

**NOTICE**

For the purpose of facilitating review of this draft ordinance, where there are changes to previous Council direction that are recommended by staff, the section that is proposed to be changed is shaded and the staff recommendation follows in ***shaded bold italics***.

ORDINANCE NO.

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING  
TITLE 5 OF THE SAN JOSE MUNICIPAL CODE TO ADD A  
NEW CHAPTER 5.08 ADOPTING A CITYWIDE  
INCLUSIONARY HOUSING PROGRAM**

**WHEREAS**, the San José City Council desires to adopt 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 housing element's goals and objectives; and

**WHEREAS**, a Citywide inclusionary housing program will 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

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

**WHEREAS**, the San José City Council desires to include Redevelopment Project Areas in the Citywide inclusionary housing program in order to continue to comply with the requirements of California Health and Safety Code section 33413(b) and to provide for

greater ease of access to, and administration of, inclusionary housing requirements for Residential Development; and

**WHEREAS**, a Use of a Final Environmental Impact Report and Addendum thereto for the San José 2020 General Plan (the "FEIR"), which FEIR was certified by the City Council on August 16, 1994 in conformance with the California Environmental Quality Act of 1970, as amended ("CEQA"), was prepared for the ordinance under File No. PP08-258; and

**WHEREAS**, the City Council, on August 16, 1994, adopted Resolution No. 65459 making certain findings in connection with the approval of the San José 2020 General Plan concerning that project's significant environmental effects, the feasibility of alternatives, and adopting a statement of overriding considerations identifying the project benefits that outweighed and made acceptable the identified significant environmental effects, and those findings remain valid in light of the proposed Inclusionary Housing Ordinance; and

**WHEREAS**, said Use of a FEIR and Addendum thereto was prepared and approved by the Director of Planning, Building and Code Enforcement on November 17, 2008, and was reviewed and considered by the Planning Commission on November 19, 2008, none of which actions were challenged, appealed, or protested; and

**WHEREAS**, the City Council of the City of San José is the decision-making body for the proposed ordinance, and has considered and approves of the information contained in such Use of a FEIR and Addendum thereto, together with related Resolution No. 65459, prior to acting upon the proposed ordinance;

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

Title 5 of the San José Municipal Code is hereby amended by adding a Chapter to be numbered, entitled and 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%) percent 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 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.

Redevelopment Project Areas are included in the Citywide inclusionary housing program in order to comply with the requirements of California Health and Safety Code section 33413(b), and in order to provide a single source for affordable housing requirements for all Residential Development and administration of the program.

The City Council desires to provide incentives in this Chapter for 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 and maintain affordable housing opportunities in the community through an inclusionary housing program for both ownership and rental housing, and, in furtherance of that goal, includes rental inclusionary housing requirements in this Chapter that shall become operative at such time as there is a change in the current law as expressed in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2nd Dist. 2009) 175 Cal.App.4th 1396.

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 the affordable rent for Moderate Income Rental Inclusionary Units that are located upon the same site as the Market Rate Residential Development shall be no more than thirty percent (30%) of eighty percent (80%) of Area Median Income.

#### **5.08.110 Affordable Housing Dispersion Policy**

“Affordable Housing Dispersion Policy” means the collective goals and policies in the San José 2020 General Plan and other policies adopted by the City Council to encourage the distribution of affordable income housing throughout all areas of the City of San José in order to avoid concentrations of low income households and encourage racial and economic integration. The Affordable Housing Dispersion Policy includes, but is not limited to, the following sections of the San José 2020 General Plan and any amendments thereto, and the following related policies adopted by the City Council as may be amended or supplemented from time to time:

- A. San José 2020 General Plan, Chapter IV “Goals and Policies,” Distribution and Low/Moderate Income Housing Policies;
- B. San José 2020 General Plan, Chapter VI “Implementation,” Housing Policy Goals of the Housing Assistance Program Objectives;

- C. San José 2020 General Plan, Chapter VI "Implementation," Housing Programs Balanced Community Policy #2;
- D. San José 2020 General Plan, Chapter VI "Implementation," Equal Housing Opportunities;
- E. San José 2020 General Plan, Appendix C "Housing" (p. C67); and
- F. San José City Council Resolution No. 67604, adopted August 26, 1997.

