

ATTACHMENT A-5
INCLUSIONARY HOUSING ORDINANCE COMPLIANCE OPTIONS:
PROCEDURE FOR SURPLUS INCLUSIONARY UNIT CREDITS OPTION
(FOR-SALE)

I. Introduction

The Inclusionary Housing Ordinance (Ordinance) allows Developers to build and restrict Surplus Inclusionary Units (on-site Inclusionary Units in excess of the number required by the Ordinance) and provides Developers with the option to transfer credits for Surplus Inclusionary Units from one Residential Development to another, or to purchase credits for Inclusionary Units from another Developer who has Surplus Inclusionary Units, in lieu of including Inclusionary Units in a Residential Development.

This attachment to the Guidelines provides more information on how a Developer can comply with the Ordinance using purchased or transferred credits for Surplus Inclusionary Units. It also explains how a Developer can build Surplus Inclusionary Units (a “Generating Developer”) that can be credited to another Residential Development and describes the standards for Surplus Inclusionary Units. Definitions for capitalized terms may be found in the Guidelines and the Ordinance.

II. Surplus Inclusionary Units and Credits (SJMC Section 5.08.255, 5.08.540)

The Residential Development where Surplus Inclusionary Units are located may not receive any city subsidies or affordable housing loans. Fee credits that are generally available to affordable housing projects (e.g. park impact fee credits) are not considered city subsidies. For-Sale credits may only be used by For-Sale projects. Rental credits may be used by both For-Sale and Rental projects. Surplus Inclusionary Units shall be restricted for affordability consistent with the requirements for off-site units in SJMC Section 5.08.510.A and 5.08.510.B.

A developer who declares that they will construct Surplus Inclusionary Units in the project’s Affordable Housing Compliance Plan and then constructs the project with on-site Inclusionary Units and Surplus Inclusionary Units is a “Generating Developer.” Once the project with the Surplus Inclusionary Units has been entitled, a Generating Developer may: 1) claim Credits on their Compliance Plan for its own separate concurrent or near future project, or 2) agree to sell Credits to a different developer with a concurrent or near future project.

III. Location of Surplus Inclusionary Units

The site chosen for the Surplus Inclusionary Homes must have a General Plan designation allowing residential uses, and environmental review shall have been completed with hazards mitigated to the satisfaction of the City prior to the acceptance of the site in the Affordable Housing Compliance Plan. The surplus land must also be zoned for Residential Development at a density that will accommodate at least the number of required Inclusionary Homes no later than the approval of the entitlement(s) for the market rate project. Completion of these entitlements and documentation of ownership or control of surplus land must be obtained and

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provided consistent with the construction schedule that was provided with the Affordable Housing Compliance Plan.

Where the market rate Residential Development is located in a Redevelopment Project Area, the off-site Inclusionary Homes must be located within the same Redevelopment Project Area unless, at the time of submission of the Affordable Housing Compliance Plan, the Developer has petitioned and provided credible documentation in writing to the City that there is insufficient available land within the Redevelopment Project Area to construct the off-site Inclusionary Homes, in which event such Inclusionary Homes shall be constructed upon a site approved by the City in another Redevelopment Project Area.

The Ordinance specifies that Inclusionary Homes built off-site of the Residential Development must be built on a site that is consistent with the City's Affordable Housing Dispersion Policy. The Housing Department encourages affordable housing to be constructed throughout San Jose to achieve socio-economic integration at the neighborhood level. The Housing Department discourages concentration of extremely low-income units in census tract where the poverty rate in the census tract is 20% or greater.

If the proposed development is located in a census tract where the poverty rate is 20% or greater, you must demonstrate two of the three following:

- 1) Neighborhoods that show signs of revitalization, through indicators such as declining census tract poverty rates, low or declining violent crime rates or evidence of increased educational opportunities (educational opportunity includes adult education, vocational school, state or community college); and/or
- 2) New market-rate residence have been/are being developed in the same census tract where the proposed development will be located and it is likely that those units will positively impact the poverty rate in the area; and/or
- 3) Neighborhoods in which there is high private and public investment in retail or commercial that is already occurring or will imminently occur in the area, as economic advancement opportunities include retail and other business offering entry-level job opportunities.

IV. Affordable Housing Compliance Plan Application (*For using transferred credits*)

As part of the application for First Approval¹ of any Residential Developments, Developers are required to submit a signed Affordable Housing Compliance Plan application to the City, and pay the application processing fee. If an Affordable Housing Compliance Plan was not submitted and approved at First Approval, it is due when a Developer applies for any other Planning Permit. Additionally, upon the expiration of any Planning Permit, and unless otherwise exempted, the Residential Development shall be subject to the requirements of the Ordinance

¹ SJMC Section 5.08.185 - "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.

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and shall not proceed until such time as an Affordable Housing Compliance Plan application is approved in conjunction with any other required Planning Permit or amendment thereto.

