

RESOLUTION NO. \_\_\_\_\_

**A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE APPROVING AMENDMENTS TO THE COUNCIL POLICY 1-16, THE POLICY FOR THE ISSUANCE OF THE MULTIFAMILY HOUSING REVENUE BONDS**

**WHEREAS**, the City Council of the City of San José (“City”) initially adopted City Council Policy 1-16, “Policy for the Issuance of Multifamily Housing Revenue Bonds” by City Council action on June 11, 2002, which policy was amended by the City Council in December 2005, and was reaffirmed on March 27, 2018 (“Policy”); and

**WHEREAS**, the City Debt Management Policy, approved by Resolution 70977 on May 21, 2022, requires an annual review of the Policy by Finance Department staff and the submittal of any proposed changes to the City Council for its review and approval by the City Council; and

**WHEREAS**, consistent with the City’s Debt Management Policy, Finance and Housing staff completed the annual review of the Policy and recommend that the City Council approve the amendments to the Policy to revise the General Matters and City Fees sections, shown in redlines in Exhibit “A” attached to this resolution; and

**WHEREAS**, consistent with Section 5031(c) of the Regulations of the California Debt Limit Allocation Committee, the proposed amendments to the Policy have been reviewed by counsel having expertise with the federal and state laws pertaining to the issuance or conversion and post-closing compliance of private activity conduit bonds; and

**WHEREAS**, this amended Policy supersedes the existing Policy reaffirmed on March 27, 2018 by Resolution No. 78538 of the Council of the City of San José;

**NOW, THEREFORE**, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

The revised City Council Policy 1-16, entitled "Policy for the Issuance of Multifamily Housing Revenue Bonds," which revised Policy is attached hereto as Exhibit "A" and incorporated herein by this reference as though fully set forth herein, is hereby approved and shall replace the existing City Council Policy 1-16, initially approved by the City Council on June 11, 2002, which policy was amended by the City Council in December 2005, and was reaffirmed on March 27, 2018.

ADOPTED this \_\_\_\_\_ day of \_\_\_\_\_, 2023, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

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MATT MAHAN  
Mayor

ATTEST:

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TONI J. TABER, CMC  
City Clerk

## EXHIBIT A

### City of San José, California

#### COUNCIL POLICY

<b>TITLE</b> POLICY FOR THE ISSUANCE OF MULTIFAMILY HOUSING REVENUE BONDS	<b>PAGE</b>  1 of 13	<b>POLICY NUMBER</b>  1-16
<b>EFFECTIVE DATE</b> June 11, 2002	<b>REVISED DATE</b>	<b>[March 27, 2018]</b>

#### APPROVED BY COUNCIL ACTION

June 11, 2002, Item 3.7, Resolution No. 71023; December 6, 2005, Item 3.5, addition of TEFRA Fee and amendment of Annual Monitoring Fee policy; Reaffirmed March 27, 2018, Item 4.1, Resolution No. 78538.

#### GENERAL MATTERS

##### I. ISSUER

The City of San José (the "City") shall be the issuer of all revenue bonds or notes (either referred to as "bonds" herein) financing multifamily housing rental projects (a "Project" or "Projects") within the City, except as provided below, subject to the City Council's approval. The City's Housing Department and Finance Department will consider other issuing agencies as follows:

**~~A. The Redevelopment Agency~~**  
**~~Not applicable.~~**

##### A. ABAG, CSCDA, Other Conduits

The City may agree to the issuance of bonds by the Association of Bay Area Governments ("ABAG"), California Statewide Community Development Authority ("CSCDA") or a similar issuing conduit provided ~~that~~ the City is not making a loan or grant to the Project and the Project is one of multiple projects being financed by the Project Sponsor through such issuing conduit agency in the same California Debt Limit Allocation Committee ("CDLAC") round under a similar financing program so as to result in economies of issuance.

