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CITY OF SAN JOSE POLICY ON IMPLEMENTATION OF THE INCLUSIONARY HOUSING REQUIREMENT OF HEALTH & SAFETY CODE SECTION 33413(b)(2)

Effective July 1, 2007

I. General.

The inclusionary housing requirement set forth in Health and Safety Code Section 33413(b)(2) shall be imposed upon all private housing developments, whether for-sale or rental, in the redevelopment project areas to which it applies (*i.e.*, all project areas and expansions except Park Center Plaza, San Antonio Plaza, Pueblo Uno, Mayfair One and original Rincon de los Esteros area) through the zoning process in accordance with this Policy ("Inclusionary Requirement").

- A. The Inclusionary Requirement shall be met through any of the options set forth in Article II hereof.
- B. Residential units subject to the Inclusionary Requirement shall remain affordable to the targeted income group for the longest feasible time, but in no event less than the time periods set forth in the California Health and Safety Code Section 33413 (c)(1).
- C. Restricted units shall be made available for the term of the restriction at "affordable housing cost" or "affordable rent" to "extremely low income households", "very low income households" and "persons and families of low or moderate income" as such terms are defined in the California Health and Safety Code.
- D. Affordability controls on rental units must be evidenced by either a recorded deed restriction or a recorded affordability agreement that is binding on subsequent owners of the property. Affordability controls on "for sale" units must be evidenced by either a recorded deed restriction or a recorded affordability agreement that is binding on subsequent owners of the property. Affordability controls on "for sale" units may be released if the owners agree to comply with a program designed to preserve the City's supply of affordable units including, but not limited to, an equity share program.

- E. Developers subject to the Inclusionary Requirement shall submit a compliance plan detailing the manner in which the Inclusionary Requirement will be met, for the approval of the Agency's Executive Director, prior to the issuance of a foundation or building permit for the proposed development. The compliance plan and any agreement or restrictions recorded pursuant thereto may be subsequently modified with the approval of the Agency's Executive Director, so long as any modification is consistent with this Policy.
- F. The Agency has delegated to the City the authority to implement and enforce compliance with the Inclusionary Requirement. The City Housing Department shall monitor and report to the Agency and State Department of Housing and Community Development such information as is required by law on income and affordability of restricted units. The City's Housing Department shall report to the Executive Director periodically on the status of all implementation and enforcement activities. Unless a provision of this Policy expressly states that it requires an action by either the City Council or the Redevelopment Agency Board, any action to be taken hereunder by the Agency or City may be taken by either the Agency's Executive Director or the Director of Housing on behalf of either the Agency or the City hereunder.
- G. The City's Director of Planning shall include the Inclusionary Requirement as a condition to any new or substantially rehabilitated residential development located within a redevelopment project area to which this Inclusionary Requirement applies.
- H. It shall not be inconsistent with the inclusionary policy for the City or Agency to provide financial assistance towards the development of the required inclusionary units provided that 100% of the total units in the project will be Restricted Affordable Units, and such project is not developed under Section II below.

II. Satisfaction of Inclusionary Requirement.

The Inclusionary Requirement shall be met through satisfaction by developer of any of the options set forth below, which options shall be selected by developer and evidenced in a written compliance plan submitted by developer.

A. Development of Units within the Project.

The Inclusionary Requirement may be met through the development of units situated within the Project as follows:

- 1) Rental Projects: At least twenty-percent (20%) of the rental units developed within a residential project subject to this policy shall be made available for the term of the restriction at "affordable housing cost", with at least 8% of the rental units restricted to "very-low income" households and at least 12% of the rental units restricted to "low income" households, provided that rents for "low

income” households shall be set at 60% of area median income (AMI), although “low-income” households up to 80% of AMI shall also be eligible to occupy such units.