**5.08.115 Affordable Housing Fund**

"Affordable Housing Fund" means a fund or account designated by the City to maintain and account for all monies received pursuant to this Chapter and which shall comply with all of the requirements of the Community Redevelopment Law (California Health and Safety Code section 33000 *et seq.*).

**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 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 or zoning ordinance.

**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.

**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 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.*), or any Residential Development including such For-Sale Dwelling Units.

**5.08.195 Inclusionary Housing Agreement**

"Inclusionary Housing Agreement" means an agreement 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, in conjunction with the Executive Director of the San José Redevelopment Agency, 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 Area**

“Lower Income Area” means any census tract in the City of San José in which greater than fifty percent (50%) of the households are reported to be Lower-, Very Low-, and Extremely Low- Income pursuant to the most recent U. S. Census statistics. “Lower Income Area” specifically excludes any portion of a census tract that is within a Redevelopment Project Area.

***[Staff Recommendation: Section 5.08.210 must be deleted as unnecessary if the staff recommendation to make uniform the on-site inclusionary requirement in Section 5.08.400.A is approved by Council. All following sections would require renumbering accordingly.]***

#### **5.08.215 Lower Income Household**

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

#### **5.08.220 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.

#### **5.08.225 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 eighty percent (80%) of Area Median Income.

**5.08.230 Operative Date**

"Operative Date" shall have the definition given in Section 5.08.300.

**5.08.235 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.

**5.08.240 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.

#### **5.08.245 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.*

#### **5.08.250 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 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.

#### **5.08.255 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 twenty (20) 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 twenty (20) or more residential units.

**5.08.260 Surplus Inclusionary Unit**

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

**5.08.265 Unit Type**

"Unit Type" means any form of dwelling described in Section 20.200.320, Section 20.200.330, or Section 20.200.340 of Chapter 20.200 of Title 20 of the San José Municipal Code.

**5.08.270 Utilities**

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

**5.08.275 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. 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, of which no more than one thousand two hundred fifty (1,250) are for Dwelling Units in the North San José Development Policy Area; or

***[Staff Recommendation: In order to provide timely notice of the Operative Date of this Chapter to the public, change Subsection 5.08.300.A to read:***

***“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, of which no more than one thousand two hundred fifty (1,250) are for Dwelling Units in the North San José Development Policy Area; or”]***

B. January 1, 2013, if Council takes action to approve this Chapter no later than December 1, 2012.

***[Staff Recommendation: Change Subsection 5.08.300.B to read:***

***“B. January 1, 2013.”***

### **5.08.310 Applicability**

The provisions of this Chapter shall apply to:

- A. All Residential Development, as defined in Section 5.08.255 of this Chapter, except for any Residential Development exempt under Section 5.08.320 of this Chapter;
- B. All Residential Development and Contiguous Property that is under Common Ownership or Control; and
- C. Residential Development in Redevelopment Project Areas prior to the Operative Date of this ordinance by written agreement of the owner of the Residential Development and the San José Redevelopment Agency, or by adopted written policy of the San José Redevelopment Agency. In the event that this Chapter is implemented by the Redevelopment Agency in Redevelopment Project Areas prior to the Operative Date pursuant to this Subsection 5.08.310.C, the Redevelopment Agency may delegate to the City the administration of this Chapter as applied to Redevelopment Project Areas, including monitoring and reporting to the Redevelopment Agency and the State Department of Housing and Community Development such information as is required by law on outcome and affordability of Inclusionary Units in the Redevelopment Project areas.

### **5.08.320 Exemptions**

This Chapter shall not apply to any of the following:

- A. Projects that are not Residential Developments as defined in Section 5.08.255 of this Chapter.