##### B. Special Circumstances

Another agency may issue bonds when merited by special circumstances of the Project and the financing. The Project Sponsor shall notify the City of the specific special circumstances that it wishes the City to consider at least four (4) months before the applicable CDLAC application deadline. The Project Sponsor shall

promptly provide all documents requested by City staff for the completion of the City's staff report to the City Council no later than three (3) months before the applicable CDLAC application deadline. If City staff initiates the request or determines it is in the City's best interest, these submittal deadlines may be modified as needed

Where the City is not the issuer of bonds for a Project, it shall be the City's policy to require the issuer to assume full responsibility for issuance and on-going compliance of the bond issue with federal tax and state laws. Where feasible, however, the City shall seek to hold a public hearing required under Section 147(f) of the Internal Revenue Code of 1986, better known as the Tax Equity and Fiscal Responsibility Act ("TEFRA") of 1986 Hearing, ~~better known as the "TEFRA" Hearing~~ for such Project.

## II. FINANCING TEAM

The City shall select the financing team for all multifamily housing revenue bonds issued by the City. The Finance Department is responsible for selecting the financial-municipal advisor, trustee and the investment banker/ underwriter (assuming a negotiated public sale of bonds). The City Attorney's Office is responsible for selecting the bond counsel firm. The financial-municipal advisor, investment banker and bond counsel shall be selected from approved lists determined from time to time by a request for qualifications/proposal process.

## III. COORDINATION AMONG CITY DEPARTMENTS

The City recognizes ~~that~~ the issuance of housing bonds entails a coordinated effort among the Housing Department, Finance Department and City Attorney's Office. The Housing Department shall ensure ~~that~~ the Finance Department and the City Attorney's Office are provided with regular updates on projects that may involve the issuance of bonds.

## THE FINANCING PROCESS

### I. INITIAL MEETING WITH PROJECT SPONSOR

#### A. Prior Due Diligence

Prior to arranging an initial meeting with the Project Sponsor, the Housing Department shall perform initial due diligence on the Project Sponsor, including whether the Project Sponsor has ever failed to use an allocation from CDLAC and

whether the Project Sponsor has failed to comply with the terms of any other City financings or City loans.

## **B. Determination of Readiness**

Following the initial meeting, City representatives shall determine if the project is in a state of sufficient "readiness" to proceed with the CDLAC application process. This includes the status of the project in terms of the development process. In general, a project will be deemed "not ready" if the discretionary planning approvals will not have been completed by the time of the CDLAC application.

## **C. Selection of Financing Team**

Following a determination of readiness, the Finance Department and City Attorney shall recommend the ~~financial-municipal~~ advisor, underwriter (if applicable) and bond counsel, as the case may be, for each project.

# **II. DEPARTMENTAL APPROVALS**

Pursuant to the Delegation of Authority by the City Council, both the City's Directors of Finance and Housing must approve each Project, the financing, and the filing of a CDLAC application before the City can make an application to CDLAC for private activity bond allocation. The approval of the Directors of Finance and Housing ~~Directors~~ shall be evidenced by a jointly signed "Notice to Proceed" addressed to the Project Sponsor. The Notice to Proceed shall describe the project, identify the developer or Project Sponsor, the affordability mix, the proposed plan of finance and the amount of bond funding requested.

## **A. Resolution**

The City Attorney's Office will be responsible for preparing a resolution for joint approval by the Directors of Finance and Housing. The resolution will:

1. Memorialize the Council's intent to issue the debt ~~in order~~ to induce others to provide project financing;
2. Authorize the filing of a CDLAC application; and
3. Authorize the execution of a Deposit and Escrow Agreement.

## **B. TEFRA HEARING**

The TEFRA hearing will be held before the Director of Finance on the date specified in the TEFRA Notice. The Director of Finance has the discretion to have the TEFRA hearing held by the City Council.

### III. CDLAC APPLICATIONS

#### A. Description

Before the City is legally able to issue private activity tax-exempt bonds for a project, an application must be filed with CDLAC ~~in Sacramento~~ and an allocation of the State ceiling on qualified private activity bonds must be approved by CDLAC.

#### B. City to File

The City is the applicant to CDLAC for each project to be financed with tax-exempt bonds issued by the City. The Housing Department will file all applications to CDLAC on behalf of project sponsors.

#### C. Project Sponsor to Prepare Application

Each project sponsor shall take responsibility for preparing the CDLAC application for its project with input from City representatives, the City's ~~financial~~ municipal advisor and bond counsel.

