

**Interim Guidelines for Implementation of the
Inclusionary Housing Ordinance
of the City of San José,
Chapter 5.08 of the San José Municipal Code.**

Interim Version Approved June 30, 2016

**Revised May 24, 2021 to Implement Inclusionary Housing Ordinance
Amendments Applicable to New Projects as of May 1, 2021**

This Interim Version of the Guidelines for Implementation of the Inclusionary Housing Ordinance (Guidelines), Chapter 5.08 of the San José Municipal Code, is provided by the City of San José's Department of Housing as a public service while adoption of the fully updated Guidelines is pending.

Residential developers are encouraged to check the Inclusionary Housing Ordinance (IHO) website (www.sjhousing.org/IHO) for the most recent version or use this [link](#) to access the document. The Guidelines that apply to projects approved prior to May 1, 2021 are available at [link](#).

As such, the City reserves the right to modify or supplement this document as the need arises and further information is developed. Therefore, no express or implied guarantees should be inferred regarding the accuracy of this information.

Inclusionary Housing Guidelines

City of San José

Table of Contents

1.0	General Provisions.....	3
1.1	Adoption and Purpose of the Inclusionary Housing Guidelines.....	3
1.2	Definitions, Guidelines Interpretation	3
1.3	Administrative Responsibility	5
2.0	Rental Residential Developments Following Enactment of AB 1505	5
2.1	Rental Requirements Effective Date; Transition	5
2.2	Transition between AHIF and IHO Requirements	6
2.3	Projects with Tentative Maps Approved On or Prior to June 30, 2018.....	6
2.4	Downtown High Rises.....	7
3.0	Operative Date of the Ordinance and Grace Period.....	7
3.1	Operative Date and Implementation of the Ordinance	7
3.2	Grace Period	7
4.0	Projects Subject to the Ordinance	8
5.0	Exemption Claims and Expiration of Exemptions or Fee Reductions	8
5.1	Small Projects Exemption.....	8
5.2	Projects with Map Act Exemptions	8
5.3	Projects in a Planned Community Approved Prior to 1993.....	9
5.4	Projects Subject to Development Agreement	9
5.5	Projects Subject to a Disposition and Development Agreement	9
5.6	Residential Developments with a Planning Permit before Jan 1, 2013	10
5.8	Expiration of Exemption - Planning Permit Expiration.....	10
6.0	Ordinance Compliance Options.....	10
6.1	Build On-Site	11
6.2	Build Off-Site (SJMC Section 5.08.500).....	12
6.3	Payment of an In-Lieu Fee.....	12
6.4	Dedication of Qualifying Land In-Lieu of Construction	13
6.5	Surplus Inclusionary Housing In-Lieu Credits	13
6.6	Acquisition and Rehabilitation of Existing Units	13
6.7	HUD Restricted Units	13
6.8	Combination of Methods to Provide Inclusionary Housing	13
6.9	Alternative Methods to Provide Inclusionary Housing	14
7.0	Affordable Housing Plan and Application	14
7.1	Timing of Submittal of the Compliance Plan Application	14
7.2	Contents of the Compliance Plan Application.....	15

Inclusionary Housing Guidelines

City of San José

7.3	Approval of the Compliance Plan.....	15
7.4	Confirming Adherence to the Compliance Plan.....	16
8.0	Inclusionary Housing Agreement	16
8.1	Contents of the Inclusionary Housing Agreement.....	16
8.2	Requirements for Contiguous Property under Common Ownership and Control.....	17
9.0	Waiver of Inclusionary Housing Obligation	17
10.0	Continued Affordability and Occupancy	17
11.0	Monitoring and Reports.....	18
ATTACHMENTS: COMPLIANCE OPTIONS, PROVIDING FOR-SALE UNITS.....		18
Attachment A-1	PROCEDURE FOR BUILD ON-SITE OPTION . Error! Bookmark not defined.	
Attachment A-2	PROCEDURE FOR BUILD OFF-SITE OPTION Error! Bookmark not defined.	
Attachment A-3	PROCEDURE FOR UTILIZING THE IN LIEU-FEE OPTION ... Error! Bookmark not defined.	
Attachment A-4	PROCEDURE FOR LAND DEDICATION OPTION Error! Bookmark not defined.	
Attachment A-5	PROCEDURE FOR SURPLUS INCLUSIONARY UNIT CREDITS OPTION Error! Bookmark not defined.	
Attachment A-6	PROCEDURE TO ACQUIRE AND REHABILITATE EXISTING DWELLING UNITS..... Error! Bookmark not defined.	
Attachment A-7	PROCEDURE TO PROVIDE HUD RESTRICTED UNITS Error! Bookmark not defined.	
ATTACHMENTS: COMPLIANCE OPTIONS, PROVIDING FOR RENTAL UNITS		
Error! Bookmark not defined.		
Attachment B-1	PROCEDURE FOR BUILD ON-SITE OPTION . Error! Bookmark not defined.	
Attachment B-2	PROCEDURE FOR BUILD OFF-SITE OPTION Error! Bookmark not defined.	
Attachment B-3	PROCEDURE FOR THE IN-LIEU FEE OPTION..... Error! Bookmark not defined.	
Attachment B-4	PROCEDURE FOR LAND DEDICATION OPTION Error! Bookmark not defined.	
Attachment B-5	PROCEDURE FOR SURPLUS INCLUSIONARY UNIT CREDITS OPTION Error! Bookmark not defined.	
Attachment B-6	PROCEDURE TO ACQUIRE AND REHABILITATE EXISTING DWELLING UNITS..... Error! Bookmark not defined.	
Attachment B-7	PROCEDURE TO PROVIDE HUD RESTRICTED UNITS Error! Bookmark not defined.	

