

**ATTACHMENT B-1**  
**INCLUSIONARY HOUSING ORDINANCE (IHO) COMPLIANCE OPTIONS:**  
**PROCEDURE FOR BUILD ON-SITE OPTION**  
**(PROVIDING RENTAL INCLUSIONARY UNITS)**

**I. Introduction**

This attachment to the Guidelines provides more information on how Developers may satisfy their inclusionary housing obligation by building Rental Inclusionary Units (Inclusionary Rentals) on-site dispersed throughout their Residential Development and renting those units to eligible households. Definitions for capitalized terms may be found in the Guidelines and the Ordinance.

**II. Build On-Site Obligation** (San José Municipal Code - SJMC Sections 5.08.400, 5.08.410)

Developers who elect to build on-site must build (consistent with the standards as described in Part VII) and rent at least fifteen percent (15%) of the units in the Residential Development to income qualified renters. The equivalent of at least nine percent (9%) of the units in the Residential Development shall be made available for rent at an Affordable Rental Rate to households earning no more than 80 percent (80%) of the Area Median Income (AMI) adjusted for family size, as defined in California Health & Safety Code and as amended from time to time. The equivalent of at least six percent (6%) of the units in the Residential Development shall be made available for rent at an Affordable Rental Rate to households earning no more than 50 percent (50%) of the Area Median Income (AMI) adjusted for family size, as defined in California Health & Safety Code and as amended from time to time. The Income Limit and Affordable Housing Cost will be determined by the City for each inclusionary unit as described in section VIII below. The City of San José annually publishes [AMI levels](#) for the City and posts these on its website.

When computing the number of units required to satisfy the 15% on-site obligation, resulting fractions of one-half (1/2) or greater shall be rounded up to the next highest whole number, and fractions of less than one-half (1/2) shall be rounded down to the next lowest whole number.

**III. Build On-Site Incentives** (SJMC Section 5.08.450)

The Developer of a Residential Development providing all required Inclusionary Units upon the same site as the market rate units pursuant to SJMC Section 5.08.400 may, at the Developer's sole option and concurrently with the submittal of the Affordable Housing Compliance Plan, and the earlier of the zoning or Planning Permit application, submit a written request for a density bonus, waivers or incentives pursuant to California Government Code Section 65915 et seq. and [SJMC Chapter 20.190](#), if the Residential Development includes the provision of Inclusionary Units within the Residential Development that meets the minimum thresholds for a density bonus pursuant to California Government Code Section 65915 et seq.

The Developer of a project providing Inclusionary Units on-site may request a density bonus based on those Inclusionary Units, consistent with Chapter 20.190, provided the units meet the Density Bonus requirements.

**IV. Affordable Housing Compliance Plan Application** (SJMC Sections 5.08.120, 5.08.155, 5.08.320H, 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 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 the Build On-Site Compliance Option must provide the following information when submitting the Affordable Housing Compliance Plan application:

- 1) General information about the Developer and the Residential Development;
- 2) Whether the Developer intends to seek a parcel, or tentative, and final map for the project;
- 3) Affirming that the Developer intends to build Inclusionary Rentals on-site consistent with the standards in Part VII;
- 4) Detailed information about the unit makeup of the Residential Development:
  - i. Total number of units,
  - ii. Total number of Inclusionary Rentals by income level of the units,
  - iii. Unit type (e.g. townhouse, attached multi-family) and tenure (e.g. For-Sale or Rental),
  - iv. Number of bedrooms and bathrooms,
  - v. Parcel map and/or site plan(s) indicating the proposed location and square footage of both the Inclusionary Units and the market rate units,
  - vi. Construction and completion schedule of all Inclusionary and market rate units, and
  - vii. Phasing of Inclusionary Rentals in relation to market rate rentals consistent with Part VI and VII of this chapter.
- 5) As part of the Affordable Housing Compliance Plan application process, Developers shall provide a marketing plan that includes the following:
  - i. Anticipated timeline for the rental of both market rate and Inclusionary Units, and
  - ii. The planned approach to offering the Inclusionary Rentals to the public in a non-discriminatory and equitable manner.
- 6) Any requested build on-site incentives as described in Part III of this chapter,
- 7) Whether the Developer or any affiliate owns, has an interest in, or controls any property contiguous to the project,

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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.

- 8) A reliable financing mechanism for the ongoing administration and monitoring of the Inclusionary Rentals,
- 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, and
- 10) 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 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 Contiguous Property (as defined below) and any other property used for the purposes of memorializing the requirement to meet the obligations of the Ordinance.

