

**ATTACHMENT B-5**  
**INCLUSIONARY HOUSING ORDINANCE (IHO) COMPLIANCE OPTIONS:**  
**PROCEDURE FOR SURPLUS INCLUSIONARY UNIT CREDITS OPTION**  
**(RENTAL)**

**I. Introduction**

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.

The 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.

**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 Units 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 Units 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 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 Units 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 Units, in which event such Inclusionary Units shall be constructed upon a site approved by the City in another Redevelopment Project Area.

The Ordinance specifies that Inclusionary Units 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.
- 4) Neighborhoods with high-quality public transportation, this includes proposed developments near rail stations, bus-rapid transit, or bus stops with high-frequency service.

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

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

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

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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,

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 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 to satisfy a project’s Inclusionary Housing obligation with Surplus Inclusionary Units (“Surplus Credits”) transferred or purchased from another Residential Development (“Surplus Project”) shall provide the following information when submitting the project’s Affordable Housing Compliance Plan application:

- 1) General information about the Developer and the Residential Development including details about the Surplus Project;
- 2) Whether the Developer intends to seek a parcel, or tentative and final map for the market rate 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 entitlement, timing, and unit makeup for both the market rate and the Surplus Project, including:
  - i. Location of the market rate project and the proposed Surplus Credits,
  - ii. Total number of units,
  - iii. Total number of market rate units and the Surplus Credits by income level,
  - iv. Unit type (e.g. townhouse, attached multi-family) and tenure (e.g. For-Sale or Rental),
  - v. Number of bedrooms and bathrooms,
  - vi. Parcel maps and/or site plans indicating the proposed location and square footage of both market rate units and Surplus Credits,
  - vii. General Plan designation of the land of the Surplus Credits which must allow residential uses,
  - viii. Current phase I environmental review for the Surplus Project, and if called for, phase II and evidence of completed hazard mitigation,
  - ix. Construction timeline for the Surplus Project 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 Credits.
- 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 market rate units and Surplus Credits, 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

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rezoning, pre-zoning, annexation, planned development permit, tentative map, parcel map, conditional use permit, special use permit, or building permit.

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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) A reliable financing mechanism for the ongoing administration and monitoring of Rental Inclusionary Units,
- 9) A description of 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,
- 10) Identify any public funding anticipated in connection with the project with the Surplus Inclusionary Units,
- 11) Affirming the Surplus Inclusionary units have been not been sold or rented,
- 12) A title report, and
- 13) Any other information, including a detailed narrative that facilitates the Housing Department’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).

### **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 describing 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, 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 CPCOC Property (as described below), and the land that is the site of the Credits.

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.

**VI. Timing Restrictions on Surplus Credits (SJMC Sections 5.08.460, 5.08.540, 5.08.610)**

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 **Rental**

- i. Studio: 400 sq ft
- ii. 1 bedroom: 550 sq ft
- iii. 2 bedrooms: 750 sq ft
- iv. 3 bedrooms: 950 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, 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.

*The San José Housing Department is in the process of creating a list of developers with Credits.*