Inclusionary Housing Guidelines

City of San José

Inclusionary Housing Guidelines

City of San José

1.0 General Provisions

1.1 Adoption and Purpose of the Inclusionary Housing Guidelines (San José Municipal Code (SJMC) Sections 5.08.020; 5.08.200; 5.08.730)

On January 12, 2010, the San José City Council adopted a Citywide Inclusionary Housing Ordinance (IHO) No. 28689, 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. On March 9, 2021, the City Council amended the IHO, pursuant to Ordinance Number 30538, authorizing the modification of Chapter 5.08 of the San José Municipal Code (SJMC). The IHO expressly calls for the adoption of inclusionary housing guidelines (the Guidelines) to assist in the implementation and administration of the IHO by the City Manager or their designee.

1.2 Definitions, Guidelines Interpretation (SJMC Sections 5.08.200, 5.08.730)

These Guidelines elaborate upon and are intended to be used in conjunction with the IHO and should be read together with the IHO. All undefined capitalized terms in the Guidelines shall be as defined in the IHO. If there is an express conflict between the IHO and the Guidelines, the IHO will prevail. Certain terms defined in the IHO have been further described below to provide clarity and assist in the implementation of the IHO.

a. “Affordable Housing Compliance Plan” is to provide developers with background and a general understanding of the IHO requirements, to define what information must be provided for Housing Department Staff to determine the extent to which any Obligation may be associated with the project, and to describe the process of Compliance Plan Application submittal, review, and determination. The Affordable Housing Plan will also be referred to in these Guidelines and attachments as the Affordable Housing Compliance Plan Application or the Compliance Plan Application, and after approval, as the Affordable Housing Compliance Plan or Compliance Plan. Interested parties may access the Compliance Plan application form from the City of San José Housing Department website. The form is currently found at www.sjhousing.org/IHO. More information is provided in Section 7.0 of these guidelines.

1. “Dwelling Unit” shall not be interpreted to exempt from the Inclusionary Housing Ordinance less traditional developments described or designed or permitted based on shared common facilities (e.g., single room occupancy, suite-style student or senior housing) or accessory dwelling units.

Inclusionary Housing Guidelines

City of San José

2. In such nontraditional projects, number of units shall be determined in a manner that reasonably reflects the design of a project for separate rental of bedrooms or suites.
 3. A co-living dwelling unit as described in San José Municipal Code Section 20.80.290 (together with access to the associated facilities) shall be considered a Dwelling Unit.
 4. An accessory dwelling unit, including a junior accessory dwelling unit as described in San José Municipal Code Chapter 20.200 (together with access to the associated facilities) shall be considered a Dwelling Unit.
 5. Any bedroom, room or suite that is only available as part of and within a state licensed residential care facility for the elderly and is part of a development permitted by the City as a residential care facility for the elderly (“RCFE unit”) will not be considered a dwelling unit subject to the Ordinance if the development is required to pay the commercial linkage fee for the RCFE unit. This exemption shall not apply to any dwelling units that are not RCFE units, such as staff units or other types of dwelling units.
- b. “For-Sale” shall mean a development with a tentative map, final map, parcel map, condominium plan, or other similar documentation allowing for the creation of separately conveyable dwelling units or interests (such as condominiums, stock cooperatives, or community apartments).
 - c. “Downtown High Rise” shall mean a Residential Development that meets all of the following criteria: (1) The Residential Development is located in the Downtown Core Area (as described in Resolution Number 73587 adopted January 9, 2007); (2) The highest occupied floor has a floor level elevation is at least 150 feet above street level and the development has (10) or more floors or stories in height not including any non-residential uses; and (3) The Residential Development receives all of its final certificates of occupancy on or prior to June 30, 2021. If these criteria are met, then the Downtown High Rise may request in the Residential Development’s Affordable Housing Compliance Plan and Inclusionary Housing Agreement a waiver/exemption from the IHO.
 - d. "First Approval" shall mean 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.
 - e. “Residential Development” means any project requiring a Planning Permit for which an application has been submitted to the City, and where the Residential Development:

Inclusionary Housing Guidelines

City of San José

- i. Would create ten (10) or more new, additional, or modified Dwelling Units by:
 - The construction or alteration of structures,
 - The conversion of a use to residential from any other use, or
 - The conversion of a use to For-Sale residential from Rental residential use.
- ii. Is contiguous to property under Common Ownership or Control where the combined residential capacity of all 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 ten (10) or more residential units

1.3 Administrative Responsibility (SJMC Sections 5.08.140, 5.08.200, 5.08.730)

The IHO is intended to be administered by the City Manager or their designee.

