.08.590 shall be no more than thirty percent (30%) of one hundred percent (100%) of Area Median Income; (b) the affordable rent for Moderate Income Rental Inclusionary Units that are not located upon the same site as the Market Rate Residential Development or Moderate Income Rental Inclusionary Units that are

located on the same site but are geographically concentrated shall be no more than thirty percent (30%) of eighty percent (80%) of Area Median Income; and (c) that the affordable rent for Dwelling Units that do not include private cooking and/or bathroom facilities shall be ninety percent (90%) of the otherwise applicable affordable rent for studio (0-bedroom) Dwelling Units.

5.08.107 Affordable Housing Developer

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

5.08.110 Affordable Housing Development

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

5.08.115 Affordable Housing Siting Policy

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

5.08.120 Affordable Housing Plan

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

5.08.125 Applicant

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

5.08.130 Area Median Income

“Area Median Income” or “AMI” means the annual median income for Santa Clara County, adjusted for household size, as published periodically in the California Code of Regulations, Title 25, Section 6932, or its successor provision, or as established by the

City of San José in the event that such median income figures are no longer published periodically in the California Code of Regulations.

5.08.135 Building Permit

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

5.08.140 City Manager

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

5.08.145 Certificate of Occupancy

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

5.08.150 Common Ownership or Control

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

5.08.155 Construction Phase

“Construction Phase” means either:

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

5.08.160 Contiguous Property

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

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

5.08.165 Deemed Substantially Complete

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

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

5.08.170 Density Bonus Units

"Density Bonus Units" means those additional Dwelling Units approved in a Residential Development pursuant to California Government Code section 65915 *et seq.* that are in excess of the maximum residential density otherwise permitted by the San José General Plan.

5.08.175 Dwelling Unit

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

5.08.180 Extremely Low Income Household

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

5.08.185 First Approval

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

5.08.190 For-Sale

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

5.08.192 Inclusionary Fee Fund

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

5.08.195 Inclusionary Housing Agreement

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

5.08.200 Inclusionary Housing Guidelines

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

5.08.205 Inclusionary Unit

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

5.08.210 Lower Income Household

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

5.08.212 Market Area

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

5.08.215 Market Rate Unit

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

5.08.220 Moderate Income Household

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

5.08.222 Moderate Market Area

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

5.08.225 Operative Date

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

5.08.227 Opportunity Area

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

5.08.230 Physical Needs Assessment

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

5.08.235 Planning Permit

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

5.08.240 Redevelopment Project Area

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

5.08.245 Rental

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

5.08.250 Residential Development

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

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

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

5.08.253 Strong Market Areas

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

5.08.255 Surplus Inclusionary Unit

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

5.08.260 Unit Type

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

5.08.265 Utilities

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

5.08.270 Very Low Income Household

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

Part 3
Operative Date and Applicability

5.08.300 Operative Date of Chapter

This Chapter shall be operative:

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

- B. January 1, 2013.

5.08.310 Applicability

The provisions of this Chapter shall apply to:

- A. All Residential Development, as defined in Section 5.08.250 of this Chapter, except for any Residential Development determined to be exempt under Section 5.08.320 of this Chapter;

- B. All Residential Development and Contiguous Property that is under Common Ownership or Control.

5.08.320 Exemptions

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

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

on the date the application for the development was Deemed Substantially Complete.

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

other required Planning Permit or amendment thereto. This provision shall not apply to any discretionary extension of a Planning Permit or Land Use approval beyond its initial term.