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 provided 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 of Construction of Rental Inclusionary Units** (SJMC Sections 5.08.460, 5.08.610)

On-site Inclusionary Rentals must be developed and made available for occupancy either prior to or concurrently with the market rate units. Construction must also be consistent with the phasing plan for Inclusionary Rentals in relation to market rate units. The City may not issue Building Permits for more than ninety percent (90%) of the market rate units within the Residential Development (or construction phase) until it has issued Building Permits or authorized occupancy for all the Inclusionary Rentals within that project.

If the Rental units are attached units without separate building permits, the foregoing Building Permit ratio requirement shall be applied consistent with the general intent of the Ordinance.

A marketing plan for the Inclusionary Rentals is required including a commitment to provide the Inclusionary Rentals to the public in a nondiscriminatory and equitable manner. Such a plan should provide for concurrent marketing and the rental of one (1) inclusionary unit for each six (6) market rate units.

## **VII. Standards for Rental Inclusionary Units (SJMC Section 5.08.470)**

The Inclusionary Rentals shall have a comparable square footage and the same bedroom count and bedroom count ratio as the market rate units. Square footage will be considered comparable if the total average square footage of Inclusionary Rentals is at least 85% of the total average square footage of the market rate units for each unit by bedroom type (for example, the average square footage for 1-bedroom Inclusionary Rentals must be at least 85% of the average square footage for 1-bedroom market rate units).

In addition, Inclusionary Rentals must be dispersed throughout the project site with the market rate units and not clustered together. When the Residential Development is comprised of attached townhouses, row houses or multi-family buildings the Inclusionary Rentals shall be located so as not to create a geographic concentration. There is a geographic concentration if the Inclusionary Rentals are clustered in: (a) one area of the Residential Development away from the Market Rate Units, (b) in a separate building from the market rate units, and/or (c) all on one floor or one side of a building.

Developers may choose to cluster Inclusionary Units in a wing of a building or separating the units in another building (although on the same parcel) due to the type of financing needed to support the project, such as tax credits. The Housing Department will work with the Developer to acknowledge and understand the requirements of their financing plan and how that will impact the compliance option they elect. However, if Inclusionary Units are clustered rather than integrated with market rate units, the development will be considered an off-site compliance option and subject to the provisions outlined in Attachment B-2 – Build Off-Site.

The quality of exterior design and overall quality of construction of the Inclusionary Rentals must be consistent with the exterior design of the market rate units. Inclusionary Rentals may have different interior finishes and features than the market rate units in the Residential Development, as long as the finishes and features are functionally equivalent to the market rate units and are durable and of good quality. Functional equivalency includes the architectural style, detailing, and, to some extent, the quality of materials and the size of structures.

## **VIII. Inclusionary Rentals Household Income Limits (SJMC Sections 5.08.400.B, 5.08.600.A)**

The Developer is responsible for verifying the income eligibility of Rental Inclusionary Unit tenants, based on the following methodology and definitions.

1) Household Composition Definition

The Household is comprised of **all** eligible individuals who are currently living together at the same address and will continue to be living together in the Inclusionary Rental. New household members **cannot** be added to the application to income qualify for an Inclusionary Unit after initial submission of an application. In addition, the following individuals are not counted as part of the household: foster children, unborn children, children who are subject to a shared-custody agreement in which the child resides with the household less than 50% of the time, children being pursued for legal custody or adoption who are not yet living with the household at the time of application, and non-related live-in care-takers.

To be considered an Eligible Household Member, an individual must comply with the above criteria and meet one of the following criteria:

- i. All household members who are 18 years of age or more (adult household members) must be included on the application to rent the inclusionary unit; or
- ii. Any minor individual who is a dependent listed on the most recent year's tax returns of an adult household member. All household members who are under 18 years of age must be the legal dependent of an adult household member.

2) Household Income Limits

To establish the eligibility of households who intend to occupy the Inclusionary Rental, limits are set on the amount of income that households (including all Eligible Household Members) can earn. These limits are based on the number of Eligible Household Members; the family size to be used for determining the Household Income Limit is the number of Eligible Household Members.