If any official or employee fails to fulfill the requirements of the IHO or Guidelines, that does not excuse the Developer from fulfilling its obligations under the IHO and the Guidelines. The City Attorney is authorized to enforce the requirements of the IHO, these Guidelines, and related agreements by civil action and any other proceeding permitted by law.

2.0 **Rental Residential Developments Following Enactment of AB 1505** (SJMC Section 5.08.400)

2.1 Rental Requirements Effective Date; Transition

When the IHO was adopted, it included requirements on Rental Residential Development that were suspended until such time as state law was modified to authorize control of rents in Inclusionary Units. On September 29, 2017, the Governor signed into law California Assembly Bill (AB) 1505, which went into effect on January 1, 2018. The legislation explicitly authorizes cities and counties to adopt ordinances that require, as a condition of the development of residential rental units, that the development includes a certain percentage of residential rental units affordable to moderate-income, lower-income, very low-income, or extremely low-income households. As a result, the IHO automatically applies to rental projects with twenty (20) or more units effective January 1, 2018. The City also has an adopted Affordable Housing Impact Fee (AHIF) which is applicable to rental developments with three (3) or more units. On December 19, 2017, the City Council directed that the Inclusionary Guidelines be amended to provide a transition period for rental developments with twenty (20) or more units that had been subject to the AHIF and would now be subject to the IHO.

Inclusionary Housing Guidelines

City of San José

The requirements for this waiver of the Ordinance during the limited term transition period waiver are found in Resolution No. 78576 and summarized in this Section for convenience.

2.2 Transition between AHIF and IHO Requirements

The following provisions provide the conditions for a limited term transition period waiver that will allow qualifying rental developments to satisfy their affordable housing obligations under the IHO by paying the Affordable Housing Impact Fee (AHIF) obligation for their residential developments consistent with City Council Resolution No. 78576, as amended.

- 1) The developer or the rental development has submitted a complete Planning Application for first approval and has paid all planning application fees to the Department of Planning, Building, and Code Enforcement (“PBCE”) on or prior to June 30, 2018. The application for first approval must be for a conditional use, planned development, site development, or special use permit;
- 2) The developer has submitted a completed Affordable Housing Compliance Plan Application, acquired Housing Department approval or conditional approval, paid the associated fee of \$3,200, on or prior to June 30, 2018;
- 3) The developer has executed, with owner authorization, an Acknowledgement of the Terms and Conditions for the Inclusionary Housing Ordinance Transition Waiver and submitted it to Housing on or prior to June 30, 2018, and pays any review fee that may be adopted pursuant to the City’s schedule of fees and charges;
- 4) After obtaining final approval of building plans, the developer pays the then current Affordable Housing Impact Fee on or prior to the end of the local emergency as identified in the City Council’s adopted proclamation of termination of the local emergency, and if no date is identified, on the date of adoption ; and
- 5) Different or additional requirements apply to projects with tentative maps and Downtown High Rises. See below for details.

2.3 Projects with Tentative Maps Approved On or Prior to June 30, 2018

The Developer of a residential development that has (1) tentative map(s) or other map(s) or plan(s) approved on or prior to June 30, 2018, allowing the creation of separately conveyable dwelling units or interests (such as condominiums, stock cooperatives, or community apartments) and (2) an approved Compliance Plan indicating that the residential development is rental may proceed under the limited term transition period waiver subject to Section 2.2 and this Section. The Developer must record an Affordable Housing Agreement prior to payment of the AHIF that provides for monitoring and requires the Developer to comply with the Inclusionary Housing Ordinance’s requirements if Developer has applied to the state Bureau of Real Estate for a public report or filed a notice of

Inclusionary Housing Guidelines

City of San José

intention, or otherwise taken action to change the development to a For-Sale development prior to the issuance of the final Certificates of Occupancy.

2.4 Downtown High Rises

If the development is also claiming a Downtown High Rise Exemption/Fee Reduction, it must also comply with all terms of that exemption including location in the Downtown Core, height requirements, and the requirement to obtain all Certificates of Occupancy on or prior to June 30, 2025. The Developer must record a Downtown High Rise Affordable Housing Agreement prior to May 30, 2025.

