

**ATTACHMENT B-4**  
**INCLUSIONARY HOUSING ORDINANCE (IHO) COMPLIANCE OPTIONS:**  
**PROCEDURE FOR LAND DEDICATION OPTION**  
**(RENTAL)**

**I. Introduction**

This attachment to the Guidelines provides more information on how Developers may satisfy their Inclusionary Housing Obligation by dedicating land to the City in-lieu of constructing Inclusionary Units within the Residential Development. Definitions for capitalized terms may be found in the Guidelines and the Ordinance.

**II. Criteria for Sites Dedicated In-Lieu of Providing Inclusionary Units (SJMC Section 5.08.530)**

Sites proposed to be dedicated in-lieu of constructing Inclusionary Units must satisfy all of the criteria below. The determination of whether a site meets the criteria below will be made by the City Manager or his or her designee. If a site is determined to meet the criteria below, and the City Manager or his or her designee determines that the acquisition of the site is in the best interest of the City, the Developer and the City will enter into an agreement to transfer/dedicate the site to the City (or, at the City Manager's discretion, to an affordable housing developer approved by the City) prior to the issuance of Building Permits for the Residential Development and the site will be transferred to the City within 30 days of the execution of the agreement:

- 1) The Developer has marketable fee title on the site proposed to be transferred/dedicated.
- 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 (20% of total Dwelling Units) within the Residential Development and conforms to City development standards.
- 3) The site is suitable for development of affordable housing 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, including:
  - a. The site is not located in a special hazard flood area
  - b. The site is vacant and no demolition of structures is needed
- 4) Infrastructure to serve the 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 prior to acquisition (as determined by a California Licensed Residential Appraiser using the Comparable Approach Method) upon the date of dedication agreement is equal to or greater than the amount due for the development's In Lieu Fee in effect at the date of dedication agreement.

- 7) The dedicated site complies with the City's Affordable Housing Dispersion Policy intended to avoid overconcentration of low income households, or meets other City General Plan policies such as being located near transit.

*The San José Housing Department is in the process of updating its Dispersion Policy.*

**III. Affordable Housing Compliance Plan Application** (SJMC Sections 5.08.120, 5.08.155 5.08.320.H, 5.08.420, 5.08.610)

As part of the application for First Approval<sup>1</sup> 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 IHO, and shall not proceed until an Affordable Housing Compliance Plan application is approved in conjunction with any other required Planning Permit or amendment thereto.

Developers who elect the Land Dedication Compliance Option must provide the following information when submitting the Affordable Housing Compliance Plan application:

- 1) General information about the Developer, the Residential Development, and the site identified by the Developer for dedication to the City;
- 2) Whether the Developer intends to seek a parcel, or tentative, and final map for the project;
- 3) Affirming that the Developer owns and intends to dedicate land to the City (or if approved by the City Manager to a specific affordable housing Developer);
- 4) Detailed information about the unit makeup for the Residential Development:
  - i. Total number of units in the Residential Development,
  - ii. Unit type (e.g. townhouse, attached multi-family) and tenure (e.g. For-Sale or Rental), and
  - iii. Number of bedrooms and bathrooms
- 5) If the Developer wishes to dedicate land to an affordable housing developer, general information about the affordable housing developer, including name, prior project experience, contact information, and intention for the site,
- 6) Detailed information about the site intended for dedication to the City or affordable housing developer:
  - i. Parcel APN(s), site size, General Plan designation and Zoning designation,
  - ii. Preliminary Title Report showing the Developer as owner of the site and dated within 30 days of submittal,
  - iii. Recent Land/Site Surveys,
  - iv. Geotechnical Report,
  - v. Phase I Environmental Report (must be current and for the benefit of the City),

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<sup>1</sup> 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.

- vi. Phase II Environmental Report if hazardous materials are suspected in Phase I Report,
  - vii. Cost estimate for mitigation of any hazardous materials (which must be completed prior to dedication),
  - viii. An assessment of the proposed site’s ability (with existing zoning, occupancy, building, and use restrictions) to provide at least the number of otherwise required Inclusionary Units (20% of total Dwelling Units, with the same bedroom mix and substantially the same size as within the Residential Development),
  - ix. Fair Market Value Appraisal to be completed to Uniform Standards of Professional Appraisal Practice Standards by qualified appraisers holding a California Certified General Appraisal License (issued by the Office of Real Estate Appraisers), preferably with a Member of the Appraisal Institute member designation (issued by the Appraisal Institute), and with experience valuing similar properties in the Bay Area, with provision for update on the date of execution of the dedication agreement,
  - x. Infrastructure study by a licensed professional assessing the availability and capacity of infrastructure (sewer, utilities, water, light, street access and sidewalk) available to support the proposed affordable housing project. If adequate infrastructure is not provided, a third-party cost estimate of providing such infrastructure must be provided,
  - xi. Schedule for transfer of the site, including estimated dates for site clearance, lot division, etc. consistent with the criteria in Section II, and
  - xii. A narrative that describes consistency with the City’s Affordable Housing Dispersion Policy (including the percentage low income residents in the proposed site’s census tract), or other General Plan policies such as being located near transit.
- 7) Whether the Developer or any affiliate owns, has an interest in, or controls any property contiguous to the project; and
  - 8) Any other information, including a detailed narrative that facilitates the City’s ability to evaluate the Project’s compliance with the Ordinance 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](http://www.sjhousing.org/IHO) or by contacting the Housing Department by sending an email to: [IHO@sanjoseca.gov](mailto:IHO@sanjoseca.gov).