The Ordinance requires that on-site Rental Inclusionary Units be rented to Moderate Income households and Very Low Income households, as defined below:

- i. When Moderate Income Rental Inclusionary Units are provided on-site, Moderate Income Households are defined in the ordinance as households earning no more than 80% of AMI for the household's family size. Please refer to the income limits currently published at 25 Cal. Code Reg Section 6932 for the current AMI in Santa Clara County by family size, 80% of AMI is prorated from 100% of AMI based on family size.
- ii. The Household Income Limits for Very Low Income households are defined pursuant to Health & Safety Code Section 50105. Please refer to the 25 Cal. Code Reg Section 6932 for the current Very Low Income Household Income Limits in Santa Clara County by family size.

The City of San José annually publishes [AMI levels](#) for the City and posts these on its website.

3) Household Income Definition

For income eligibility purposes, the gross annual income (income before deductions or exemptions) received by all members of the household 18 years of age or older (except for non-related live-in caretakers paid by an outside source who are not considered household members) will be considered. The gross annual income is determined by calculating the household's total current monthly income and then multiplying that total by 12.

In the event that current monthly income deviates by more than 15% from the preceding 12-month average, the gross annual income will be determined by combining the preceding half year's gross income with one-half year's gross income at the current level.

4) Types of Income

- i. All wages and salaries, overtime pay, commissions, fees, tips, bonuses, and other compensation for personal services, before payroll deductions;
- ii. The net income from the operation of a business or profession or from the rental of real or personal property (without deducting expenditures for business expansion or amortization of capital indebtedness, or any allowance for depreciation of capital assets);
- iii. Interest and dividends (including income from assets – see Excluded Income section below);
- iv. The full amount of periodic payments received from Social Security, annuities, insurance policies, retirement funds, pensions, disability or death benefits, and other similar types of periodic receipts, including any lump sum payment for the delayed start of a periodic payment;
- v. Payments in lieu of earnings, such as unemployment, disability compensation, and severance pay;
- vi. The maximum amount of public assistance available to household members, other than the amount of assistance specifically designated for shelter and utilities;
- vii. Periodic and determinable allowances, such as alimony and child support payments, and regular contributions or gifts received from persons not residing in the home;
- viii. All regular pay, special pay and allowances of a member of the Armed Forces (whether or not living in the dwelling) who is the head of household or spouse; and
- ix. Any earned income tax credit to the extent that it exceeds income tax liability.

5) Excluded Income

- i. Casual, sporadic or irregular gifts;
- ii. Amounts that are specifically for, or in reimbursement of, medical expenses;
- iii. Lump sum additions to household assets (as defined in the Assets section below), such as inheritances, insurance payments (including payments under health and accident insurance and workmen's compensation), capital gains, and settlement for personal losses;

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- iv. Monies received for educational scholarships paid either directly to students, or to the educational institution, as well as amounts paid by the Government to a Veteran of the U.S. Armed Forces for use in meeting the costs of tuition, fees, books, and equipment. Any money received over and above the associated educational costs listed are not exempt and considered income;
- v. Special pay to a person in the U.S. Armed Forces who is head of household who is deployed and exposed to hostile fire;
- vi. Foster child care payments;
- vii. The value of benefits received from the Supplemental Nutrition Assistance Program.
- viii. Payments to volunteers under the Domestic Volunteer Service Act of 1973;
- ix. Income derived from certain sub-marginal land of the United States that is held in trust for certain Indian tribes;
- x. Payments or allowances made under the Department of Health and Human Services' Low-Income Home Energy Assistance Program;
- xi. Payments received from the Job Training Partnership Act; and
- xii. Income derived from the disposition of funds of the Grand River band of Ottawa Indians.

### 6) Determination of Income from Assets

To determine a Household's income eligibility for occupancy of an Inclusionary Rental, a percentage of the Household's assets (as defined in the Assets section below) shall be added to the Household income only when the Household's assets exceed the annual Household Income Limit. Please refer to the Housing Department website for current [income limits](#).

When the total of the Household's assets exceed the Household Income Limit for the Household, then the amount of income attributed to these assets shall be computed as the higher of:

- i. The actual annual income generated from the assets; or
- ii. 2.5% of all assets in excess of the Household Income Limit.

### 7) Assets

Assets are defined as:

- i. Cash savings, including but not limited to bank accounts, credit union accounts, certificates of deposit, and money market funds;
- ii. Marketable securities, stocks, bonds and other forms of capital investment;
- iii. Inheritance and lump sum insurance payments, already received;
- iv. Settlements for personal or property damage already received;
- v. Equity in real estate including residential and commercial property and unimproved land; and
- vi. Other personal property that is readily convertible into cash.