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

Part 4

Affordable Housing Requirements

5.08.400 Inclusionary Housing Requirement

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

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

1. For-Sale Residential Development:

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

2. Rental Residential Development:

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

3. Affordable Housing Development:

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

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

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

5.08.410 Fractional Units

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

5.08.420 Contiguous Property under Common Ownership and Control

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

5.08.430 Residential Development with Overlapping Inclusionary Requirements

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

5.08.440 Residential Development with Both For-Sale and Rental Units

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

5.08.450 On-Site Inclusionary Housing Incentives

- A. The Developer of a Residential Development providing Inclusionary Units upon the same site as the market rate units pursuant to Section 5.08.400 may, at the Developer's sole option, submit a written request for density bonus, waivers or incentives pursuant to California Government Code Section 65915 *et seq.* and Chapter 20.190 of this Code, if the Residential Development includes the provision of affordable Inclusionary Units within the Residential Development that meets the minimum thresholds for density bonus pursuant to California Government Code Section 65915 *et seq.*

- B. Affordable Housing Plan. The incentives requested by the Developer of the Residential Development shall be included in the proposed Affordable Housing Plan submitted at the time of application for the First Approval, and any incentives authorized by the City pursuant to Chapter 20.190 of this Code shall be included in the Affordable Housing Plan, if approved by the City, for the Residential Development.

5.08.460 Timing of Construction of Inclusionary Units

- A. All required Inclusionary Units shall be made available for occupancy concurrently with the Market Rate Units. For the purposes of this subsection, “concurrently” means:
1. When the Inclusionary Units require construction and building permits therefor, for each Building Permit issued for an Inclusionary Unit the City may issue no more than six (6) Building Permits for Market Rate Units, and the City may not approve any final inspections for single-family detached homes, or any certificates of occupancy for all other residences, unless at least fifteen percent (15%) of all final inspections or certificates of occupancy, as appropriate, in the Residential Development have been approved for Inclusionary Units.
 2. When the Inclusionary Units do not require construction and Building Permits therefor, upon authorization for occupancy by the City of each Inclusionary Unit at an Affordable Housing Cost, the City may issue no more than five (5) Building Permits for Market Rate Units, and the City may not approve any final inspections for single-family detached homes, or any certificates of occupancy for all other residences, unless at least twenty percent (20%) of all Inclusionary Units for the Residential

Development have been authorized for occupancy at an Affordable Housing Cost by the City.

- B. The City may not issue Building Permits for more than ninety percent (90%) of the Market Rate Units within a Construction Phase in a Residential Development until it has issued Building Permits, or authorized for occupancy at an Affordable Housing Cost as applicable, for all of the Inclusionary Units to be included in that Construction Phase. The City may also not approve final inspections for single-family detached homes, or certificates of occupancy for all other residences, for more than ninety percent (90%) of the Market Rate Units within a Construction Phase until it has approved final inspections or certificates of occupancy, as appropriate, or authorized for occupancy at an Affordable Housing Cost as applicable, for all of the Inclusionary Units within that Construction Phase.
- C. The Applicant may elect to comply with the requirements of this Chapter by utilizing any of the Applicant's options under Part 5 of this Chapter. The phasing requirements of Subsections A and B shall not apply to any in lieu Inclusionary Unit credit pursuant to Sections 5.08.520 (In Lieu Fee), 5.08.530 (Dedication of Land), and 5.08.560 (HUD-Restricted Units).
- D. Subject to the approval of the City Manager, the Applicant may alternatively elect to contract with an affordable housing Developer with experience in obtaining tax-exempt bonds, low income housing tax credit financing, and other competitive sources of financing, that is approved by the City to construct all or part of the Inclusionary Units required by Section 5.08.400. The Inclusionary Housing Agreement required in Section 5.08.600 of this Chapter shall contain specific assurances guaranteeing the timely completion of the required Inclusionary Units, including satisfactory assurances that construction and permanent financing will be secured for the construction of the units within a

reasonable time. Such assurances may include a requirement that the Affordable Housing Developer and the Applicant execute an agreement that requires the closing of construction financing for the Inclusionary Units prior to the issuance of the first certificate of occupancy for the Residential Development or that the Applicant shall secure its obligations to the City by a letter of credit or escrow account in the amount of the In Lieu Fee, acceptable to the City in form and substance. The Inclusionary Housing Agreement shall include provisions for the payment of the City's costs of monitoring and administration of compliance with the requirements of this Chapter. After the Inclusionary Housing Agreement is approved by the City, then the phasing requirements of Subsection B apply only to Inclusionary Units not included in the contract with the City-approved affordable housing Developer. Off-site projects by a City-approved affordable housing Developer where all units are affordable to Lower Income Households are exempted from the timing requirements of this Section 5.08.460.