3.0 **Operative Date of the Ordinance and Grace Period**

3.1 Operative Date and Implementation of the Ordinance

The IHO originally became operative on January 1, 2013. Implementation of the IHO was initially delayed pending appeal. On June 15, 2015, the California Supreme Court upheld the IHO's validity, and a subsequent petition for review to the U.S. Supreme Court was denied.

Residential Developments that received First Approvals or other Planning Permits after July 15, 2015 were subject to the original IHO requirements (unless they were in an unexpired redevelopment area and already subject to a condition requiring compliance with the Inclusionary Housing Policy).

Residential Developments with unexpired Planning Permit approvals (or otherwise deemed final pursuant to State law) prior to May 1, 2021 that have not paid the In Lieu Fee, recorded an Inclusionary Housing Agreement or been issued a building permit, may elect to comply with these updated IHO requirements by completing a replacement Affordable Housing Plan and providing all required submittals consistent with these Guidelines.

3.2 Grace Period

On March 29, 2016, the City Council authorized staff to implement a "Grace Period" allowing any Residential Development that has been issued all of its needed Planning Permits prior to June 30, 2016, to be exempted from the substantive requirements of the IHO, provided that the Planning Permits are not subsequently modified, violated, or expired, and new Planning Permits are not obtained prior to issuance of all of the final certificates of occupation for the Residential Development. To qualify for the Grace Period exemption, Residential Developments must have prior to June 30, 2016: (a) all required permits signed by the PBCE and delivered to the Developer; (b) an approved Compliance Plan; and (c) in the event that planning permits require adoption of an ordinance, the City Council's second reading of the ordinance shall be completed prior to June 30, 2016.

Inclusionary Housing Guidelines

City of San José

Developers of Residential Developments that believe they are exempt from the IHO under the grace period shall indicate the basis for the exemption in the Affordable Housing Compliance Plan Application and the claim shall be reviewed prior to the approval of the Affordable Housing Compliance Plan Application. The Affordable Housing Compliance Plan will indicate that the underlying permit condition applies and the Grace Period exemption will only provide relief from that requirement if the Residential Development obtains no new or amended permits between June 30, 2016 and the issuance of all Certificates of Occupancy.

4.0 Projects Subject to the Ordinance (SJMC Sections 5.08.250, 5.08.310, 8.05.420)

The IHO applies to all Residential Developments as defined in SJMC Section 5.08.250.

For the purposes of these Guidelines, the term Modified (as referenced in 5.08.250 of the IHO) is not intended to include projects where units are remodeled, the use of the units is unchanged, and no new or additional units are created as a part of the project.

5.0 Exemption Claims and Expiration of Exemptions or Fee Reductions (SJMC Sections 5.08.320, 5.08.610.B.9)

Sections 5.1 – 5.7 of these guidelines summarize the requirements for claims of exemptions under the IHO and the Downtown High Rise fee reduction. Residential Developments that claim they are exempt from the requirements of the IHO must indicate the basis for the exemption in the Affordable Housing Compliance Plan Application. Section 5.8 of these guidelines describes how Residential Developments may lose their exemptions if their Planning Permits expire.

5.1 Small Projects Exemption (SJMC Section 5.08.320.A.2)

Residential Developments that have 9 or fewer For Sale Dwelling units will be exempt from compliance with the requirements of the IHO; however, Applicants with Residential Developments of 3 or more dwelling units shall submit a Compliance Plan Application for approval. This will allow staff to verify that the Residential Development qualifies for the claimed exemption and conditions for any claimed exemption are addressed. Specifically, Residential Developments that are part of a construction phased development or are being developed on Contiguous Property under Common Ownership or Control with a total unit count of 10 or more units across the phases or properties are not eligible for this Small Projects Exemption.

5.2 Projects with Map Act Exemptions (SJMC Section 5.08.320.A.5)

Residential Developments will be exempt from the substantive requirements of the IHO if they are exempted pursuant to California Government Code section 66474.2 or 66498.1, provided that such Residential Developments shall comply

Inclusionary Housing Guidelines

City of San José

with any predecessor ordinance, resolution, or policy in effect on the date the application for the development was Deemed Substantially Complete. Applicants with Residential Developments of 3 or more dwelling units shall submit a Compliance Plan Application for approval. This will allow staff to verify that the Residential Development qualifies for the claimed exemption and conditions for any claimed exemption are addressed.

5.3 Projects in a Planned Community Approved Prior to 1993 (SJMC Section 5.08.320.A.7)

Residential Developments located within a Planned Community approved prior to 1993 will be exempt from the substantive requirements of the IHO provided that: (a) the project is not in a Redevelopment Project Area; (b) the Specific Plan and/or Planning Permit specifies that the project will occur in phases and authorizes the phased construction of new on-site and off-site infrastructure; and (c) one or more phases of the project and the required infrastructure improvements related to each of those phases, has been completed in conformance with the Specific Plan and Planning Permits prior to the Operative Date. Applicants with Residential Developments of 3 or more dwelling units shall submit a Compliance Plan Application for approval. This will allow staff to verify that the Residential Development qualifies for the claimed exemption and conditions for any claimed exemption are addressed.