The following are not considered assets:

- i. Ordinary household effects including furniture, fixtures, and personal property;
- ii. Automobiles used for personal use; and
- iii. Cash, securities, stocks, bonds, and other forms of capital held in a tax deferred retirement plan recognized by the Federal Internal Revenue Service.

**IX. Affordable Rental Rates for On-Site Rental Inclusionary Units (SJMC Section 5.08.400.A)**

The Affordable Rental Rates for On-Site Rental Inclusionary Unit are as follows:

- 1) For Moderate Income Rental Inclusionary Units that are located upon the same site as the market rate Residential Development households, the Affordable Rental Rate is the product of 30 percent times 80 percent (80%) of the AMI for Santa Clara County adjusted for family size appropriate for the unit.
- 2) For Very Low Income Rental Inclusionary Units, the Affordable Rental Rate is the product of 30 percent (30%) times 50 percent (50%) of the AMI for Santa Clara County adjusted for family size appropriate for the unit.

The City of San José annually publishes AMI levels for the City and posts these on [its website](#).

As defined in Health and Safety Code Section 50052.5 (h), the family size appropriate for the Rental Inclusionary Unit is determined by the number of bedrooms. The “family size” is equal to one person greater than the number of bedrooms in the unit. For the purpose of determining the Affordable Rental Rate, each Rental Inclusionary Unit shall be adjusted for family size appropriate for the unit based on the number of bedrooms as follows: a studio = one person, one bedroom = two persons, two bedrooms = three persons, three bedrooms = four persons, and four bedrooms = five persons. These apply when there are no other pertinent federal statutes applicable to the Rental Inclusionary Units. However if federal statutes apply (e.g. Tax Credit Allocation Committee - TCAC) the following occupancy guidelines may be used: 1.5 persons per bedroom. Owners may make an election to use the TCAC occupancy guidelines for an entire property.

Affordable Rental Rate includes all charges related to occupancy of the unit including utilities, parking fees, fees for use of common facilities and other fees and charges. If utilities are paid by tenants of the Rental Inclusionary Units, the rent for the Rental Inclusionary Units must be adjusted downward for tenant utility expenses, calculated in accordance with the utility allowances published by the Santa Clara Housing Authority annually.

In situations where there are multiple affordability restrictions/income or rent limits set by different funding requirements or jurisdictions, the Project must adhere to the strictest requirement so it can meet all of the layering restrictions.

**X. Occupancy Conditions**

The approved tenant(s) must occupy the Rental Inclusionary Unit as its principal residence during the entire term of the lease. If an additional occupant (roommate, family member, etc.) moves into the Rental Inclusionary Unit, he/she will be considered part of the existing

household. As a condition for lease or occupancy of a Rental Inclusionary Unit, tenant must be required to provide notice to the owner/property manager, prior to the move in date of a new household member, and the entire household (including the new occupant) will be reevaluated to determine eligibility, including household income requirements. If the tenant(s) fail to receive approval from the owner/property manager for any changes in occupancy or if the tenant(s) subleases the property or fails to provide the annual Tenant Income Certification, the tenant shall be in violation of its lease and will no longer qualify as a Rental Inclusionary Unit tenant.

If the owner/property manager suspects that there have been any changes to the occupancy of the Rental Inclusionary Unit, the owner/property manager shall make a reasonable effort to determine who is occupying the unit.

#### **XI. Minimum Household Size**

To be eligible for a Rental Inclusionary Unit, a household must be of a size at least equal to the number of bedrooms in the Rental Inclusionary Unit. For example, in order to rent a two-bedroom unit, a household must have at least two Eligible Household Members. Minimum household sizes for Rental Inclusionary units are as follows: one bedroom unit = one person, two bedroom unit = two persons, three bedroom unit = three persons, four bedroom unit = four persons. A household is comprised of all eligible individuals who are currently living together at the same address and will continue to be living together in the Rental Inclusionary Unit.

#### **XII. Annual Rent Adjustments**

The maximum Affordable Rental Rates will be adjusted annually based on the most recently published household income limits for Santa Clara County by family size. The City or its agent will notify the property owner/property manager of the new rental rates. If the owner chooses to raise rents, the tenant must be given a sixty (60) day notice before any rent increase.

#### **XIII. Ongoing Compliance with Affordability Restrictions (SJMC Section 5.08.710)**

The developer of each project containing Rental Inclusionary Units is required to submit an Annual Compliance Report and pay any City monitoring fees. The Annual Compliance Report (ACR) consists of the following three documents which may be obtained from the Department of Housing's website at <http://www.sjhousing.org/>.