- B. Residential Developments with a total of less than twenty (20) Dwelling Units.
- C. 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.
- D. 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.
- E. 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.
- F. Residential Developments that are not within a Redevelopment Project Area where the Applicant has submitted an application for a Planning Permit no later than six (6) calendar months from the Operative Date of this Chapter that is

Deemed Substantially Complete by the City pursuant to the provisions of Title 20 (Zoning) and Title 21 (Environmental Clearance); and

1. For Residential Development of less than 750 Dwelling Units:

- a. Within twenty-four (24) months after the Operative Date, the Applicant is issued an approved Planning Permit by the City for the Residential Development, and
- b. Within thirty (30) months after the Operative Date, the Applicant obtains approved building permits for one or more Dwelling Units in the Residential Development; or

2. For Residential Development of 750 Dwelling Units or more:

- a. Within thirty (30) months after the Operative Date, the Applicant is issued an approved Planning Permit by the City for the Residential Development, and
- b. Within forty (40) months of the Operative Date, the Applicant obtains approved building permits for one or more Dwelling Units in the Residential Development.

***[Staff Recommendation: Change Subsection 5.08.320.F and add Subsection 5.08.320.G to read:***

***“F. Residential Developments for which a Planning Permit has been approved by the City no later than the Operative Date of this Chapter.”]***

**G. Residential Development in a Planned Community, as specified in the San José 2020 General Plan, and:**

- 1. The Residential Development is not in the Redevelopment Project Area;**
- 2. A Specific Plan was adopted by the City for the Planned Community prior to 1992;**
- 3. 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;**
- 4. One or more phases of the Residential Development, and the required infrastructure improvements related to each of those phases, is completed in conformance with the Specific Plan and Planning Permits prior to the Operative Date; and**
- 5. As of the Operative Date, there has been no construction of residential units in one or more remaining phases of the Residential Development within the Specific Plan area, and within forty (40) months of the Operative Date the Developer has obtained City approval of at least one building permit in any such remaining construction phase.”]**

H. Planning Permit Expiration. Upon the expiration of any Planning Permit, 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 an Affordable Housing Plan is approved in conjunction with any

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

- I. Limited Extension of Exemption Due to Delay. The City Manager, with the concurrence of the Redevelopment Executive Director whenever the Residential Development is in a Redevelopment Project Area, 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. City-Wide. In all areas of the City of San José, excepting any Redevelopment Project Area or Lower Income Area:

***[Staff Recommendation: Delete Subsection 5.08.400.A.1 in order to make uniform the inclusionary housing requirement City-wide; renumber/re-letter the following sections accordingly.]***

- a. 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.
- b. Rental Residential Development: Nine percent (9%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Moderate Income Households, and six percent (6%) 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.

***[Staff Recommendation: Add the following paragraph to Subsection 5.08.400.A.1.b to address recent appellate case law:***

***This Subsection 5.08.400.A.1.b shall be operative at such time as current appellate case law in Palmer/Sixth Street Properties, L.P. v. City of Los Angeles (2nd Dist. 2009) 175***

***Cal.App.4th 1396, is overturned, disproved, or depublished by a court of competent jurisdiction or modified by the state legislature to authorize control of rents of Inclusionary Units.]***

2. **Redevelopment Project Areas.** In all Redevelopment Project Areas within the City of San José:

a. **For-Sale Residential Development:**

(1) Twenty percent (20%) of the units in each Residential Development shall be made available for purchase at an Affordable Housing Cost to Lower Income Households or to Moderate Income Households. Such units may be sold to households earning no more than one hundred twenty percent (120%) of the Area Median Income; or

(2) Six percent (6%) of the Dwelling Units in each for-sale Residential Development shall be made available for purchase at an Affordable Housing Cost to Very Lower Income Households, and nine percent (9%) shall be made available for purchase at an Affordable Housing Cost to Lower Income Households or to Moderate Income Households.

b. **Rental Residential Development:** Eight percent (8%) of the Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Very Low Income Households, and twelve percent (12%) of the Dwelling Units shall be made available for rent at an Affordable Housing

Cost to Lower Income Households. Such units may be rented to households earning no more than eighty percent (80%) of the Area Median Income.