#### D. Deposit and Escrow Agreement

The City will not file a Project Sponsor's CDLAC application unless the Project Sponsor executes a Deposit and Escrow Agreement and makes the necessary deposits specified in this Agreement. The Deposit and Escrow Agreement shall contain the items identified below. It shall be the responsibility of the Housing Department to see that all requirements under the Deposit and Escrow Agreement are met.

##### 1. CDLAC Performance Deposit

The Deposit and Escrow Agreement must require the payment of the CDLAC performance deposit, provided that current CDLAC rules require the payment of such deposit to the issuer.

##### 2. City of San José Performance Deposit

In addition to the CDLAC performance deposit, the Deposit and Escrow Agreement shall require the Project Sponsor to deposit \$50,000 with the City as a City of San José performance deposit. This deposit shall be forfeited in the event that the City, on behalf of the Project Sponsor, receives an allocation but does not issue bonds. The deposit may be applied to pay costs of issuance or returned to the Project Sponsor as soon as practicable. By agreement between the City and the Project Sponsor, the Project Sponsor may designate its City loan as the source of payment in the event of forfeiture.

### 3. Financing Team Fees

The Deposit and Escrow Agreement shall identify, if available, the fees of the bond counsel, financial-municipal advisor, and underwriter (if applicable). It shall be the responsibility of the Finance Department and the City Attorney's Office to identify these fees.

## IV. COUNCIL APPROVAL

### A. Staff Report

The Finance Department, in conjunction with the Housing Department and City Attorney's Office, shall prepare a staff report recommending final Council approval for a bond issue. The staff report shall be submitted to the City Manager's Office in accordance with the timing requirements of ~~the~~ then-current City procedures.

The staff report shall specify the approvals that are recommended, provide background on the project being financed, describe the financing structure, indicate any exceptions to the City's investment policy, describe the financing documents to be approved, identify the financing team participants, and seek approval of consultant agreements and financing participants that have not previously been approved by Council. The staff report should indicate if a separate City loan is being provided. However, the terms of that loan should be discussed in a separate staff report which, whenever possible, shall be submitted for the same agenda. The staff report shall be signed by the Directors of Finance and Housing.

The staff report should be submitted only after the major transaction terms (e.g., financing structure, security provisions, bond amount, maximum maturity, etc.) are identified and agreed to by the parties. The staff report may note that the bond issue is contingent upon certain other approvals and may identify certain issues to be resolved at a later time.

### B. Substantially Final Documents

The City Council shall approve documents that are "substantially final" documents. Documents are in "substantially final" form if they identify the final security provisions and financing structure for the transaction. The City Attorney's Office shall determine whether documentation is in substantially final form.

### C. Council Meeting

The Council meeting shall occur on a date after which all approvals from major financial participants (e.g., credit enhancement provider, bond purchaser, tax credit investor) have been obtained. At the discretion of the City Attorney and

Finance Department, the Council may proceed with its approval process without such other final approvals if: (1) such final approval is likely; (2) the Council's approval is subject to such other party's final approval; and (3) the Council approval process cannot be delayed without jeopardizing the financing.

## V. BOND SALE AND CLOSING

### A. Timing

The bond sale and closing may commence only after the Council authorizes the bond issue, including the distribution of a Preliminary Official Statement, if applicable.

### B. Investment Agreements

If authorized by the Council, the Project Sponsor, through its representative, which may include the underwriter or financial-municipal advisor, may solicit investment agreement providers for the purpose of reinvesting bond proceeds and revenues. The investment agreement providers must meet the City's requirements and the requirements in the bond resolution and trust indenture for the bonds. Bond counsel and the financial-municipal advisor shall review the investment agreement solicitation forms, the eligible providers, and the investment agreements.

### C. Payment of Issuance Fee

The City's issuance fee shall be funded from the Costs of Issuance Fund held by the Trustee.

### D. ~~Information Memorandum~~Report to Council

~~Promptly after the issuance of all bonds for a CDLAG round, the City Finance Department shall~~ report activities related to the multifamily housing revenue bonds in the quarterly Debt Management Report to the assigned City Council Committee and the City Council prepare an information memorandum summarizing the salient points of each bond issue.