2) For-Sale Projects: At the option of the Developer:

a) At least twenty percent (20%) of the “for sale” units developed within a residential project subject to this policy must be made available for the term of the restriction at “affordable housing cost” to “low or moderate income” households; or

b) At least six percent (6%) of the “for sale” units developed within a residential project subject to this policy must be made available for the term of the restriction at “affordable housing cost” to “very low income” households and nine percent (9%) must be made available to “low or moderate income” households, for a total of 15% of the units restricted pursuant to the requirements of Health and Safety Code Section 33413(b)(2).

3) Mixed Rental and For-Sale Projects: At the option of the Developer, a project containing both rental and for-sale units may satisfy the requirements of this Section by (i) either satisfying one of the rental or for-sale options in Subsections A 1 or A 2 above for the entire project; or (ii) by applying the rental option in Subsection A 1 above to the rental portion of the project and by applying either of the for-sale options in Subsection A 2 above to the for-sale portion of the project.

B. Payment of In-Lieu Fee.

The Inclusionary Requirement may be satisfied by the payment of a fee to the City *in-lieu* of constructing the required affordable units within that private housing development, provided that such fee is received by the City after the issuance of the development permit for the project, but prior to the initial occupancy of the unit. The amount of in-lieu fees will be established in the City Council’s annual resolution establishing the Schedule of Fees and Charges or as established otherwise by resolution of the City Council.

C. Dedication of Land in Lieu of Construction of Affordable Units.

A developer of a private housing development may satisfy the Inclusionary Requirement by dedicating land in lieu of constructing restricted affordable units within the private housing development if the City Council determines that all of the following criteria have been met:

1. The dedicated site is transferred to the City prior to commencement of construction of the private housing development or is subject to an agreement between the developer and the City that sets forth a date

certain for transfer of the dedicated site and such agreement is in the best interests of the City.

2. The value of the dedicated site at the date of dedication or the date such agreement to dedicate is executed, as applicable, is greater than the in-lieu fee in effect at the date of dedication or the date such agreement to dedicate is executed, as applicable, multiplied by the number of otherwise required affordable units within the private housing development.
3. The dedicated site could accommodate at least the number of otherwise required affordable units within the private housing development.
4. The dedicated site is adjacent to the private housing development.

If the dedicated site is not to be transferred to the City prior to commencement of construction of the private housing development subject to the Inclusionary Requirement, the agreement between the developer and the City shall provide, among other things, that:

1. The dedicated site shall be transferred by the developer to the City at a date certain acceptable to the City;
2. The developer shall, prior to commencement of construction of the private housing development, pay to the City a substantial percentage (as determined by the City Council) of the in-lieu fee in effect at the date such agreement to dedicate is executed multiplied by the number of otherwise required affordable units within the private housing development, and
3. In the event that, upon transfer of the dedicated site, the value of the dedicated site is not at least equal to the future value of the in-lieu fee remaining payable, the developer shall immediately pay the shortfall in cash.

Notwithstanding the above, the City shall not be required to construct restricted affordable units on the dedicated site, but may sell, transfer, lease or otherwise dispose of the dedicated site as necessary in furtherance of its inclusionary affordable housing goals. Notwithstanding anything to the contrary contained herein, the provisions of this Subsection C shall expire and be of no further force and effect after December 31, 2007.

D. Develop a Stand-Alone Affordable Project.

1. A developer of a private housing development may satisfy the Inclusionary Requirement by developing a stand alone rental affordable project if all of the following criteria have been met:

- a) Except as provided otherwise in Section 3 below, the stand alone project would accommodate at least the number of affordable units which would otherwise have been required under Section II A above within the private housing development;
 - b) Except as provided otherwise in Section 3 below, the affordability levels of the stand-alone project shall be consistent with the rental requirements set forth in Section II A above to be constructed in the stand-alone project;
 - c) Except as provided otherwise in Section 4 below, the stand alone project is developed within the redevelopment project area in which the private housing development is located;
 - d) An affordability agreement in a form acceptable to the Agency and City has been recorded against the underlying real property on which the stand alone project will be constructed; and
 - e) The developer of the market rate project shall have entered into an agreement with the Agency or the City, which agreement provides: (i) a time line for completion of the stand alone project, and (ii) adequate security to the City by developer (i.e. such as a bond or letter of credit) to ensure that the stand alone project will be completed or transfer of the land for the stand alone project to an affordable housing developer with the Agency/City's standard form affordability agreement recorded against such land.
2. Two or more developers of private housing developments may satisfy the Inclusionary Requirement by mutually developing (pooling) a stand alone rental affordable project if all of the following criteria have been met:
- a) Except as provided otherwise in Section 3 below, the stand alone project would accommodate at least the number of affordable units which would otherwise have been required under Section II A above within the private housing developments;
 - b) Except as provided otherwise in Section 3 below, the affordability levels of the stand-alone project shall be consistent with the rental requirements set forth in Section II A above to be constructed in the stand-alone project;
 - c) Except as provided otherwise in Section 4 below, the stand alone project is developed within the redevelopment project area in which at least one of the private housing developments is located.

- d) An affordability agreement in a form acceptable to the Agency and City has been recorded against the underlying real property on which the stand alone project will be constructed; and
 - e) The developers of the market rate projects shall have entered into an agreement with the City, which agreement provides: (i) a time line for completion of the stand alone project, and (ii) adequate security to the City by such developers (i.e. such as a bond or letter of credit) to ensure that the stand alone project will be completed or transfer of the land for the stand alone project to an affordable housing developer with the Agency/City's standard form affordability agreement recorded against such land.
3. Notwithstanding anything to the contrary contained herein, the Inclusionary Requirement of twenty percent (20%) of the units set forth in Section II A 1 above shall be reduced to fifteen percent (15%), if, in connection with the development of a stand alone rental affordable project under this Section, the developer, pursuant to a recorded affordability agreement against the stand alone project, agrees to provide at least 25% of the units to extremely low-income (ELI) households and the remaining units are provided to very low-income households (VLI).
4. If, after a written request from a developer of a market rate project to be located in any of the project areas identified below, the Agency and City mutually determine that sufficient land is not available within the applicable project area for a stand alone project to be constructed under Section 1 or 2 above, the requirement that a stand alone project be developed within the redevelopment project area in which the private housing development is to be located may be waived by the City Council of Redevelopment Agency Board. This requirement shall only apply to a market rate project developed in a Neighborhood Business District, a Neighborhood Business Cluster, the Almaden Gateway Project Area, the Guadalupe-Auzerais Project Area, the Market Gateway Project Area, the Century Center Project Area, or the Civic Plaza Project Area. This requirement may only be waived if the Redevelopment Agency Board or the City Council finds, based on substantial evidence, after a public hearing, that the development of the stand alone project in another project area will not cause or exacerbate racial, ethnic, or economic segregation.

E. Combination of Other Inclusionary Options.

A developer of a private housing development may satisfy the Inclusionary Requirement by electing any combination of the above options, so long as such election fully satisfies the developers Inclusionary Requirement under this Policy. For example, if a market-rate developer has an inclusionary obligation of 100 affordable units but the site for the stand-alone affordable rental project can only

accommodate 80 units, the developer could either: (i) pay an in-lieu fee for the remaining 20 units or (ii) provide 20 affordable units in the developer's market rate project.

In the event the calculation for the number of restricted affordable units that the developer must provide results in a fraction of a unit, then the developer shall have the option of either (i) providing a full unit within the project at the affordable price, or (ii) making an in-lieu payment to the Housing Department in an amount equal to the percentage represented by the fractional unit multiplied by the then current in-lieu fee.

F. Exception for Small Housing Projects.

Notwithstanding the Inclusionary Requirements set forth above, a private developer of a private housing development of ten (10) housing units or less shall not be subject to the requirements of this Policy.

G. Inclusionary Credits, Transfers.

If, in connection with satisfying the Inclusionary Requirements hereunder, a private developer under either Section II A or D above, develops affordable units without any Agency or City Assistance in excess of such developer's Inclusionary Requirement ("Surplus Inclusionary Units"), such developer shall have the right to utilize such Surplus Inclusionary Units to satisfy any future Inclusionary Requirements of such developer for a period of up to twenty (20) years after construction of such units. Such developer shall also have the right to sell or otherwise transfer to another developer any Surplus Inclusionary Units. The City and Agency shall establish administrative procedures to monitor Surplus Inclusionary Units.