5.08.470 Standards for Inclusionary Units

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

- B. The quality of exterior design and overall quality of construction of the Inclusionary Units shall be consistent with the exterior design of all Market Rate Units in the Residential Development and meet all site, design, and construction standards included in Title 17 (Buildings and Construction), Title 19 (Subdivisions), and Title 20 (Zoning) of this Code, including but not limited to compliance with all design guidelines included in applicable specific plans or

otherwise adopted by the City Council, and the Inclusionary Housing Guidelines. Inclusionary Units shall have functionally equivalent parking when parking is provided to the Market Rate Units.

- C. Inclusionary Units may have different interior finishes and features than Market Rate Units in the same Residential Development, as long as the finishes and features are functionally equivalent to the Market Rate Units and are durable and of good quality and comply with the Inclusionary Housing Guidelines.
- D. The Inclusionary Units shall have the same amenities as the Market Rate Units, including the same access to and enjoyment of common open space and facilities in the Residential Development.
- E. The Inclusionary Units shall have the same proportion of Unit Types as the Market Rate Units in the Residential Development except:
 - 1. Single family detached Residential Projects may include single family attached Inclusionary Units;
 - 2. Single-family detached Inclusionary Units may have smaller lots than single-family detached Market Rate Units in a manner consistent with Title 20 of this Code; and
 - 3. Inclusionary Units made available for rent may consist of any Unit Type selected by the Applicant. Provided, however, Unit Types that do not include a private kitchen and/or bathroom may not be substituted for Unit Types that have a private kitchen and bathroom.

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

5.08.480 Minimum Requirements

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

**Part 5
Developers' Compliance Options**

5.08.500 Developers' Compliance Options

- A. On-Site. A Developer may construct on-site inclusionary rental units where the Developer would otherwise be required by this Chapter to construct on-site inclusionary for-sale units. If a Developer desires to construct on-site inclusionary rental units in lieu of on-site inclusionary for-sale units, the requirement for such on-site rental inclusionary units shall be: (i) Five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Moderate Income Households, five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Lower Income Households and five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Very Low Income Households, or (ii) ten percent (10%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Extremely Low Income Households.

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

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

5.08.510 Off-Site Construction

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

A. For-Sale Residential Development:

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

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

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

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

1. The site of the inclusionary housing conforms to the City's Affordable Housing Siting Policy.
2. The site has a General Plan designation that authorizes residential uses and is zoned for Residential Development at a density to accommodate at least the number of otherwise required Inclusionary Units within the Residential Development.
3. The site is suitable for development of the Inclusionary Units in terms of configuration, physical characteristics, location, access, adjacent uses, and other relevant planning and development criteria.
4. Environmental review for the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and all such hazards are or shall be mitigated to the satisfaction of the City prior to acceptance of the site by the City.
5. The construction schedule for the off-site Inclusionary Units shall be included in the Affordable Housing Plan and the Inclusionary Housing Agreement.

6. Construction of the off-site Inclusionary Units shall be completed prior to or concurrently with the Market Rate Residential Development pursuant to Section 5.08.460.

5.08.520 In Lieu Fee

- A. The inclusionary housing requirement in Section 5.08.400 may be satisfied by the payment of a fee to the City in lieu of constructing the affordable units within the Residential Development, provided that such fee is received by the City after the issuance of the development permit for the project, but prior to the issuance of the certificate of occupancy for the first Market Rate Unit in the Residential Development.
- B. In lieu fees shall be determined as follows:
 1. For-Sale Residential Development: The in lieu fee for For-Sale Residential Developments shall be established as specified in the Inclusionary Housing Guidelines based on the amount by which the average sales price of an attached Market Rate Unit exceeds the affordable sales price for an average-sized attached unit ("Affordability Gap – For Sale"). The average size, number of bedrooms, and sales price of an attached Market Rate Unit shall be based on units completed in the prior sixty (60) month reporting period and sold within the prior twenty-four (24) month period. The affordable sales prices for an average-sized attached unit shall be determined consistent with this Section and the Inclusionary Housing Guidelines based on the Affordable Housing Cost for a household earning no more than one hundred ten percent (110%) of the Area Median Income. The Affordability Gap - For-Sale shall be multiplied by the percentage of Inclusionary Units required by Section 5.08.510.A. and