3. Lower Income Areas. In all Lower Income Areas within the City of San José, fifteen percent (15%) of the Dwelling Units in each Residential Development shall be made affordable to Moderate Income Households.

***[Staff Recommendation (City and Redevelopment Agency): Delete Subsections 5.08.400.A.2 and 5.08.400A.3 in order to make the inclusionary housing requirement uniform in all areas of the City.]***

- 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 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 an approved subordinate shared appreciation 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 executed pursuant to Section 5.08.600 of this Chapter shall be waived by the City. The subordinate shared appreciation 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 Agreement shall be recorded against the Residential Development and all Contiguous Property under Common Ownership or Control and

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 twenty (20) 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 all required Inclusionary Units upon the same site as the market-rate units pursuant to Section 5.08.400 may, at the Developer's sole option and concurrently with the submittal of the Affordable Housing Plan, and the earlier of the zoning or Planning Permit application for requests pursuant to Subsections 2 and 3 herein, submit a written

request for one or more of the following on-site inclusionary housing development incentives:

1. Density Bonus. The Residential Development may receive a density bonus 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.* For Residential Projects qualifying for a density bonus pursuant to this Subsection 1, the City shall, upon request of the Applicant at the time of application for the First Approval, authorize a density bonus in the amount specified in California Government Code section 65915 unless such a density bonus would cause a specific adverse impact to the public health, safety and welfare, including but not limited to historic or natural resources or the environment. The City shall not provide any other incentives or concessions, other than those listed in this Section 5.08.450, in addition to such density bonus.
  
2. Flexible Parking Standards. The Developer may request a reduction in the maximum number of parking spaces required or other parking requirements for the Residential Development pursuant to Title 20 herein, which shall not cause a specific adverse impact to the public health, safety and welfare, including but not limited to historic or natural resources or the environment, and which also complies with the minimum requirements for the provision of parking for the disabled.
  
3. Reduction in Minimum Setback Requirements. The Developer may request a reduction in the minimum setback requirements for the Residential Development, which shall not cause a specific adverse impact

to the public health, safety and welfare, including but not limited to historic or natural resources or the environment.

4. Alternative Unit Type. The Developer may request to provide Inclusionary Units within the Residential Development that are of a different Unit Type than the Market Rate Units within the Residential Development. The Inclusionary Units shall have the same bedroom count and percentage distribution among the units as the Market Rate Units.
5. Alternative Interior Design Standards. Except as may otherwise be required by federal or state law, the Developer shall provide the same amenities as the Market Rate Units, but may request to provide different but functionally equivalent amenities for the Inclusionary Units within the Residential Development than the Market Rate Units.
6. Expedited Review. A Developer may request to enter into an agreement with the City to deposit and pay for all of the City's costs of providing expedited review of the application for the Planning Permit for the Residential Development. Such an agreement shall be in a form approved by the City Attorney. Such an agreement shall require both the City and the Developer to comply with requirements for timing and adequacy of submittals to the City and responses from the City to such submittals. Delay by the Developer in the performance of the Developer's obligations under such an agreement shall relieve the City of its obligation to provide expedited review pursuant to the agreement. Delay by the City in the performance of its obligations under such an agreement shall entitle the Developer to a refund of its deposits with the City for expedited review. No other remedies for failure to perform the terms of the agreement shall be available to the parties. Nothing in this Chapter shall require the City to

approve an application for Residential Development based upon an agreement for expedited review.

***[Staff Recommendation: Delete Subsection 5.08.450.A.6 and renumber the following Subsections accordingly. The Department of Planning, Building and Code Enforcement has performance measures for the timely processing of Planning Permits. All development, including applications with inclusionary housing, benefit from the reduced processing times.]***

7. City Process Assistance. The Developer may request the City to provide assistance to the Developer by explaining the City's development review process for the Residential Development, financing alternatives, and assistance in the sale or rental of the Inclusionary Units to qualified households at an Affordable Housing Cost. The City shall provide assistance as to the City's requirements for such Inclusionary Housing only, and shall not be considered in any manner an employee, agent or consultant of the Developer.
  