5.4 Projects Subject to Development Agreement (SJMC Section 5.08.320.A.3)

Residential Developments which are developed in accordance with the terms of a development agreement adopted by ordinance prior to the Operative Date of the IHO will be exempt from the substantive requirements of the IHO provided that such projects 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. Applicants with Residential Developments of 3 or more dwelling units shall submit a Compliance Plan Application. This will allow staff to verify that the Residential Development qualifies for the claimed exemption and conditions for any claimed exemption are addressed.

5.5 Projects Subject to a Disposition and Development Agreement (SJMC Section 5.08.320.A.4)

Residential Developments which are developed in accordance with the terms of a disposition and development agreement (DDA) pursuant to the authority and provisions of California Health and Safety Code section 33000 *et seq.*, and that was approved by the Board of the San José Redevelopment Agency and executed prior to the Operative Date will be exempt from the substantive requirements of the IHO, provided that such Residential Development must comply with any affordable housing requirements included in the DDA or any other law or policy in effect at the time of execution of the disposition and development agreement. Applicants with Residential Developments of 3 or

Inclusionary Housing Guidelines

City of San José

more dwelling units shall submit an Affordable Housing Compliance Plan Application. This will allow staff to that the Residential Development qualifies for the claimed exemption and conditions for any claimed exemption are addressed.

5.6 Residential Developments with a Planning Permit before Jan 1, 2013 (SJMC Section 5.08.320.G)

Residential Developments which have a valid unexpired Planning Permit issued before January 1, 2013 will be exempt from the substantive requirements of the IHO. See also the Grace Period provisions described in Section 3.2 of these guidelines for projects obtaining all required permits prior to June 30, 2016. Applicants with Residential Developments of 3 or more dwelling units shall submit an Affordable Housing Compliance Plan Application. This will allow staff to verify that the Residential Development qualifies for the claimed exemption and conditions for any claimed exemption are addressed.

5.7 Downtown High Rise Term Limited In-Lieu Fee Reduction

On June 12, 2018, the City Council has authorized a reduction in the Inclusionary In-Lieu Fee to \$0 (per In-Lieu unit) for High Rise rental developments in the Downtown Core (as described in Resolution Number 73587 adopted January 9, 2007) that are ten (10) or more floors or stories in height not including any nonresidential uses where the highest occupied floor has a floor level elevation that is at least 150 feet above street level, if they obtain issuance of all Certificates of Occupancy on or prior to June 30, 2021. [Note: this is all in the definition of Downtown High Rise above]

Qualified Downtown High Rise rental developments may be eligible to pay a reduced in lieu fee at the time of issuance of its Certificate of Occupancy upon compliance with the requirements in these guidelines including selection of this option in the Affordable Housing Compliance Plan, and execution and recording of Downtown High Rise Inclusionary Housing Agreement on the City's form.

5.8 Expiration of Exemption - Planning Permit Expiration (SJMC Section 5.08.320.B)

Upon the expiration of any Planning Permit, a Residential Development shall be subject to the IHO (and any previously claimed exemption shall be considered to have expired), and it shall not proceed until such time as an Affordable Housing Compliance Plan (or a revised Plan) is approved in conjunction with any other required Planning Permit or amendment thereto. This Section 5.8 shall not apply to a non-discretionary extension of a Planning Permit or Land Use approval beyond its initial term where extension is required by state or local law.

6.0 Ordinance Compliance Options

Residential Developments may satisfy the requirements of the IHO through any of the following options. A brief description of each compliance option is provided below, and

Inclusionary Housing Guidelines

City of San José

more detailed information about each is available in the specified Attachments. Attachments A-1 through A-7 address compliance options for For-Sale Residential Developments. Attachments B-1 through B-7 address compliance options for Rental Residential Developments. Please note that the described requirements are only mandated if the Developer selects that compliance option. With the exception of the Build On-Site option, all compliance options shall require the number of inclusionary units (or their equivalents) be equal to at least twenty percent (20%) of the homes built within the Residential Development.