divided by the average square footage of the Market Rate Units reflected in the sales data to determine the per square foot in lieu fee.

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

3. Less Than 19 Units. The in lieu fee for Residential Developments with up to nineteen (19) dwelling units that provide ninety percent (90%) or more of

maximum residential density permitted for the site by the San José General Plan shall be half of the amount otherwise due under this Section.

- C. The in lieu fee for each For-Sale Residential Development shall be determined based on the net square footage of the For-Sale Residential Development as calculated by the City. The in lieu fee for each Rental Residential Development shall be determined based on the rentable square footage of the Rental Residential Development as calculated by the City. To account for inflation in affordable housing development costs the in lieu fee shall be increased on July 1 of each year by the Engineering News Record (“ENR”) Construction Cost Index for the San Francisco area published by McGraw Hill on January 1 of every year, or its successor publication, for the preceding twelve (12) months until such time that a new in lieu fee is determined pursuant to this Section.
- D. The Council may by resolution based on findings, designate defined Market areas or other geographical areas as Strong Market Areas or Moderate Market Areas, and specify different in lieu fees which apply in those defined geographical areas which do not exceed the fees that do not exceed the fees which otherwise apply pursuant to this Section.
- E. The amount of in lieu fees shall be established in accordance with the provisions of this Section 5.08.520 by the City Council’s annual resolution establishing the Schedule of Fees and Charges, or as established otherwise by resolution of the City Council, and may include in the fee the actual estimated costs of administration and the estimated cost of increases in the price of housing and construction from the time of payment of the in lieu fee to the estimated time of provision of the affordable units by the City. The amount of the in lieu fee shall be updated periodically, as required.

- F. The in lieu fee pursuant to this Section 5.08.520 may be reduced for Residential Development of ten (10) or more floors or stories in height not including any non-residential uses where the highest occupied floor has a floor level elevation is at least one hundred fifty (150) feet above street level (High Rise Residential Development) in any specified area of the City by City Council resolution or policy providing incentives for the provision of high rise Residential Development. The reduction of in lieu fees pursuant to this Subsection 5.08.520.F shall only apply through the adoption by the City Council of a resolution or policy for all such development and shall not apply to individual High Rise Residential Development projects.
- G. No certificate of occupancy shall be issued by the City for any Market Rate Unit in the Residential Development prior to the payment in full of all in lieu fees to the City. The Developer shall provide both notice by recorded document against the Residential Development and, additionally, for each For-Sale Dwelling Unit therein, the Developer shall provide specific written notice to any purchaser of any Dwelling Unit prior to the acceptance of any offer to purchase, and shall obtain executed acknowledgement of the receipt of such notice, that purchaser shall not have any right to occupy the Dwelling Unit until such time as all in lieu fees owing for the Residential Development are paid to the City.
- H. All in lieu fees collected under this Section shall be deposited in the Inclusionary Fee Fund established pursuant to this Chapter.
- I. An updated determination of the in lieu fees for this option shall be commenced no later than five (5) years after the prior determination was adopted in the City Council's resolution establishing the Schedule of Fees and Charges. The Council may adopt in lieu fee amounts that are less than those determined under this Section.

5.08.525 Mixed Compliance with Rental Inclusionary Units On-Site

- A. The inclusionary housing requirement for Rental Residential Developments in Section 5.08.400 may be satisfied by the providing of at least five percent (5%) of the total Dwelling Units in the Residential Development as on-site Inclusionary Units in at least one income category in Section 5.08.400 together with the payment of an adjusted in lieu fee reduced for the Inclusionary Units provided consistent with this Section and the Inclusionary Housing Guidelines.

