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ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING CHAPTER 5.11 OF TITLE 5 OF THE SAN JOSE MUNICIPAL CODE TO MODIFY THE TIME OF PAYMENT TO SCHEDULING OF FINAL BUILDING INSPECTION, AND ADD CREDITS FOR CONSTRUCTING NEW AFFORDABLE HOUSING UNITS OR RESTRICTING MARKET RATE UNITS AS AFFORDABLE HOUSING AND ASSOCIATED DEFINITIONS

WHEREAS, on September 22, 2020 the Council of the City of San José (“City Council”) approved a Commercial Linkage Fee for the Provision of Affordable Housing Ordinance, Chapter 5.11 of Title 5 of the San José Municipal Code (“Commercial Linkage Fee Ordinance”), enacting a requirement that new non-residential development pay a Commercial Linkage Fee with the purpose of addressing the increased need for affordable housing; and

WHEREAS, the Commercial Linkage Fee is intended to create a funding mechanism to increase the supply of affordable housing in San José without reference to a specific development or property; and

WHEREAS, the Commercial Linkage Fee is authorized pursuant to Section 200 of the City Charter and Section 7, Article XI of California Constitution as a police power measure to improve the public welfare of the City of San José and is designed to implement its housing goals while also balancing other interests as expressed in the General Plan; and

WHEREAS, City Council directed staff to further research and explore credits and incentives to bolster the Commercial Linkage Fee program, and staff has proposed amending the Commercial Linkage Fee Ordinance to include credits for the provision of

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affordable housing and thus support the underlying purpose of the Commercial Linkage Fee program; and

WHEREAS, staff faced challenges in implementing the Commercial Linkage Fee's existing delayed/phased payment procedure, and after careful review of the Commercial Linkage Fee and coordination across departments, staff has proposed amendments to the Commercial Linkage Fee Ordinance to enable efficient and effective implementation by changing the payment options for all projects to require the Commercial Linkage Fee be paid at scheduling of the Final Building Inspection; and

WHEREAS, pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code (collectively, "CEQA"), the Director of Planning, Building and Code Enforcement has determined that the provisions of this Ordinance do not constitute a project, under File Nos.PP17-009, Staff Reports, Assessments, Annual Reports, and information memoranda that involve no approval of any City action; and PP-17-008, General Procedure and 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; and

WHEREAS, the Council of the City of San José approves and adopts the changes to the Commercial Linkage Fee Ordinance to require that the Commercial Linkage Fee be paid at scheduling of the Final Building Inspection and to add credits for constructing new affordable housing units or restricting market rate units as affordable housing, as set forth in the Memorandum prepared by the departments of Housing, Economic

Development, and Planning, Building, and Code Enforcement, dated February 15, 2022.

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

SECTION 1. Section 5.11.020 of Chapter 5.11 of Title 5 of the San José Municipal Code is hereby amended to read as follows:

5.11.020 Definitions

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

- A. “Affordable Housing” means housing that is provided at an Affordable Housing Cost to households of Extremely Low Income, Very Low Income, Lower Income, and Moderate Income. “Affordable Housing Cost” is as defined by California Health & Safety Code section 50052.5 for owner-occupied housing and as defined by California Health & Safety Code section 50053 for rental units, as applicable. “Extremely Low Income Household” is as defined in California Health & Safety Code section 50106. “Very Low Income Household” is as defined in California Health & Safety Code section 50105. “Lower Income Household” is as defined in California Health & Safety Code section 50079.5. “Moderate Income Household” is as defined in California Health & Safety Code section 50093(b).

- B. “Applicant” means any person or entity who is an applicant, developer, owner, or appellant with a property interest in a Non-Residential Project subject to the terms of this Chapter, and the authorized representative of any such person or entity.