6.1 Build On-Site (SJMC Sections 5.08.400, 5.08.450, 5.08.470, 5.08.620)

Developers may satisfy their inclusionary housing obligation by building Inclusionary Units on-site dispersed throughout their Residential Development and transferring/renting those homes/apartments to eligible households. Developers who select to build on-site to satisfy the requirements of the IHO must build a percentage of the units within a project and dispersed throughout the project site:

- a. For For-Sale Residential Developments, fifteen percent (15%) of the homes must be transferred at a price affordable to those households earning no more than 110 percent (110%) of the Area Median Income (AMI) determined by family size. Such homes may be sold to households earning no more than one hundred twenty percent (120%) of the AMI. Please see **Attachment A-1** for details on compliance with this option.
- b. For Rental Residential Developments or For-Sale Residential Developments electing to provide rental units on-site in lieu of for-sale units, there are two options for compliance: (i) Five percent (5%) of the units in the Residential Development shall be made available for rent to Moderate Income households (100% AMI), five percent (5%) of the units in the Residential Development shall be made available for rent to Lower Income Households (80% AMI), and five percent (5%) of the units in the Residential Development shall be made available for rent to Very Low Income Households (50% AMI); (ii) ten percent (10%) of the units in the Residential Development shall be made available for rent to Extremely Low Income Households (30% AMI). Please see **Attachment B-1** for details on compliance with this option.
- c. The term of the restrictions shall be not less than 99 years for for-sale homes and rental units.
- d. If build on-site units create a geographic concentration, then the project would be considered under the following build off-site compliance option.

The Section 5.08.450 of the SJMC refers to the incentives for Developers who select to build units on-site. Developers who wish to apply for incentives, waivers or density bonuses must do so in writing before approval of the Residential Development's first planning permit and coordinate incentives directly with PBCE. A Developer who has received incentives must build on-site.

Inclusionary Housing Guidelines

City of San José

6.2 Build Off-Site (SJMC Section 5.08.500)

Developers who select to build off-site to satisfy the requirements of the IHO must build and transfer a number of units built at an alternate location within San José. The location of the off-site units must be within the same Opportunity Area and be consistent with the City's Affordable Housing Siting Policy. The location requirements are described further in the Attachments noted below. Developers who select to build off-site to satisfy the requirements of the IHO must build at least twenty percent (20%) of the units off-site according to the following requirements:

- a. For For-Sale Residential Developments, the homes built at the alternate location must be transferred at a price affordable to those households earning no more than 110 percent (110%) of the AMI determined by family size. Such homes may be sold to households earning no more than one hundred twenty percent (120%) of the AMI. A market rate For-Sale project may provide For-Sale homes or Rental apartments to satisfy their off-site requirement, but they must follow the appropriate AMI levels depending on the tenure provided. Please see **Attachment A-2** for details on compliance with this option.
- b. For Rental Residential Developments, the equivalent of five percent (5%) of the dwelling units in the Residential Development shall be made available for rent at an Affordable Rental Rate to Moderate Income households (defined for this section as earning no more than 80% AMI), adjusted for family size. The equivalent of five percent (5%) of the dwelling units in the Residential Development shall be made available for rent at an Affordable Rental Rate to Lower Income households (60% AMI), as defined in California Health & Safety Code section 50079.5 and adjusted for family size. The equivalent of ten percent (10%) of the dwelling units in the Residential Development shall be made available for rent at an Affordable Rental Rate to Very Low Income households (50% AMI), as defined in California Health & Safety Code section 50053 and adjusted for family size. Please see **Attachment B-2** for details on compliance with this option
- c. The term of the restrictions shall be not less than 99 years for for-sale homes and rental units.

6.3 Payment of an In-Lieu Fee (SJMC Section 5.08.520)

Developers may select to pay an in-lieu fee to the City to satisfy the requirements of the IHO. Please see **Attachment A-3** (For Sale Projects) or **Attachment B-3** (Rental Projects) for details on compliance with this option. Developers are entitled to a 50% reduction in the assessed in-lieu fee for projects up to nineteen (19) units that provide at least 90% of the maximum residential density allowed by the San José General Plan. The Developer may pay the in-lieu fee at any time after the Inclusionary Housing Agreement has been recorded, but prior to the City issuing a certificate of occupancy for the Project. The final in-lieu fee will be calculated at the time when the Developer provides payment, based on the adopted in-lieu fee in place at that time.

Inclusionary Housing Guidelines

City of San José

6.4 Dedication of Qualifying Land In-Lieu of Construction (SJMC Section 5.08.530.A)

Developers may select to convey residentially zoned land to satisfy the requirements of the IHO, provided certain conditions are met, and the City Manager agrees to such donation. The land must be immediately available, suitable for construction of housing, free from hazardous materials, and have unencumbered marketable title. Please see **Attachment A-4** (For Sale Projects) or **Attachment B-4** (Rental Projects) for details on compliance with this option.

6.5 Surplus Inclusionary Housing In-Lieu Credits (SJMC Section 5.08.540.C)

Developers who select to utilize in-lieu credits to satisfy the requirements of the IHO may purchase or transfer credits for affordable housing units that are available for occupancy concurrently with the Developer's Market Rate units from the Developer of another project within the City of San José. Please see **Attachment A-5** (For Sale Projects) or **Attachment B-5** (Rental Projects) for details on compliance with this option.