  8. Financial Subsidies. The Developer may apply for financial subsidies for the Inclusionary Units from any available federal and state funding sources, or may work with the City to apply for such sources on its behalf. The Developer may also apply for financial subsidy from City-administered funds for the difference in costs that results if the Developer provides more Inclusionary Housing Units or all units in the Residential Development as Inclusionary Units at an Affordable Housing Cost to households in income classifications that are lower than required for the Residential Development pursuant to Section 5.08.400.
- 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 this Section 5.08.450 shall be included in the Affordable Housing Plan, if approved by the City, for the Residential Development.

- C. Inclusionary Housing Guidelines. The provision of incentives pursuant to this Section 5.08.450 shall also be in accordance with the Inclusionary Housing Guidelines.

#### **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. 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, and multifamily Inclusionary Units shall be located so as not to create a geographic concentration of Inclusionary Units within the Residential Development.
  
- 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.
- 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:
1. Nine percent (9%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Moderate Income Households, and six percent (6%) 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. 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 5.08.570 of this Chapter. If the Developer selects any of the compliance options in Sections 5.08.510 through 5.08.570 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.

Where the market rate Residential Development is located in a Redevelopment Project Area, the off-site Inclusionary Units for the Residential Development shall

be located within the same Redevelopment Project 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 and the San José Redevelopment Agency that there is insufficient available land within the Redevelopment Project Area to construct the off-site Inclusionary Units, in which event such Inclusionary Units shall be constructed upon a site approved by the City and the San José Redevelopment Agency in another Redevelopment Project Area in 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 twelve percent (12%) 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 off-site rental dwelling units numbering no less than eight percent (8%) 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 twelve percent (12%) 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 off-site rental inclusionary units numbering no less than eight percent (8%) 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 Dispersion 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 equal to the difference between: (1) the amount of a conventional permanent loan that an Inclusionary Unit would support based on the affordable sale price or rent for the required Inclusionary Unit, and (2) the estimated total development cost per Inclusionary Unit based on the cost per unit of similar San José affordable housing and/or Inclusionary Units.

**[Staff Recommendation: Subsection 5.08.520.B should be changed to read:**

**"B. In lieu fees shall be as follows:**

1. ***For-Sale Residential Development: The in lieu fee for each For-Sale Inclusionary Unit shall be no greater than the difference between the median sales price of an attached Market Rate Unit in the prior thirty six (36) month reporting period specified in the Inclusionary Housing Guidelines and the Affordable Housing Cost for a household of 2.5 persons earning no more than one hundred ten percent (110%) of the Area Median Income.***

2. ***Rental Residential Development:***

a. ***The in lieu fee for each Rental Inclusionary Unit shall be:***

(1) ***No greater than the average City subsidy required for new construction of a rental residential unit at an Affordable Housing Cost for a Lower Income Household, with changes in the fee based upon commitments of City affordable housing development funding in the prior twelve (12) month reporting period specified in the Inclusionary Housing Guidelines when there are three (3) or more such City-subsidized rental affordable new construction projects during the reporting period; or***

(2) ***In the event that there are less than three (3) City-subsidized rental affordable housing new construction projects within any twelve (12) month reporting period, the in lieu fee shall be updated annually using the Real Estate Construction Report published by the Real Estate Research Council of Northern California. The change in***

***the in lieu fee shall be based upon the percentage difference in the New Home Prices in Santa Clara County published in the fourth quarter report for the then current year from the immediately preceding year.”]***

***[Staff Recommendation: Add the following Subsection 5.08.520.B.2.b to address recent appellate case law relating to rental inclusionary housing and in lieu fees therefor:***

***“b. Subsection 5.08.520.B.2.a shall be operative at such time as current appellate case law in Palmer/Sixth Street Properties, L.P. v. City of Los Angeles (2nd Dist. 2009) 175 Cal.App.4th 1396, is overturned, disproved, or depublished by a court of competent jurisdiction or modified by the state legislature to authorize control of rents of Inclusionary Units.”]***

- C. 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.
- D. 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 (High Rise Residential Development) in any specified area of the City by City Council resolution or policy providing incentives for the provision of

high density Residential Development. The reduction of in lieu fees pursuant to this Subsection 5.08.520.D 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.