## CITY FEES

### I. TEFRA HEARING FEE

The City shall charge a fee of \$5,000, or as otherwise provided in the City's Schedule of Fees and Charges, whichever is greater, for the administrative costs associated with holding a TEFRA hearing relating to a Project. The fee shall be payable prior to the date that notice of the TEFRA hearing is published. No separate TEFRA hearing fee shall be charged if the City ~~or Redevelopment Agency~~ is issuing the bonds for the Project.



## II. ISSUANCE FEE

The City shall charge a fee for the administrative costs associated with issuing the bonds for a Project Sponsor. The fee shall be payable at bond closing and may be contingent on the bond sale. The issuance fee shall be based on the total amount of the bonds (both tax-exempt and taxable) to be issued in accordance with the following sliding scale:

*\$0 to \$10 million:* 0.5% of the principal amount of bonds issued, with a minimum fee of \$30,000.

*Over \$10 million:* 0.5% of the first \$10 million principal amount of bonds; 0.25% of any additional amount.

## III. ANNUAL MONITORING FEE

The City shall charge an annual fee for monitoring the restricted units. The fee shall be in an amount equal to 0.125% of the original principal amount of tax-exempt bonds issued. Except for non-profit or government agency Project Sponsors, the fee shall not be reduced until all of the tax-exempt bonds are retired and the bond regulatory agreement ceases to have validity or is no longer in effect, at which time it will terminate. Upon conversion to permanent financing, a nonprofit or government agency Project Sponsor, may have a reduction in their annual fee to 0.125% of the permanent bond amount after conversion subject, to a minimum annual fee of \$7,500. For clarification, this fee reduction only applies if none of the general partners of the limited partnership (aka the borrower) are for-profit entities.

The City annual monitoring fee shall be paid "above the line," i.e., on a parity with bond debt service and trustee fees. This parity provides the greatest assurance that the City's fee will be paid, although it may reduce the amount ~~that~~ the Project Sponsor's lender may be willing to underwrite. The City may determine, at its sole discretion, to subordinate all or a portion of its annual fee to bond debt service only when the Housing Department has made a substantial loan to the Project, so long as at the time of allocation, the project has substantial hardship, and the Project Sponsor provides adequate assurance of the payment of such fees. The City shall not subordinate its fee in circumstances where no City funds are subsidizing the Project.

## CREDIT CONSIDERATIONS

### I. CREDIT ENHANCEMENT

#### A. General Policy

It shall be the general policy of the City to encourage the use of credit enhancement for bonds issued by the City. Credit enhancement shall be a requirement for any multifamily bonds that are publicly distributed. The minimum rating on such credit

enhancement shall be "A" or higher by Moody's, Standard & Poor's, ~~and/or~~ Fitch and/or Kroll Bond Rating Agency ("KBRA"). This policy shall be subject to the exceptions described below.

## **B. Forms of Credit Enhancement**

Credit enhancement may be in the form of a bank letter of credit, bond insurance, surety, financial guaranty, mortgage-backed security (e.g., Fannie Mae, Freddie Mac or Ginnie Mae) or other type of credit enhancement approved by the market. If the City has not previously issued bonds with a particular kind of credit enhancement, the Finance Department and ~~financial~~ municipal advisor shall determine whether such credit enhancement is acceptable and whether marketing restrictions shall be imposed.

## **C. Project Sponsor Responsibility**

It shall be the responsibility of the Project Sponsor to obtain and pay for the costs of credit enhancement. The City will assume no responsibility therefor.

# **II. NON-CREDIT ENHANCED BONDS**

## **A. General Policy**

It shall be the general policy of the City to require bonds that are not secured with credit enhancement to be sold through private placement or through a limited public offering to institutional or accredited investors. As an exception to this ~~p~~Policy, the City may authorize the public distribution of non-credit enhanced bonds that are rated at least in the "A" category by Moody's, Standard & Poor's, ~~and/or~~ Fitch, and/or KBRA after consultation with the underwriter and ~~financial~~ municipal advisor. In connection with such authorization, the City shall consider the sophistication of the Project Sponsor, its financial resources, commitment to the community and other factors.

## **B. Additional Requirements for Non-Rated Bonds**

Non-rated bonds must comply with the following additional requirements:

### **1. Minimum Denominations and Number of Bondholders**

In order to limit the transferability of non-rated bonds, the City shall seek minimum denominations of at least \$100,000. In addition, the City may also limit the number of bondholders to further limit the transferability of non-rated bonds.