- B. An updated determination of the adjusted in lieu fees for this option shall be commenced no later than five (5) years after the prior determination was adopted in the City Council’s resolution establishing the Schedule of Fees and Charges. The determination shall be updated as follows: the adjusted in lieu fee applicable to this Section 5.08.525 will be determined consistent with the procedures provided in Section 5.08.520.B.2 and Section 5.08.520.D, however the income categories, the percentages and rents applicable under Section 5.08.400.A.2(i) shall be used, rather than those provided under Section 5.08.510.B. The Affordability Gap will be calculated and made applicable on a square footage basis for each such income category consistent with the procedures provided in Section 5.08.520.B.2. A further reduction for on-site compliance shall be determined for each category and Market Area pursuant to the Inclusionary Housing Guidelines based on a review of factors including the rate of utilization of this Section to produce on-site Inclusionary Units and the affordability of the Inclusionary Units provided (the “On-Site Adjuster”).

- C. When the Applicant restricts five percent (5%) or ten percent (10%) of the total Dwelling Units in the Rental Residential Development so that they are made available for rent at an Affordable Housing Cost to one or two of the following income categories: Moderate Income Households, Low Income Households, or

Very Low Income Households consistent with Section 5.08.400.A.2(i), the in lieu fee amount determined under this Section for the Rental Residential Development shall be reduced based on the amount of the adjusted in lieu fee otherwise applicable to the Rental Residential Development based on the on-site Inclusionary Units in the income category provided and then by the applicable On-Site Adjuster.

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

5.08.530 Dedication of Land In Lieu of Construction of Inclusionary Units

- A. The inclusionary housing requirement in Section 5.08.400 may be satisfied by the dedication of land in lieu of constructing Inclusionary Units within the Residential Development if the City Manager determines that all of the following criteria, as implemented by in the Inclusionary Housing Guidelines, have been met:
1. Marketable title to the site is transferred to the City, or an affordable housing Developer approved by the City, prior to the commencement of construction of the Residential Development pursuant to an agreement between the Developer and the City and such agreement is in the best interest of the City.
 2. The site has a General Plan designation that authorizes residential uses and is zoned for Residential Development at a density to accommodate at least the number of otherwise required Inclusionary Units within the Residential Development, and conforms to City development standards.

3. The site is suitable for development of the Inclusionary Units in terms of configuration, physical characteristics, location, access, adjacent uses, and other relevant planning and development criteria including, but not limited to, factors such as the cost of construction or development arising from the nature, condition, or location of the site.
 4. Infrastructure to serve the dedicated site, including but not limited to streets and public utilities, must be available at the property line and have adequate capacity to serve the maximum allowable residential development pursuant to zoning regulations.
 5. Environmental review of the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and all such hazards are or will be mitigated to the satisfaction of the City prior to acceptance of the site by the City.
 6. The value of the site upon the date of dedication is equal to or greater than the in lieu fee in effect at the date of dedication multiplied by the number of otherwise required Inclusionary Units within the Residential Development.
 7. The dedicated site complies with the City's Affordable Housing Siting Policy, or meets other City General Plan policies such as being located near transit.
- B. With respect to sites dedicated pursuant to Subsection A, the City shall not be required to construct restricted income units on the site dedicated to the City, but may sell, transfer, lease, or otherwise dispose of the dedicated site. Any funds collected as the result of a sale, transfer, lease, or other disposition of sites

dedicated to the City shall be deposited into the City of San José Inclusionary Fee Fund and used in accordance with the provisions of Section 5.08.700.