- C. “Building Permit” includes full structural building permits as well as partial permits such as foundation-only permits.
- D. “Certificate of Occupancy” means the permit issued by the City Building Division authorizing the initial occupancy of one or more buildings and includes final inspections and temporary certificate of occupancy permits.
- E. “City Manager” means the City Manager of the City of San José or ~~his or her~~ City Manager’s designee.
- F. “Commercial Linkage Fee” means the fee adopted by the City Council pursuant to this Chapter to be paid to the City pursuant to Section 5.11.030 of this Chapter in connection with approval of a Development Permit to contribute to the creation of Affordable Housing production or preservation to offset additional need for Affordable Housing generated by new Non-Residential development.
- G. “Credit Units” means new Affordable Housing rental units to be constructed on or off the site of the Non-Residential Project.
- H. “Covenant Credit Units” means existing unrestricted market rate rental units to be restricted as Affordable Housing rental units.
- ~~I.G.~~ “Development Permit includes any rezoning, tentative subdivision map, vesting tentative subdivision map, parcel map, conditional use permit, special use permit, building permit, or other entitlement for a Non-Residential Project.
- ~~J.H.~~ “Geographic Subarea” means one or more of the following geographic areas within the corporate limits of the City of San José as generally depicted in Section 2.3, Map 1 entitled “Geographic Subareas” of the Feasibility Study and more specifically described as follows:

1. “Downtown and Nearby” means the subarea encompassing approximately three square miles generally bounded to the north by Taylor Street from the boundary of the West San Jose subarea to State Route 87, south on State Route 87 to Coleman Avenue, and Coleman Avenue to Julian Street, and Julian Street to North 5th Street. The eastern boundary of the subarea runs south from the intersection of East Julian Street and North 5th Street to the intersection of East San Fernando Street from which point it includes the properties north of East San Fernando Street to the intersection of South 4th Street from which point the eastern boundary includes the properties to the west of South 4th Street between East San Fernando Street and Interstate 280. Interstate 280 establishes the southern boundary of the subarea and to the west the subarea is bounded by the eastern boundary of the West San Jose subarea.

2. “North San José and Nearby” means the subarea generally bounded to the north by the City limit, bounded to the east by Interstate 680 between the intersection of the City limit and Interstate 680 and the intersection of Interstate 680 and McKee Road; bounded to the south by Highway 101 between McKee Road and the Highway 101/Interstate 880 interchange and Highway 880 between the Highway 101/Interstate 880 interchange and the intersection of Interstate 880 and the railroad tracks between Elm Street and Stockton Avenue; and bounded to the west by these railroad tracks to the City limit.

3. “West San José Urban Villages” means the subarea generally bounded to the east by the intersection of West Taylor Street and the railroad tracks between Stockton Avenue and Chestnut Street and continuing to the north at the point which these railroad tracks intersect the City limit. The eastern boundary continues to the south from the railroad tracks/West Taylor Street intersection

- east to Stockton Avenue at which point the subarea includes those properties east of Stockton Avenue to the intersection at Morrison Park Drive, then following Morrison Park Drive west to the intersection at West Julian Street. The boundary includes those properties south of West Julian Street to the intersection at Rhodes Court, and includes those properties west of Rhodes Court to the intersection at The Alameda, then east along The Alameda to the intersection at Wilson Avenue. The boundary runs south on Wilson Avenue until it intersects with West San Fernando Street from which point the boundary includes the properties north of West San Fernando Street to the intersection with Sunol Street from which point the boundary continues south on Sunol Street to the intersection with West Home Street, then following West Home Street east to the Los Gatos Creek, then following the Los Gatos Creek until it intersects with Interstate 280. South of Interstate 280 the subarea is generally bounded to the east by Meridian Avenue until the Los Gatos Creek, includes the properties to the west of the Los Gatos Creek from Meridian Avenue until the City limit at South Bascom Avenue. The remainder of the subarea to the north, south and west is bounded by the City limit.
4. "Monterey Corridor" means the subarea generally bounded to the north by West Alma Avenue and East Alma Avenue between State Highway 87 and Senter Road. The eastern boundary of the subarea follows Senter Road from East Alma Avenue to Needles Drive and includes the properties south of Needles Drive from Senter Road to Coyote Creek and from this point the eastern boundary follows Coyote Creek from Needles Drive to East Capitol Expressway. The subarea is generally bounded to the south by East Capitol Expressway between Coyote Creek and Snell Avenue and includes the area between East Capitol Expressway and Seven Trees Boulevard to the point where these two roads intersect at the north to where Seven Trees Boulevard intersects with Senter Road and from this point west to Monterey Road. The subarea is generally bounded to the west by Snell Avenue from

where it intersects with West Capitol Expressway and continues north along Hillsdale Avenue to State Highway 87 and the remainder of the western boundary is State Highway 87 between Hillsdale Avenue to West Alma Avenue. The subarea also includes all properties with frontage on Monterey Road from Alma Ave to Skyway Drive.