### **2. Qualified Institutional Buyer ("QIB") Letter**

The bond purchaser in a private placement or limited public offering must certify that it is a qualified or accredited investor (a "big boy letter"). Such letter must be signed by subsequent bond purchasers so long as the bonds remain unrated.

## **REFUNDING/RESTRUCTURING/REMARKETING**

### **I. General**

The City ~~may~~has issued both fixed rate and variable rate multifamily bonds. On occasion, the Project Sponsor may ask the City to refund those bonds to lower the interest rate, to remarket the bonds with a new credit enhancement, and/or to remarket the bonds as fixed rate bonds. The Project Sponsor will be responsible for all costs and fees related to the refunding.

### **II. Optional Refunding**

#### **A. Reasons to Refund Outstanding Bonds**

A Project Sponsor may ask the City to refund its outstanding bonds for one of several reasons:

1. Lower the interest rate on fixed rate bonds at the call date (through the issuance of fixed rate or variable rate refunding bonds);
2. Substitute a new credit structure that was not expressly provided for in the existing documents; or
3. Restructure the existing debt.

#### **B. Financing Team**

The City shall select the financing team to implement the refunding. Where possible and if desired by the City, the financing team shall consist of the bond counsel, ~~financial-municipal~~ advisor and, if applicable, underwriter that were retained for the original financing.

#### **C. Legal/Documentation**

New documents shall be prepared to meet the City's then-current legal, credit, financial, and procedural requirements. The City shall follow the documentation process applicable to new bonds. Because the City's primary purpose in issuing multifamily housing bonds is to preserve and increase the supply of affordable housing in the City, if federal or state affordability, income, and/or rent restrictions have changed between the time of the original financing and the refunding bonds,

the more restrictive provisions shall apply. If new requirements are more restrictive than existing requirements, the new requirements shall be applied in phases to new tenants over a period of time, not to exceed five (5) years, as determined by the Housing Department staff and the City Attorney.

#### **D. Bond Maturity**

Subject to the approval of bond counsel, the final maturity of the refunding bonds may be later than the final maturity of the prior bonds so as to allow the Project Sponsor the longest possible period for repayment under federal law.

#### **E. Compliance**

The City shall not proceed with a refunding if the Project is not in compliance with the current regulatory agreement, continuing disclosure reporting, or arbitrage rebate reporting and payment.

#### **F. Fees**

The Project Sponsor shall pay the following City fees in connection with the refunding:

##### **1. Issuance Fee**

The City shall charge an issuance fee in accordance with the City's current policy on issuance fees for new projects.

##### **2. Annual Monitoring Fee**

The City shall continue to charge the same annual fee for monitoring the Project as for the original bonds. Such fee shall not be reduced even if the refunding bond size is lower.

#### **G. Cash Flow Savings**

Cash flow savings from refunding fixed rate bonds at a lower fixed interest rate or a variable rate shall be applied as follows:

##### **1. Projects with a City Loan**

A portion of the projected cash flow savings, to be determined by the Housing Department, shall be used to accelerate the repayment of the City loan, subject to restrictions in existing documents.

##### **2. Projects with No City Loan**

The City Housing Department shall require the Project Sponsor to provide affordability or other financial concessions to the City as a condition for refunding. Such concessions may include increasing the percentage of affordable units and extending the term of affordability restrictions.

#### **H. City Council Approval**

All refunding bonds and related legal documentation must be approved by the City Council in accordance with the procedures set for the issuance of new bonds.

### **III. DEFAULT REFUNDING**

#### **A. General**

In the event of a default on the bonds or the underlying mortgage, a fixed rate bond issue may be refundable in advance of the call date without premium. The issue does not arise with variable rate bonds, as such bonds are callable at any time. Default refunding bonds are an area of potential sensitivity for the City as it will not want a developer to manufacture a default to take advantage of more favorable interest rates.

#### **B. Financing Team**

The City shall select the financing team to implement the refunding. Where possible and if desired by the City, the financing team shall consist of the bond counsel, financial-municipal advisor and, if applicable, underwriter that were retained for the original financing.