- E. 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.
- F. All in lieu fees collected under this Section shall be deposited in the City of San José Affordable Housing Fee Fund established pursuant to Section 5.08.700 of this Chapter.

**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 Dispersion Policy, or meets other City General Plan policies such as being located near transit.
- B. 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 Affordable Housing 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. Five (5) HUD-restricted Dwelling Units shall be provided in lieu of each single Inclusionary Unit required pursuant to this Part 5.

**[Staff Recommendation: Change Subsection 5.08.560.B to read:**

**“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 5.04.560 in accordance with this Chapter and the Inclusionary Housing Guidelines.

- I. The restrictions on the Inclusionary Units to be provided pursuant to this Section 5.08.560 shall commence upon the termination of the agreement between the Applicant and HUD providing the unit at an Affordable Housing Cost to Low or Very Low Income Household and shall be for five (5) years.

***[Staff Recommendation: Change Subsection 5.08.560.I to require the same term of affordability as all of the other inclusionary housing required by this Chapter, as follows:***

- "I. The restrictions on the Inclusionary Unit to be provided pursuant to this Section 5.08.560 shall commence upon the termination of the agreement between the Applicant and HUD providing the unit at an Affordable Housing Cost to Low or Very Low Income Household and shall be for the full term required for inclusionary housing under Section 5.08.600.B."***

- 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 Density Bonus Not Applicable**

The options for provision of Inclusionary Units pursuant to Part 5 of this Chapter shall not also be used to obtain a Density Bonus for the Residential Development or any site upon which an option pursuant to Part 5 has been exercised by the Applicant for the Residential Development.

**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 resale the difference between the market rate value of the Inclusionary Unit and the Affordable Housing Cost, plus a share of appreciation realized from an unrestricted sale in such amounts as deemed necessary by the City to replace the Inclusionary Unit.

- B. All Inclusionary Units shall remain affordable to the targeted income group for no less than the time periods set forth in California Health and Safety Code sections 33413(c)(1) and (2). A longer term of affordability may be required if the Residential Development receives a subsidy of any type, including but not limited to loan, grant, mortgage financing, mortgage insurance, or rental subsidy, and the subsidy program requires a longer term of affordability, or as prescribed in the Inclusionary Housing Guidelines.
- 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 Affordable Housing 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 or Redevelopment Agency, 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;
  5. Marketing plan, including the manner in which Inclusionary Units will be offered to the public in a nondiscriminatory and equitable manner;
  6. Specific methods to be used to verify tenant incomes, when applicable, and to maintain the affordability of the Inclusionary Units; and
  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.
  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.

## Part 7

### Implementation, Waiver, and Enforcement

#### 5.08.700 Affordable Housing 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 Affordable Housing Fee Fund.
- B. The moneys in the Affordable Housing Fee Fund and all earnings from investment of the moneys in the Affordable Housing Fee Fund shall be expended exclusively to provide housing affordable to Extremely Low Income, Very Low Income, Lower Income, and Moderate Income Households in the City

of San José and administration and compliance monitoring of the Inclusionary Housing program.

#### **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 the Redevelopment Agency and other governmental agencies as required by law. Such provisions shall require annual compliance reports to be submitted to the City by the owner 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 Housing 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, in conjunction with the Executive Director of the San José Redevelopment Agency, 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.

RD:VMT  
12/15/2009

PASSED FOR PUBLICATION of title this \_\_\_\_\_ day of \_\_\_\_\_, 2010, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

\_\_\_\_\_  
CHUCK REED  
Mayor

ATTEST:

\_\_\_\_\_  
LEE PRICE, MMC  
City Clerk