III. Subordination of Redevelopment Inclusionary Housing Restriction in Rental Projects.

The restriction for the Redevelopment Inclusionary Housing Requirement for a rental project may be subordinated to a lien, encumbrance or regulatory agreement of a federal or state government agency when all of the following conditions are met:

- A. The agency is providing financing or other assistance for the housing development;
- B. The statute or regulation governing the financing or assistance from that agency does not permit the restriction for the Inclusionary Requirement to be senior to the agency's lien, encumbrance or regulatory agreement.
- C. The agency will record a regulatory agreement that will require the housing development to provide affordable units in an amount not less than the amount

required for the Inclusionary Requirements for the particular housing development.

- D. The City and Agency have determined that there is no economically feasible alternative method of financing or assisting the housing development on substantially comparable terms and conditions without subordination.
- E. The City and Agency obtain written commitments reasonably designed to assure that the restricted affordable units in the housing development will not be removed in the event of default of the agency's lien, encumbrance or regulatory agreement, such as the following:
 - 1. A right of the City or Agency to cure a default on the agency lien, encumbrance or regulatory agreement
 - 2. A right of the City or Agency to negotiate with the agency after notice of default from the agency.
 - 3. An agreement that if prior to foreclosure by the agency, the City or Agency takes title to the property and cures the default on the lien, encumbrance or regulatory agreement, the agency will not exercise any right it may have to accelerate a loan by reason of the transfer of title to the City or Agency.
 - 4. A right of the City or Agency to purchase property from the owner at any time after a default on the lien, encumbrance or regulatory agreement.

IV. Subordination of Redevelopment Area Inclusionary Housing Restriction in For Sale Projects.

The restrictions for the Inclusionary Requirement for a "for sale" unit may be subordinated to a lien, encumbrance, or regulatory agreement of a lender other than the City or from a bond issuance providing financing, refinancing, or other assistance of "for sale" units or parcels where the Director of Housing, or his/her designee, makes a finding that an economically feasible alternative method of financing, refinancing, or assisting the "for sale" units or parcels on substantially comparable terms and conditions, but without subordination, is not reasonably available, and where the City obtains written commitments reasonably designed to protect the City's affordable housing supply in the event of default, such as any of the following:

- (A) A right of the City to cure a default on the loan.
- (B) A right of the City to negotiate with the lender after notice of default from the lender.

(C) An agreement that if prior to foreclosure of the loan, the City takes title to the property and cures the default on the loan, the lender will not exercise any right it may have to accelerate the loan by reason of the transfer of title to the City.

(D) A right of the City to purchase property from the owner at any time after a default on the loan.

V. Request for Adjustment.

Notwithstanding the general requirements set forth above, the City Council shall, upon request of a private residential developer, reduce, adjust or relieve the developer of its obligations under this Redevelopment Area Inclusionary Housing Policy, but only to the extent the Developer demonstrates that there is no nexus between the proposed development and the purposes of this Policy.

VI. Projects Constructed Pursuant to a Development Agreement.

Notwithstanding the general requirements set forth herein, if the City Council approves a development agreement, by ordinance pursuant to the authority and provisions of Government Code Section 65864 *et. seq.* and City Ordinance 24297, with a private developer of a private housing development and, pursuant to such development agreement, the private developer agrees to provide the number of affordable units required pursuant to this Redevelopment Area Inclusionary Housing Policy but at lower levels of affordability, then the location, construction and phasing of such inclusionary units within such project if approved by the Director of Housing and set forth in an Affordable Housing Plan attached as an exhibit to the development agreement shall be deemed to be consistent with the provisions of this Redevelopment Area Inclusionary Housing Policy so long as the developer remains in compliance with the terms and conditions of such development agreement. Any breach of such Affordable Housing Plan shall constitute a material breach of the development agreement.