5. “Edenvale” means the subarea generally bounded to the east by the properties fronting Hellyer Avenue from the Interstate 101 and Hellyer Avenue overcrossing to the Piercy Road and Hellyer Avenue intersection, and the properties fronting Piercy Road from Piercy Road and Hellyer Avenue intersection to Tennant Avenue; bounded to the southeast by the properties to the northwest of Silicon Valley Boulevard and Bernal Road between Hellyer Road and Santa Teresa Boulevard; bounded to the southwest by the properties northeast of Santa Teresa Boulevard between Bernal Road and Cottle Road; bounded to the west by properties fronting Cottle Road between Santa Teresa Boulevard and Blossom Hill Road; bounded to the north by Blossom Hill Road between Cottle Road and Coyote Creek; and bounded to the west by Coyote Creek from Silver Creek Valley Road to the Highway 101 and Hellyer Avenue overcrossing.
 6. “South and East San José Growth Areas” means any area within the corporate limits of the City of San José that is not included in any of the subareas described in Sections 5.11.020.J.1 through 5 above.
- Kf.** “Nexus Study” means the fee study entitled: “Nexus Analysis of Proposed Commercial Linkage Fees” prepared by Keyser Marston Associates, dated July 2020, and accepted by the City Council on September 1, 2020. The Nexus Analysis of Proposed Commercial Linkage Fees is maintained for public review in the Asset Management Division of the Department of Housing.

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

1. “Office” includes:
 - (a) social services agencies;
 - (b) health and veterinary services;
 - (c) health services;
 - (d) offices and financial services; and
 - (e) television/radio services.

2. “Retail” includes:
 - (a) recreation, commercial indoor;
 - (b) cannabis sales;
 - (c) poolroom/billiards;
 - (d) arcade;
 - (e) amusement games;
 - (f) card room;
 - (g) alcohol sales;
 - (h) pawn shop/broker;
 - (i) bail bond establishment;
 - (j) dining facilities;
 - (k) drinking establishment;
 - (l) drive-through uses;
 - (m) food service;
 - (n) fuel service station;
 - (o) general retail;
 - (p) general services;
 - (q) health recreation;
 - (r) public eating establishment;

- (s) selling or leasing of vehicles; and
 - (t) photo processing, printing and publishing in retail structures.
3. "Hotel" includes hotel/inn.
4. "Industrial" includes:
- (a) photo processing, printing, publishing in industrial facilities;
 - (b) recycling uses (not including outdoor storage areas);
 - (c) cleaning establishment;
 - (d) industry;
 - (e) installation or selling of vehicle accessories or services; and
 - (f) manufacturing and industrial services.
5. "Research and Development" or "R&D" includes:
- (a) research and development;
 - (b) lab; and
 - (c) processing.
6. "Warehouse" includes:
- (a) animal boarding;
 - (b) stockyard;
 - (c) warehouse; and
 - (d) wholesale (not including outdoor storage areas);
 - (e) waste/hazardous material storage (not including outdoor storage areas);
 - (f) common carrier depot (not including outdoor storage areas); and
 - (g) construction/corporation yard (not including outdoor storage areas).
7. "Residential Care" includes residential care/service facility for seven (7) or more persons.

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

MK. “Non-Residential Project” means any development having a Non-Residential use component and gross new or additional floor area of five thousand square feet or more or that applies for a permit to change an existing use to a different Non-Residential use category that increases the demand for Affordable Housing. Gross floor area excludes the square footage of any parking area and excludes the square footage of any other area that is specified by the City Council in its resolution adopting the schedule of fees.