#### **C. Confirming the Default**

To confirm a default, the City must receive a notice from an independent party, such as the bond trustee. If applicable, notice of cash flow insufficiency is then filed as part of the Continuing Disclosure Certificate. In addition, the City shall retain, at the expense of the Project Sponsor, an independent feasibility consultant to review the default. The City will proceed with the transaction only if a review by staff and the independent consultant indicates that:

1. Net cash flow from the Project is currently insufficient to pay debt service on the outstanding bonds and is unlikely to do so within a reasonable period;
2. The Project is being operated in accordance with reasonable real estate management practices and the net operating income has not been artificially

reduced by failing to rent units actively, inflating operating expenses, or other reasons within the control of the Project Sponsor; and

3. The Project Sponsor has provided audited operating statements, Continuing Disclosure filings (if applicable), and arbitrage rebate reports for all years, has cooperated in providing requested information, and has used operating income and other resources to pay debt service.

#### **D. Additional Requirements**

##### **1. Indemnification**

The City shall be indemnified as to any costs incurred as a result of the refunding. Such indemnification shall come from a party or parties with adequate net worth or other financial capacity and whose assets are not limited to ownership of the Project.

##### **2. Future Debt Coverage**

The analysis of the feasibility consultant shall show that, upon the refunding, the Project's current net operating income will be at least sufficient to pay the revised debt service plus a reasonable coverage ratio (or adequate non-bond proceeds will be available to cover such deficiencies). In other words, the City shall not proceed with the refunding if it will not cure the cash flow problem.

##### **3. Bond Counsel Review**

Bond counsel shall have determined that the original bond and disclosure documents provided adequate disclosure of such a potential redemption and that the provisions of the prior documents have been satisfied.

##### **4. Compliance**

The City shall not proceed with a refunding if the Project is not in compliance with the current regulatory agreement, continuing disclosure reporting, or arbitrage rebate reporting and payment.

#### **E. Fees**

The fees and expenses of the feasibility consultant, ~~financial~~municipal advisor and bond counsel shall not be contingent on their findings or completion of a refunding. The City shall require ~~that~~ the Project Sponsor deposit the estimated fees and expenses with the City prior to the commencement of any analysis.

#### **F. Affordability Restrictions**

The affordability requirements for a default refunding shall be the same as those listed under "Legal/Documentation" for an optional refunding.

#### **G. City Council Approval.**

##### **1. Initial City Council Approval**

The Finance Department, in conjunction with the Housing Department and City Attorney's Office, shall obtain initial City Council approval prior to proceeding with any documentation for a default refunding. Initial City Council approval shall occur after the independent feasibility consultant performs the initial analysis, a default is confirmed, and it is determined that a refunding will cure the cash flow problem.

##### **2. Final City Council Approval**

The Finance Department, in conjunction with the Housing Department and City Attorney's Office, shall obtain final City Council authorizing the bond issue and execution of the relevant documentation.

#### **H. City Fees**

The City shall charge the same issuance fee and annual monitoring fee that it otherwise would in conjunction with a new bond issue.

### **IV. REMARKETING**

#### **A. General**

A Project Sponsor may ask the City to remarket outstanding bonds under one of three basic scenarios: (1) converting variable rate bonds to fixed rate bonds; (2) a mandatory tender of bonds; or (3) substituting a new credit enhancement for the bonds in accordance with existing documentation.

#### **B. Financing Team**

The City shall select the financing team to implement the refunding. Where possible and if desired by the City, the financing team shall consist of the bond counsel, financial-municipal advisor and, if applicable, underwriter that were retained for the original financing.

#### **C. Legal/Documentation**

A remarketing of fixed rate bonds will not require new legal documentation. However, the City Attorney's Office, in conjunction with bond counsel, may require a new disclosure document. A remarketing of bonds with a new credit

enhancement may require amended documentation, as well as a new disclosure document, as determined by the City Attorney's Office and bond counsel.

**D. Fees**

A remarketing will not result in the payment of additional or revised City issuance or annual fees. However, the City shall charge a fee of \$10,000 to \$25,000 to the Project Sponsor for administrative costs.

**E. Council Approval**

All remarketed bonds and any related documentation shall be approved by the City Council prior to any remarketing.