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

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

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

5.08.540 Credits and Transfers

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

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

5.08.550 Acquisition and Rehabilitation of Existing Units

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

- A. The value of the rehabilitation work is twenty five percent (25%) or more than the value of the Dwelling Unit prior to rehabilitation, inclusive of land value. The Inclusionary Housing Guidelines shall include criteria for the determination of value.
- B. Two (2) Dwelling Units shall be rehabilitated in lieu of each single Inclusionary Unit required pursuant to this Part 5.
- C. The Developer is providing all costs of notice to and relocation of existing residents in the residential units to be rehabilitated, and as further required by the Inclusionary Housing Guidelines.
- D. The site has a General Plan designation that authorizes residential uses and is zoned for Residential Development at a density to accommodate at least the number of rehabilitated units.
- E. The use of the site of the Dwelling Units to be rehabilitated shall not constitute a nonconforming use.
- F. The rehabilitated Dwelling Units shall comply with all current applicable Building and Housing Codes.

- G. A Physical Needs Assessment to the satisfaction of the City shall be performed on each Dwelling Unit to be acquired and rehabilitated, the property upon which it is located, and any associated common area, and all items identified in the Physical Needs Assessment needing repair, replacement and maintenance at the time of the Assessment or that will likely require repair or replacement within three (3) years of the Assessment shall be completed prior to the approval of the Dwelling Unit as an Inclusionary Unit. The Developer shall include in the Affordable Housing Plan the method by which a capital reserve for repair, replacement and maintenance shall be maintained for the term of the affordability restriction, with provision for sufficient initial capitalization and periodic contributions to the capital reserve.
- H. Environmental review of the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and is clear of all such hazards to the satisfaction of the City.
- I. The construction schedule for the units to be rehabilitated in lieu of providing Inclusionary Units shall be included in the Affordable Housing Plan.
- J. The rehabilitation of the Dwelling Units shall be completed prior to or concurrently with the Market Rate Residential Development pursuant to Section 5.08.460.
- K. The inclusionary housing restrictions shall be recorded against the Market Rate Residential Development and the rehabilitated Dwelling Units pursuant to this Chapter and the Inclusionary Housing Guidelines. The restrictions on the rehabilitated Dwelling Units shall commence upon the initial sale or rental of the rehabilitated Dwelling Unit at the Affordable Housing Cost occurring subsequent

to the approval of the Affordable Housing Plan in which the rehabilitated units are offered to satisfy the requirements of this Chapter.

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

5.08.560 HUD Restricted Units

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

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

- F. Environmental review of the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and is clear of all such hazards to the satisfaction of the City.
- G. The units to be provided as Inclusionary Units shall be included in the Affordable Housing Plan.
- H. The inclusionary housing restrictions shall be recorded against the Market Rate Residential Development and the Inclusionary Units to be provided pursuant to this Section 5.08.560 in accordance with this Chapter and the Inclusionary Housing Guidelines. Unless otherwise specified in this Section 5.08.560, the restrictions on the Inclusionary Units shall be for forty (40) years and shall commence upon the initial sale or rental of the first Market Rate Unit in the Residential Development subsequent to the approval of the Affordable Housing Plan in which the Inclusionary Units are offered to satisfy the requirements of this Chapter.
- I. The restrictions on the Inclusionary Units to be provided pursuant to this Section 5.08.560 shall run concurrently with the agreement between the Applicant and HUD providing the unit at an Affordable Housing Cost to Lower or Very Low Income Household. However, if the agreement between the Applicant and HUD terminates prior to the forty (40) year term required by Subsection 5.08.560.H, then the Developer shall provide the Inclusionary Units for the balance of the term in accordance with the requirements of this Chapter, unless the agreement between the Applicant and HUD terminates because federal funding for the program is no longer available in which event the Developer shall provide the Inclusionary Units for five (5) years after the termination of the HUD agreement.

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

5.08.570 Combination of Methods to Provide Inclusionary Housing

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

5.08.580 Option to Purchase

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

- A. An option agreement to purchase property within the City of San José (the “site”) for one dollar with a term of at least five (5) years is executed by the City and the Developer along with an attached approved form of purchase and sale agreement or transfer agreement and the City Manager has determined that such agreements are in the best interest of the City. The option or transfer

agreement provides that marketable title to the site will 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.