SECTION 2. Section 5.11.030 of Chapter 5.11 of Title 5 of the San José Municipal Code is hereby amended to read as follows:

5.11.030 Commercial Linkage Fee Requirement

- A. The Commercial Linkage Fee shall be specified by resolution of the City Council, which may vary by applicable Subarea and type of Non-Residential Project.
- B. To account for inflation in Affordable Housing development costs, the Commercial Linkage Fee specified in subsection A above shall be increased by the Engineering News Record (ENR) Construction Cost Index for the San Francisco Urban area published by McGraw Hill on January 1 of every year, or its successor publication, for the preceding twelve (12) months.

- C. Compliance with this Chapter shall be a condition of approval of all Development Permits for Non-Residential Projects, whether or not the condition of approval is expressly included in the Development Permit.
- D. Unless otherwise specified by the City Council in its resolution adopting the schedule of fees, the Commercial Linkage Fee shall be paid prior to ~~issuance of any Certificate of Occupancy~~ scheduling of final building inspection for new Non-Residential Projects in the City. The Applicant shall pay the amount of the fees in effect at the time of issuance of the Building Permit according to the resolution specifying the schedule of fees in place on the date the fees are paid as automatically adjusted in accordance with Section 5.11.030.B through the date of payment.
- E. Failure to pay the Commercial Linkage Fee within the time specified in this Chapter shall result in the imposition of additional charges as set forth by resolution of the City Council.

SECTION 3. Chapter 5.11 of Title 5 of the San José Municipal Code is hereby amended to add Section 5.11.055 as follows:

5.11.055 Credits

- A. Affordable Housing-New Construction. The Applicant may request credit for new Affordable Housing rental units to be constructed on or off the site of the Non-Residential Project (“Credit Units”) in accordance with the guidelines. The credit will be implemented as a reduction in the square footage of floor area otherwise subject to the Commercial Linkage Fee. For each Credit Unit, the Commercial Linkage Fee is satisfied for a specified amount of floor area, with the amount of floor area varying according to the affordability required by the recorded restriction. Credit amounts for Low Income units are calculated as the in lieu fee for Strong Market areas established pursuant to the Inclusionary Housing**

Ordinance, Chapter 5.08 of Title 5 of the San José Municipal Code, expressed as an equivalent amount per required affordable unit, and divided by the per square foot Commercial Linkage Fee rate for office uses over 100,000 square feet. Credits for units in other income categories are calculated based on a proportionate adjustment to the credit for Low Income units using the Affordability Gaps determined pursuant to the Inclusionary Housing Ordinance. Prior to the deadline for the payment of the Commercial Linkage Fee, these Credit Units must be completed and a City affordability restriction must be recorded on the property where the units are located, consistent with the guidelines. The Credit Units must comply with the requirements in this Section and in the implementing guidelines, which are intended to impose standards substantially similar to those required under the Inclusionary Housing Ordinance. The Credit Units must have at least an average of 1.3 bedrooms per unit. Affordable housing projects or units that have received or will receive a funding or land contribution by the City or the County of Santa Clara and units restricted to meet Inclusionary Housing Ordinance obligations may not be used as Credit Units.

B. Affordable Housing Covenants. The Applicant may request credit for restriction of existing unrestricted market rate rental units as Affordable Housing rental units (“Covenant Credit Units”) in accordance with the guidelines. The credit for these units will be implemented as a reduction in the square footage otherwise subject to the Commercial Linkage Fee, determined pursuant to the formula described in Subsection A, provided that the credit for a Covenant Credit Unit shall be half of what would be allowed for a Credit Unit. The Covenant Credit Units must have an average of 1.3 bedrooms per unit. Credit for Moderate Income Covenant Credit Units will only be granted if market rate rents for comparable units exceed 30% of 120% of area median income. The Covenant Credit Units site must comply with the siting requirements of the Inclusionary Housing Ordinance. The Covenant Credit Units and the building where they are located must have been built or substantially rehabilitated within the last five years or otherwise demonstrate a

remaining life of 55 years. The building and Covenant Credit units must meet the applicable standards in the guidelines. The Covenant Credit Units must be vacant or occupied by a household that is income eligible and no tenant shall have been removed in order to create a vacancy. A City affordability restriction must be recorded on the property where the Covenant Credit Units are located consistent with the guidelines and prior to the deadline for the payment of the Commercial Linkage Fee for the Non-Residential Project.

PASSED FOR PUBLICATION of title this _____ day of _____, 2022, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI TABER, CMC
City Clerk