6.6 Acquisition and Rehabilitation of Existing Units (SJMC Section 5.08.550)

Developers may select to acquire and rehabilitate existing market rate units for conversion to units affordable to Lower or Very Low Income Households, thus satisfying the requirements of the IHO by providing twice the number of units. Please see **Attachment A-6** (For Sale Projects) or **Attachment B-6** (Rental Projects) for details on compliance with this option. Unless otherwise specified in these Guidelines, the term of the restrictions shall be not less than 99 years for for-sale homes and rental units.

6.7 HUD Restricted Units (SJMC Section 5.08.560.H)

Developers who select to satisfy the requirements of the IHO by providing units that are restricted to Affordable Housing Cost for Lower or Very Low Income Households may do so through entering into an agreement with the U. S. Department of Housing and Urban Development (HUD). Please see **Attachment A-7** (For Sale Projects) or **Attachment B-7** (Rental Projects) for details on compliance with this option.

6.8 Combination of Methods to Provide Inclusionary Housing (SJMC Section 5.08.570)

Developers may propose any combination of the Compliance Options as long as the proposed option(s) satisfy the requirements of the IHO. For each component of the combined option, the Developer should consult the appropriate attachment for details on compliance.

Inclusionary Housing Guidelines

City of San José

Such proposals shall be made in the Affordable Housing Compliance Plan, shall be considered by the City in accordance with the IHO and the Inclusionary Housing Guidelines, and 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 than required by selecting just one of the IHO Compliance Options.

6.9 Alternative Methods to Provide Inclusionary Housing (SJMC Section 5.08.610.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 or designee may approve such an alternative if he or she determines, based on substantial evidence, and which determination shall be specified in the Affordable Housing Compliance 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.

7.0 **Affordable Housing Plan and Application** (SJMC Sections 5.08.120, 5.08.610, 5.08.730)

The IHO requires that Developers submit an Affordable Housing Plan. The Affordable Housing Plan will also be referred to in these Guidelines and attachments as the [Affordable Housing Compliance Plan Application](#) or the Compliance Plan Application, and after approval, as the Affordable Housing Compliance Plan or Compliance Plan. Interested parties may access the Compliance Plan application form from the City of San José Housing Department website. The form is currently found at www.sjhousing.org/IHO.

7.1 Timing of Submittal of the Compliance Plan Application

The City's goal is to ensure that the IHO's requirements are considered early in the planning process. Therefore, as part of the application submittal for the First Approval of any Residential Development with three (3) or more dwelling units, Developers are required to submit a signed Compliance Plan Application to the Housing Department and pay the appropriate application processing fee. See the current Compliance Plan Application for the current application processing fee. Note that this application fee is subject to change.

No application for a First Approval (or other Planning Permit) for a Residential Development may be deemed complete unless the Compliance Plan Application has been submitted and approved in accordance with the IHO and Guidelines. No permit can be granted for a project until the Housing Department has approved the Compliance Plan. No request for First Approval should be heard by the approval authority until the Affordable Housing Compliance Plan application is or has been submitted and approved by the Housing Department.

Inclusionary Housing Guidelines

City of San José

If a Compliance Plan Application was not submitted and approved at First Approval, it is due upon the earlier of: a request from the Housing Department sent to the Developer, or when a Developer applies for any other Planning Permit; or upon request for amendment or extension of any Planning Permit.

7.2 Contents of the Compliance Plan Application

The Compliance Plan Application provides information about the Developer, the project, and how they intend to satisfy their obligations as set forth in the IHO and Guidelines. Please see the Attachments to these Guidelines for detailed descriptions of the requirements for each Compliance Option:

For-Sale Inclusionary Housing Ordinance Compliance Options:

- [A-1: Procedure for Build On-Site Option](#)
- [A-2: Procedure for Build Off-Site Option](#)
- [A-3: Procedure for Utilizing the In Lieu Fee Option](#)
- [A-4: Procedure for Dedicating Qualifying Land In Lieu of Construction](#)
- [A-5: Procedure for Surplus Inclusionary Units & Credits](#)
- [A-6: Procedure for Acquisition & Rehabilitation of Existing Housing Stock](#)
- [A-7: Procedure for HUD Restricted Units](#)

Rental Inclusionary Housing Ordinance Compliance Options:

- [B-1: Procedure for Build On-Site Option](#)
- [B-2: Procedure for Build Off-Site Option](#)
- [B-3: Procedure for Utilizing the In-Lieu Fee Option](#)
- [B-4: Procedure for Dedicating Qualifying Land In-Lieu of Construction](#)
- [B-5: Procedure for Surplus Inclusionary Units & Credits](#)
- [B-6: Procedure for Acquisition & Rehabilitation of Existing Housing Stock](#)
- [B-7: Procedure for HUD Restricted Units](#)

The Compliance Plan will also include a section where the Developer can claim an exemption as described in Section 5.0 of these Guidelines and submit supporting information.