Developers who elect to satisfy a project's Inclusionary Housing Obligation with Surplus Inclusionary Unit credits ("Credits") transferred or purchased from another Residential Development shall provide the following information when submitting the project's Affordable Housing Compliance Plan application:

- 1) General information about the Developer and the Surplus Project;
- 2) Whether the Developer intends to seek a parcel, or tentative, and final map for the Project;
- 3) Affirming that the Developer intends to use Credits to satisfy its Inclusionary Housing Obligation consistent with the standards in Part III, VI, and VII;
- 4) Detailed information about the unit makeup for the Surplus Project:
 - i. Location of Surplus units,
 - ii. Total number of units,
 - iii. Total number of Market Rate, if any, and Surplus units by income level,
 - iv. Unit type (e.g. townhouse, detached single-family),
 - v. Number of bedrooms and bathrooms,
 - vi. Parcel maps and/or site plans indicating the proposed location and square footage of both the Surplus units and the Market Rate units, if applicable,
 - vii. General Plan designation of the Surplus units,
 - viii. Current phase I environmental review for the off-site land, and if called for, phase II and evidence of completed hazard mitigation, upon request by the City, and
 - ix. Construction timeline for the Surplus Inclusionary Units showing that the Residential Development will receive its Certificates of Occupancy within five (5) years from the restriction and initial sale or rental of the Surplus Inclusionary Units.
- 5) As part of the Affordable Housing Compliance Plan application process, Developers shall provide a sales and marketing plan that includes the following:
 - i. Anticipated timeline for the rental of both Surplus units and market rate units, if any in Surplus project, and
 - ii. The planned approach to offering the inclusionary units to the public in a non-discriminatory and equitable manner.
- 6) If the Developer intends to acquire Credits from another developer who has fully entitled a project with Surplus Inclusionary Units ("Generating Developer") shown in its Compliance Plan, identify the Generating Developer, indicate whether the Generating Developer owns the land that is site of the Credits and demonstrate that Generating Developer is willing to sell those Credits to the Developer.
- 7) Whether the Developer or any affiliate owns, has an interest in, or controls any property contiguous to the project,
- 8) Identify any public funding anticipated in connection with the project with the Surplus Inclusionary Units,
- 9) Affirming the Surplus Inclusionary units have been not been sold or rented,
- 10) A title report, and
- 11) Any other information, including a detailed narrative that facilitates the Housing Department's ability to evaluate the Project's compliance with the IHO and Guidelines.

Interested parties may obtain the Affordable Housing Compliance Plan application from the City of San José Housing Department website, currently available at: www.sjhousing.org/IHO or by contacting the Housing Department by sending an email to: Inclusionary@sanjoseca.gov.

V. Inclusionary Housing Agreement

The Inclusionary Housing Agreement is a covenant by the Developer for the benefit of the City describing how the project's Inclusionary Housing Obligation will be satisfied. The Inclusionary Housing Agreement may be comprised of more than one document. The approved Affordable Housing Compliance Plan application, including all components required to satisfy the Developer's selected compliance option, will be attached to the Inclusionary Housing Agreement.

Prior to the approval of any final map or parcel map, or the issuance of any Building Permit for a project subject to the Ordinance, the City and Developer will execute an Inclusionary Housing Agreement. The Inclusionary Housing Agreement will then be recorded against the entire Residential Development site and any Contiguous Property under Common Ownership and Control, and the land that is the site of the Credits.

VI. Timing Restrictions on Surplus Credits:

A Credit will not be valid if the Surplus Inclusionary Unit has been initially sold or rented prior to the approval of the Compliance Plan claiming the Credit. A Credit is eligible for use for a period of no more than five (5) years after issuance of the Certificate of Occupancy for the restricted Surplus Inclusionary Unit. After the five year period, the credit expires and can no longer be used. A Credit may be "used" if it is unexpired as of the date of the approval of the Affordable Housing Compliance Plan claiming that Credit. Additionally, the Surplus Inclusionary Unit must receive its Certificate of Occupancy concurrent with or prior to the Residential Development claiming the Credit

Each Surplus Inclusionary Unit meeting the standards will result in a Credit for that size, affordability and tenure of a unit. For example, a two bedroom rental apartment restricted to 50% AMI, will result in a 2 bedroom VLI rental Credit. Credits can be used to satisfy an inclusionary housing obligation for the same income level or a higher income level.

No Credit will be finally awarded or accepted by the City until after the issuance of the Certificate of Occupancy for the Surplus Inclusionary Unit and restriction of that unit, and the City receives sufficient confirmation that the Surplus Inclusionary Unit has been sold or rented to an eligible buyer or tenant at an affordable price or rent as required by the Inclusionary Housing Ordinance.

VII. Standards for Surplus Inclusionary Units

Minimum Size (Net Livable Square Feet) of Surplus Units restricted as **For-Sale:**

- i. Studio: 500 sq ft

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- ii. 1 bedroom: 650 sq ft
- iii. 2 bedrooms: 850 sq ft
- iv. 3 bedrooms: 1,050 sq ft
- v. 4 bedrooms: 1,200 sq ft

Bedroom Count Equivalency: The unit mix of the project proposing to use Credits, should be the same as the Credits, although the City may agree to a different mix, in its sole discretion, if the proposed mix is as good or better for the City.

VIII. Inclusionary Housing Credit Tracking

Housing Department staff will determine the number of Credits that may be earned by a Generating Developer's project, by income level and type, and maintain a record of all Credits earned, transferred and utilized. Generating Developers shall cooperate with tracking and will be required to provide information to the Housing Department, as requested.

IX. List of Developers with Credits

A developer interested in utilizing earned Credits may contact Housing Department staff for a list of Generating Developers and Credits. It is the responsibility of the interested developer to initiate a discussion with a Generating Developer.

The Housing Department strongly encourages that developers interested in purchasing Credits for a proposed project seek guidance from the Housing Department prior to filing an Affordable Housing Compliance Plan to ensure they understand the timing limitations, and location limitations. Upon request, the Housing Department will review the Utilizing Developer's proposed project, the status of Generating Developer's Surplus Inclusionary Units/Credits, and the planned transfer of Credits to determine whether the proposed credits could be used in the developers Affordable Housing Compliance Plan.

The Utilizing Developer bears the responsibility for compliance with all elements of the City's Inclusionary Housing Ordinance, including timing requirements for use of the credits. Credits may only be used as part of an Affordable Housing Compliance Plan prior to their expiration date.