- 1) Tenant Income Certification (TIC): Completed and signed by residents residing in the Inclusionary Rental. It is used to document family size, income and other financial information. Residents must be recertified annually to maintain eligibility at the inclusionary project.
- 2) Certified Rent Rolls: A report listing each affordable unit, the resident's name, rental rate, household income, the household size, and any other information regarding property tenancy. Rent Rolls should be electronically submitted in an excel spreadsheet provided by the Department of Housing. The Rent Roll form can be found here: <http://www.sjhousing.org/>. The City reserves the right to change the Rent Roll form at any time.

- 3) Certificate of Continuing Program Compliance: A signed statement attesting that the project is in compliance with the City of San José Inclusionary Housing Agreement. The Annual Certificate of Continuing Program Compliance can be found here: <http://www.sjhousing.org/>

#### **XIV. Annual Tenant Income Certification (TIC) (SJMC Section 5.08.710)**

Leases for Rental Inclusionary Units shall provide for submittal of signed TIC forms upon written request of the owner or property manager and if tenants fail to submit the form within thirty (30) days of receipt of a written request, then this is a violation of the lease and the lease shall automatically terminate. If the renter fails to comply after notice, the owner or property manager will institute eviction proceedings. If a Very Low Income inclusionary tenant's household income increases and exceeds the income limit for Very Low Income households but does not exceed the income limit for a Moderate Income household, then the tenant's rent will be increased to 30% of their actual certified income, and the tenant may remain in the unit. If a tenant's household income increases and exceeds the Moderate Income Limit, the tenant's rent will be increased to 30% of their actual certified income. If a tenant's household income increases and exceeds 140% of the Moderate Income Limit, the tenant will be given three months to locate alternate housing and vacate the inclusionary apartment unit. A three-month extension may be granted in cases of extreme hardship. The property may also offer the tenant a market rate unit.

#### **XV. Terms of Tenancy**

Rental Inclusionary Unit tenants will be subject to the same conditions of tenancy as other tenants occupying the same property, except for terms relating to occupancy, income eligibility, annual recertification, and limits on rents. The initial lease term for the Inclusionary Rental will be for one year.

#### **XVI. Availability of New Units for Lease**

A Rental Inclusionary Unit may not be leased until the City has approved the unit for occupancy.

#### **XVII. Marketing /Leasing of Units**

The Developer is responsible for marketing the Inclusionary Rentals and identifying qualified tenants that meet the income eligibility requirements of the Rental Inclusionary Units. Developer shall post the available Rental Inclusionary Units on the county-wide listing service site located at [www.scchousingsearch.org](http://www.scchousingsearch.org) or such other site as may be requested by the City. In reviewing each candidate, the owner or property manager may apply the same tenant selection criteria, such as past performance in meeting financial obligations and credit references, as those applied to applicants for non-inclusionary units on the property, except for those standards relating to income eligibility.

The Inclusionary Rentals within a Residential Development will not be operated at less than ninety percent (90%) occupancy for more than six consecutive months unless market conditions otherwise dictate. Developer shall post each vacant Rental Inclusionary Unit as soon as possible

but not later than ten (10) days after notice of an impending vacancy and provide advanced notice of the opening of any wait list on the county-wide listing service site located at [www.scchousingsearch.org](http://www.scchousingsearch.org) or such other site as may be requested by the City.

### **XVIII. Owner/Manager Certification**

Prior to the rental of the first Rental Inclusionary Unit on a property, the owner/property manager will sign a certification of receipt of these Guidelines with a statement of intent to manage the Rental Inclusionary Units according to these procedures. Developers will also submit to the City for approval a management plan consistent with the City's standards for management of affordable units. Subsequent property owners/property manager may be asked to sign certifications of receipt of these Guidelines.

### **XVIX. Terms of Affordability Covenants**

The deed restrictions applicable to Rental Inclusionary Units shall remain in effect for no less than the time periods set forth in California Health and Safety Code sections 33413(c)(1) and (2), which currently sets a minimum period of 55 years from the date of recordation of the Inclusionary Housing Agreement. Future owners of the property will abide by all of the administrative procedures and by the conditions in the recorded Inclusionary Housing Agreement for the entire 55 year period from date of recordation. Note that a longer time period may be required if the Residential Development receives a subsidy of any type and the subsidy program requires a longer term of affordability. Subsidies include, but are not limited to, loans, grants, mortgage financing, mortgage insurance, or rental subsidies.