7.3 Approval of the Compliance Plan (SJMC Section 5.08.610.C, D)

The Housing Department will review the submitted Compliance Plan Application as part of the application for First Approval of any project(s).

After an applicant submits a Compliance Plan Application to the City, the Housing Department will review it for completeness. The Director of Housing shall determine if the Compliance Plan Application is complete and conforms to

Inclusionary Housing Guidelines

City of San José

the provisions of the IHO and the Guidelines. The decision of the Director of Housing may be appealed to the City Manager.

Appeals to the Compliance Plan must be filed with the City Manager. A written appeal shall include a copy of the submitted Compliance Plan Application and a statement explaining why their proposed Compliance Option complies with the IHO.

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.

The Director of Housing may approve minor modifications to an approved Compliance Plan application. Any alterations to an approved Compliance Plan application must be consistent with the IHO and these Guidelines and must be substantially in conformance with the originally approved Compliance Plan application. Amending any Affordable Housing Compliance Plan may be subject to a fee.

7.4 Confirming Adherence to the Compliance Plan (SJMC Section 5.08.710)

The City will monitor compliance as described in Section 10 below. Prior to the issuance of the Building Permit and at Certificate of Occupancy, the City will confirm that the Developer and Residential Development are still in compliance with the Compliance Plan, including any exemption claims.

8.0 Inclusionary Housing Agreement (SJMC Sections 5.08.600, 5.08.610G)

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. Prior to the approval of any final or parcel map, or the issuance of any Building Permit for a project subject to the IHO, the City and Developer will execute an Inclusionary Housing Agreement (also referred to as an Affordable Housing Agreement). The Inclusionary Housing Agreement will then be recorded against the entire Residential Development and any other property used to meet the requirements of the IHO. The Inclusionary Housing Agreement shall recite that it is made for the benefit of the City for the purposes of ensuring that the requirements of the IHO are met.

8.1 Contents of the Inclusionary Housing Agreement

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.

Inclusionary Housing Guidelines

City of San José

8.2 Requirements for Contiguous Property under Common Ownership and Control (SJMC Section 5.08.420)

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. In the event that a Planning Permit is filed for residential development on any CPCOC Property, it will be subject to the IHO and will not be eligible for an exemption on the grounds of having fewer than 10 residential units. The requirements of the IHO imposed on the underlying project shall not be imposed on the CPCOC Property by the recording of the Inclusionary Housing Agreement against those Parcels.

9.0 **Waiver of Inclusionary Housing Obligation** (SJMC Sections 5.08.610, 5.08.720)

Any request for a waiver, adjustment, or reduction under SJMC Section 5.08.720 shall be submitted to the City concurrently with the Compliance Plan Application. The request for a waiver, adjustment, or reduction shall set forth in detail the factual and legal basis for the claim. The request shall be reviewed and may be appealed as described in SJMC Section 5.08.720.

10.0 **Continued Affordability and Occupancy** (SJMC Section 5.08.600)

The City has developed form documents to be used in implementing the IHO. The documents include, but are not limited to, Affordable Housing Agreements, deeds of trust, and resale restrictions which shall be recorded, senior to any deeds of trust, on the fee interest in the property, including the Residential Development, all Inclusionary Units, and any site subject to the provisions of this Chapter. The documents for For-Sale Units shall also include subordinate shared appreciation promissory notes 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.

For-Sale units must be occupied by the owner as a principal residence during the term of the restriction. The director may grant a temporary hardship exception may be granted if: (1) the Owner must relocate due to a medical emergency, or (2) the loss or relocation of the Owner’s job, or (3) if due to economic hardship the Owner becomes unable to pay the Owner’s monthly housing costs and the value of the Assisted Unit, in the City’s judgment, is less than the amount owed on the Assisted Unit. A temporary hardship exception must be obtained in advance and may not exceed twelve (12) months in duration. An Owner seeking a temporary hardship exception must submit a request in writing and provide documentation of the applicable medical emergency, job relocation/loss, reduction of Owner’s income, or other reason for hardship, and loan balance and Assisted Unit value.

Form documents will be posted on the Housing Department website: www.sjhousing.org/IHO.

Inclusionary Housing Guidelines

City of San José

11.0 Monitoring and Reports (SJMC Section 5.08.710)

Per the IHO, the City is required to monitor each Residential Development and each inclusionary home or apartment (on-site or off-site, and including rehabilitated and HUD-Restricted units) for compliance. As such, the City shall require biennial compliance reports to be submitted by the owner or property manager, and the City shall conduct periodic on-site audits to ensure compliance with all applicable laws, policies, and agreements. The City Council may adopt fees for the costs of monitoring and compliance by the City.