5.08.590 Partnership for Clustered Units

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

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

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

- D. Collateralized In Lieu Fee Security. In the event that the Affordable Housing Developer and the Applicant wish to execute an agreement that allows for the closing of construction financing and commencing of construction after the time periods in Subsection B or such that timeline is not met, the Applicant shall secure its obligations to the City by means of a letter of credit or escrow account in the amount of the in lieu fee, acceptable to the City in form and substance.

- E. Standards. The clustered Inclusionary Units shall comply with standards of Section 5.08.470, except the standard prohibiting geographical concentration. If the clustered Inclusionary Units are provided on contiguous property, they may be provided with equivalent amenities and open space in lieu of access to the amenities and open space in the Residential Development required by Section 5.08.470.

- F. Percentage of Inclusionary Units and Affordability. Either (i) Five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Moderate Income Households earning up to one hundred percent (100%) of Area Median Income, five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Lower Income Households and five percent (5%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Very Low Income Households or (ii) ten percent (10%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Extremely Low Income Households.

Part 6 Continuing Affordability

5.08.600 Continuing Affordability and Initial Occupancy

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

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

administration of this Chapter and the eligibility of persons to occupy Inclusionary Units pursuant to this Chapter.

5.08.610 Affordable Housing Plan Submittal and Inclusionary Housing Agreement

- A. An Affordable Housing Plan shall be submitted as part of the application for First Approval of any Residential Development. No application for a First Approval for a Residential Development may be deemed complete unless an Affordable Housing Plan is submitted in conformance with the provisions of this Chapter.

- B. For each Construction Phase, the Affordable Housing Plan shall specify, at the same level of detail as the application for the Residential Development, all of the following information including, but not limited to:
 - 1. Whether the development is for sale or rental;
 - 2. How the inclusionary housing requirement will be satisfied pursuant to this Chapter;
 - 3. The number, Unit Type, tenure, number of bedrooms and baths, approximate location, size and design, construction and completion schedule of all Inclusionary Units;
 - 4. Phasing of Inclusionary Units in relation to Market Rate Units including the specific timing required by Section 5.08.460;
 - 5. Marketing plan, including (i) the manner in which Inclusionary Units will be offered to the public in a nondiscriminatory and equitable manner, or (ii) a the manner in which Inclusionary Units will be offered in a

nondiscriminatory manner intended to affirmatively further fair housing and accompanied by an anti-displacement policy applicable to the Inclusionary Units;

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

it conforms to the provisions of this Chapter and the Inclusionary Housing Guidelines. A condition shall be attached to the First Approval of any Residential Development to require recordation of the Inclusionary Housing Agreement described in Subsection G of this Section prior to the approval of any final or parcel map or building permit for the Residential Development.

- E. A request for a minor modification of an approved Affordable Housing Plan may be granted by the City Manager if the modification is substantially in compliance with the original Affordable Housing Plan and conditions of approval. Other modifications to the Affordable Housing Plan shall be processed in the same manner as the original plan.

- F. An Applicant may propose an alternative method of meeting inclusionary housing requirements that does not strictly comply with the requirements of this Chapter. The City Manager may approve such an alternative if he or she determines, based on substantial evidence, and which determination shall be specified in the Affordable Housing Plan, that the alternative will provide as much or more affordable housing at the same or lower income levels, and of the same or superior quality of design and construction, and will otherwise provide greater public benefit, than compliance with the express requirements of this Chapter and the Inclusionary Housing Guidelines.

- G. Following the First Approval of a Residential Development, the City shall prepare an Inclusionary Housing Agreement providing for implementation of the Affordable Housing Plan and consistent with the Inclusionary Housing Guidelines. Prior to the approval of any final or parcel map or issuance of any building permit for a Residential Development subject to this Chapter, the Inclusionary Housing Agreement shall be executed by the City and the Applicant and recorded against the entire Residential Development property and any other

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

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

5.08.620 Inclusionary Housing Agreements for Affordable Housing Developments

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

Part 7
Implementation, Waiver, and Enforcement

5.08.700 Inclusionary Fee Fund

- A. Unless otherwise required by law, all in lieu fees, fees, promissory note repayments, shared appreciation payments, or other funds collected under this Chapter shall be deposited into a separate account to be designated as the City of San José Inclusionary Fee Fund.