#### **IV. Conditional Approval of Affordable Housing Compliance Plan**

If the City Manager or designee determines that the site is acceptable in accordance with the Ordinance and Guidelines and that the dedication is in the best interest of the City, the City will issue a letter approving the Affordable Housing Compliance Plan and will proceed to execute the Inclusionary Housing Agreement (described below). If the City’s acceptance of the site is dependent on certain conditions being satisfied prior to the conveyance of the site, the City shall identify such Conditions of Approval in the approval letter. At a minimum, the City’s acceptance of the site shall be conditioned on a finding of consistency with the General Plan and approval of the conveyance by the City Manager. Other conditions may include, but shall not be limited to:

- 1) The City manager or designee must approve the dedication as being in the best interest of the City;

- 2) If the proposed land dedication site is found to have any hazardous materials or other environmental damage that requires remediation prior to development of Housing Units, the City's acceptance of the site shall also be conditioned on the Developer clearing the site of such hazardous materials to the satisfaction of the City in its sole discretion prior to conveyance to City. Alternatively, if approved by the City, any required environmental remediation may be able to be mitigated after conveyance within a mitigation cost standard that is determined by the City and borne by the Developer. If the City agrees to allow environmental remediation work to be done after conveyance, the City's acceptance of the site shall also be conditioned on the Developer placing sufficient funds (as determined by the City) to pay for such remediation in an escrow account concurrently with the conveyance, which funds shall be released to the City when the environmental remediation costs are incurred;
- 3) If mitigation measures relevant to the land dedication are required as part of the Residential Development's environmental clearance, the City's acceptance of the site shall also be conditioned, when appropriate, on the Developer completing such measures for the dedicated site concurrently with the Residential Development's site. If applicable, the Developer shall be obligated under the Conditions of Approval to satisfy this condition post-conveyance.
- 4) Removal of exceptions to title deemed unacceptable to the City and Developer to pay for title insurance policy on behalf of the City; and
- 5) The City shall not be required to identify all conditions in the Compliance Plan approval letter; failure to reference any conditions in the letter shall not preclude the City from imposing such reasonable conditions after the letter is issued as may be deemed appropriate by the City in light of any new information discovered after the letter is issued, or changes in circumstances with respect to the site.

Should the Developer satisfy the Conditions of Approval and the City determines that the site is acceptable for land dedication, the City and Developer will then proceed to execute the Inclusionary Housing Agreement and the Purchase and Sale Agreement (described below). At the City's discretion, the Developer and the City may proceed to execute the Inclusionary Housing Agreement and/or the Purchase and Sale Agreement prior to the Developer satisfying the Conditions of Approval. However, all Conditions of Approval must be satisfied prior to issuance of building permits for construction of the Residential Development.

**V. Inclusionary Housing Agreement** (SJMC Sections 5.08.195, 5.08.420, 5.08.460, 5.08.600, 5.08.610, 5.08.710)

The Inclusionary Housing Agreement is a covenant by the Developer for the benefit of the City of San José governing how the project's inclusionary housing obligation will be satisfied. The Inclusionary Housing Agreement may be comprised of more than one document. The City may require that the approved Affordable Housing Compliance Plan application, including all components required to satisfy the Developer's selected Compliance Option, be attached to the Inclusionary Housing Agreement.

Prior to the approval of any final 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 Project, any CPCOC Property (as described below), and the dedicated land.

The Inclusionary Housing Agreement shall contain a specific section or exhibit which applies only to the Contiguous Property under Common Ownership or Control (“CPCOC Property”). This anti-piecemealing section will list the number of residential units in the underlying project, and provide in the event that a Planning Permit is filed for residential development on any CPCOC Property it will subject to the Ordinance and will not be eligible for an exemption on the grounds of having less than 20 residential units. The requirements of the Ordinance imposed on the underlying project shall not be imposed on the CPCOC Property by the recording of the Inclusionary Housing Agreement against those parcels.

The approved Affordable Housing Compliance Plan application will be attached to the Dedication Agreement, to further codify the Developer’s intent to dedicate land to the City. The Inclusionary Housing Agreement will include a land dedication process per the standard City land conveyance process by grant deed, unless another method is approved.

## **VI. Dedication Agreement**

The City and the Developer will enter into a Dedication Agreement, or other transfer documentation on a form prepared by the City Attorney. Entering into the Dedication Agreement is subject to a determination by the City Manager or designee that the agreement satisfies the requirements of the Ordinance and Guidelines. Subject to the terms of the Dedication Agreement, all conditions must be satisfied or waived and conveyance of the site must occur prior to issuance of Building Permits for the Residential Development. If the conditions are not satisfied, regardless of reason, the Developer shall not be able to use land dedication to satisfy its Inclusionary Housing Obligation and must satisfy the requirements of the program through another means.

## **VII. Transfer of Report(s) to the City**

Concurrently with conveyance of the site, all entitlements, permits, preliminary engineering, architectural and any other reports or studies pertinent to the site shall be transferred to the City.

## **VIII. Timing of the Land Dedication**

The Developer must convey the site prior to the issuance of the first Building Permit for the Residential Development, with all conditions set forth in the Inclusionary Housing Agreement and the Dedication Agreement having been met.