- B. The moneys in the Inclusionary Fee Fund and all earnings from investment of the moneys in the Inclusionary Fee Fund shall be expended to provide housing affordable to Extremely Low Income, Very Low Income, Lower Income, and Moderate Income Households in the City of San José ongoing administrative costs including housing production, program management and inclusionary compliance monitoring.

5.08.710 Monitoring of Compliance

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

adopt fees for the costs of monitoring and compliance by the City, which shall be deposited into the Inclusionary Fee Fund for that purpose.

5.08.720 Waiver

- A. Notwithstanding any other provision of this Chapter, the requirements of this Chapter may be waived, adjusted, or reduced if an Applicant shows, based on substantial evidence, that there is no reasonable relationship between the impact of a proposed Residential Development and the requirements of this Chapter, or that applying the requirements of this Chapter would take property in violation of the United States or California Constitutions.
- B. Any request for a waiver, adjustment, or reduction under this Section shall be submitted to the City concurrently with the Affordable Housing Plan required by Section 5.08.610 of this Chapter. The request for a waiver, adjustment, or reduction shall set forth in detail the factual and legal basis for the claim.
- C. The request for a waiver, adjustment, or reduction shall be reviewed and considered in the same manner and at the same time as the Affordable Housing Plan, and is subject to the appeal process for Affordable Housing Plans in Section 5.08.610.C.
- D. In making a determination on an application for waiver, adjustment, or reduction, the Applicant shall bear the burden of presenting substantial evidence to support the claim. The City may assume each of the following when applicable:
 - 1. That the Applicant will provide the most economical Inclusionary Units feasible, meeting the requirements of this Chapter and the Inclusionary Housing Guidelines.

2. That the Applicant is likely to obtain housing subsidies when such funds are reasonably available.
- E. The waiver, adjustment or reduction may be approved only to the extent necessary to avoid an unconstitutional result, after adoption of written findings, based on substantial evidence, supporting the determinations required by this Section.

5.08.730 Implementation and Enforcement

- A. The City Manager shall adopt guidelines to assist in the implementation and administration of all aspects of this Chapter.
- B. The City shall evaluate the effectiveness of the ordinance codified in this Chapter, for review by the City Council, five (5) years after the Operative Date of this Chapter.
- C. The City Attorney shall be authorized to enforce the provisions of this Chapter and all Inclusionary Housing Agreements, regulatory agreements, covenants, resale restrictions, promissory notes, deed of trust, and other requirements placed on Inclusionary Units by civil action and any other proceeding or method permitted by law. The City may, at its discretion, take such enforcement action as is authorized under this Code and/or any other action authorized by law or by any regulatory document, restriction, or agreement executed under this Chapter.
- D. Failure of any official or agency to fulfill the requirements of this Chapter shall not excuse any Applicant or owner from the requirements of this Chapter. No permit, license, map, or other approval or entitlement for a Residential Development

shall be issued, including without limitation a final inspection or certificate of occupancy, until all applicable requirements of this Chapter have been satisfied.

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

5.08.740 Transition Period Procedures and Fees

- A. In Lieu Fees. In connection with the amendments to this Chapter adopted in 2021 by Ordinance No. _____, in lieu fees that were applicable to Residential Developments with unexpired Planning Permit approvals prior to May 1, 2021 (or otherwise deemed final pursuant to State law) 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. _____ by completion of a replacement Affordable Housing Plan and Acknowledgement, provision of all required submittals consistent with this Chapter as amended and the Inclusionary Housing Guidelines, and the approval of the replacement Affordable Housing Plan.

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

PASSED FOR PUBLICATION of title this _____ day of _____, 2021, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk