No. 15-330

IN THE
Supreme Court of the United States

CALIFORNIA BUILDING INDUSTRY ASS'N,
Petitioner,
v.
CITY OF SAN JOSE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF IN OPPOSITION FOR RESPONDENTS-INTERVENORS AFFORDABLE HOUSING NETWORK OF SANTA CLARA COUNTY, HOUSING CALIFORNIA, CALIFORNIA COALITION FOR RURAL HOUSING, NON-PROFIT HOUSING ASSOCIATION OF NORTHERN CALIFORNIA, SOUTHERN CALIFORNIA ASSOCIATION OF NON-PROFIT HOUSING, AND SAN DIEGO HOUSING FEDERATION

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CORRECTION IN LIST OF PARTIES

Respondents-Intervenors ("Intervenors") are non-profit organizations that advocate for policies that promote the development of affordable housing for very low-, low-, and moderate-income families, both locally and statewide (Affordable Housing Network of Santa Clara County, California Coalition for Rural Housing, Housing California, and San Diego Housing Federation) and trade organizations of non-profit affordable housing developers (Non-Profit Housing Association of Northern California and Southern California Non-Profit Housing Association).[1]

The Public Interest Law Project and Law Foundation of Silicon Valley are not Intervenors, but are counsel for Intervenors.

RULE 29.6 STATEMENT

All of the Intervenors are nonprofit organizations. None of the Intervenors has any corporate parent, subsidiary, or affiliate that is a publicly owned corporation. None of the Intervenors has any stock, and therefore no publicly held company owns 10 percent or more of the stock of any of the Intervenors.

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[1] Janel Martinez, a low-income resident of San Jose, also intervened at the trial court level but has not participated in the appeal.

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INTRODUCTION

In 2010, the City of San Jose ("the City") passed a citywide Inclusionary Housing Ordinance ("the Ordinance") to help address its critical need for affordable housing and to promote the integration of affordable and market-rate homes throughout its area. But before the Ordinance had even become operative, the California Building Industry Association ("CBIA") filed a facial challenge in Superior Court. Following five years of litigation at trial and appellate levels, the California Supreme Court rejected CBIA's claims, holding that the Ordinance (1) is a land use regulation adopted to further the legitimate government interest of meeting the community's current and future affordable housing needs, and (2) does not impose an exaction of property and therefore does not trigger application of heightened scrutiny under the takings clauses of the California and United States Constitutions. This holding is consistent with the decisions of this Court and does not implicate a meaningful split of authority among the states or circuit courts of appeal. The decision thus does not warrant review by this Court pursuant to Supreme Court Rule 10.

CBIA's Petition to this Court is based on a misreading of the California Supreme Court's decision and a flawed interpretation of takings jurisprudence generally. Contrary to Petitioner's assertions, the decision did not reach the question of whether land use legislation of general application is ever subject to heightened scrutiny under this

Court's holdings in *Nollan*, *Dolan* and *Koontz*[2]—it specifically held that the Ordinance on its face did not impose an exaction that would trigger application of the heightened scrutiny.

Granting the Petition would be inconsistent with the Court's admonishment that the Court only should decide constitutionality of a law in a concrete factual setting. *Nollan, Dolan,* and *Koontz* were all as-applied challenges. This decision provides no facts involving an alleged taking. The Petition should be denied.

STATEMENT OF THE CASE

I. San Jose's Affordable Housing Crisis and the Adoption of an Inclusionary Housing Ordinance

Faced with a critical shortage of affordable housing, in 2010, the City adopted a citywide Inclusionary Housing Ordinance requiring a percentage of new housing units to be affordable to low- and moderate-income households. The primary goals of the Ordinance are to incentivize the development of affordable housing in market-rate developments to meet the current and future housing needs of the City and to disperse affordable units throughout the City. Respondents-Intervenors Appendix ("Resp.-Intv. App.") A—3-8 (San Jose Mun. Code § 5.08.010).[3] These goals are consistent with the City's police power to protect the public welfare

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[2] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

[3] Because Petitioner did not include the entire text of the Ordinance in its Appendix D, Respondents-Intervenors append it in its entirety at Resp.-Intv. App. A to provide the Court with the relevant sections addressed in this Response.

by fostering an adequate supply of housing for persons at all economic levels, increasing economic diversity, integrating affordable homes with market-rate housing, and dispersing affordable housing throughout the City. *Id.*

The Ordinance's base requirement is for 15 percent of homes in new developments of 20 or more units to be affordable to moderate-income households, but it also allows developers to choose from a variety of alternative means of compliance. These alternatives include the payment of a fee to the City in lieu of developing affordable units, developing units offsite, and donating land for affordable units. *Id.* at A—36-55 (San Jose Mun. Code, §§ 5.08.500-5.08.580). The in-lieu fee is based on the difference between the median sales price of an attached market-rate unit and the cost of housing affordable to a household earning no more than 110 percent of the area median income. Pet. App. D—14-16 (San Jose Mun. Code, §§ 5.08.520(B)(1) & (C)). All of the in-lieu fees collected must be expended exclusively for affordable housing purposes. *Id.* at D—16, 23 (San Jose Mun. Code, §§ 5.08.520(D), 5.08.700(B)).

Additionally, the Ordinance allows a developer to request a waiver, adjustment, or reduction in the inclusionary housing requirement for that particular project if the requirement "would take property in violation of the United States or California Constitutions." *Id.* at D—23-24 (San Jose Mun. Code, § 5.08.720).

II. Opinions Below

A. Trial Court

Before the Ordinance became operative, CBIA filed a lawsuit alleging that the Ordinance was invalid because the City had failed to demonstrate that the inclusionary housing requirements were reasonably related to the "deleterious public impact"

of new market-rate residential development.[4] The trial court granted Intervenors permission to intervene in support of the City in defending the Ordinance. The City and Intervenors contended that CBIA's proffered standard of review was incorrect. A local land use ordinance, they explained, is valid under a local government's police power if it is reasonably related to its legitimate governmental purpose.

The trial court held that the Ordinance's inclusionary housing requirements were "mandatory exactions of homes and in lieu fees" and determined that, in order for those requirements to be valid, they must be "reasonably related" to the deleterious public impacts created by new residential development. Pet. App. C—8-10. Although the trial court did not clearly state a statutory or Constitutional basis for its decision, it cited California's Mitigation Fee Act (Cal. Gov't Code, §§ 66000-66011) as well as the takings provisions of the state and federal Constitutions. *Id.* at C—5-8.

B. California Court of Appeal for the Sixth Appellate District

Both the City and Intervenors appealed. The Court of Appeal rejected the trial court's view that, to be valid, the Ordinance must be reasonably related to "deleterious public impact" of new residential development on the need for affordable housing and overturned its decision. Pet. App. B—13-14. The Court of Appeal noted that the Ordinance was enacted for the legitimate purpose of promoting the use of available land to help alleviate the existing and future need for affordable housing, rather than only for the purpose of mitigating the impact of any housing need caused by new

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[4] Notably, in making this argument, CBIA explicitly disavowed any takings claim. *See* Pet. App. B—7.

residential development. "[W]hether the Ordinance was reasonably related to the deleterious impact of market rate residential development in San Jose is the wrong question to ask in this case," noted the court. *Id.* at B—14. The Court of Appeal concluded that, instead, the proper standard of review for a land use ordinance adopted pursuant to a local government's police powers is whether it is reasonably related to the public welfare. *Id.* at B—20. It remanded the case to the Superior Court for a determination of whether CBIA had met its burden to prove that the Ordinance's inclusionary housing requirements were not reasonably related to a legitimate public purpose.

Petitioner mischaracterizes the Court of Appeal's decision by stating that it declined to address *Nollan* and *Dolan* "under the belief that those cases were limited to dedications of real property, not monetary exactions. . . ." Pet. at 8. That is not what the Court of Appeal held; the Court of Appeal declined to apply *Nollan* and *Dolan* primarily because this case involves "neither an asserted taking nor a land-use challenge governed by *Nollan* and *Dolan*." Pet. App. B—19 n.8.

C. California Supreme Court

Affirming the judgment of the Court of Appeal, the California Supreme Court held that the conditions of the Ordinance do not impose "exactions" upon the developers and, therefore, do not implicate the unconstitutional conditions doctrine under the takings clauses of the federal and state Constitutions. Pet. App. A—6. [5] The court reasoned that the conditions imposed by the Ordinance "do not require a developer to pay a monetary fee but rather place a limit on the way a developer may use its property."

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[5] *California Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 189 Cal. Rptr. 3d 475 (2015).

Id. The court correctly pointed out that *Koontz* did not suggest that "the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval." *Id.* at A—35. Thus, the court reasoned, the Ordinance's requirement that a developer sell 15 percent of its units at an affordable housing price "does not require the developer to dedicate any portion of its property to the public or to pay any money to the public." *Id.* at A—36. And the conditions are intended not only to mitigate the effect that market-rate residential development projects will have on the City's affordable housing deficit, but also to further the City's "constitutionally legitimate purposes" of increasing the number of affordable housing units and dispersing them throughout the City. *Id.* at A—6-7, 38-39.

Contrary to Petitioner's (*see* Pet. at 9) and *amici's* assertion, the court did not hold that *Nollan* and *Dolan* apply only to conditions imposed as part of an ad hoc administrative proceeding and not to conditions imposed pursuant to legislation. As *amici* the Cato Institute et al.[6] note, the reviewing court in a takings challenge under the unconstitutional conditions theory developed in *Nollan, Dolan,* and *Koontz* first determines whether the condition imposed would be a taking outside of the permitting process; then, if it would be, the court applies the essential nexus and rough proportionality tests. Cato AB at 3. In this case, the California Supreme Court explicitly determined that that the Ordinance's inclusionary housing requirement is not an exaction, meaning that that it would not be a taking outside of the permitting process. Pet. App.

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[6] *See* amicus curiae brief of Cato Institute and Reason Foundation ("Cato AB").

A—36-37, 43-49. Accordingly, the Court found the heightened scrutiny of *Nollan/Dolan/Koontz* to be inapplicable. *Id.* at A—35-36.

REASONS FOR DENYING THE PETITION

The decision of the California Supreme Court does not conflict with any decisions of this Court, the circuit courts of appeal or state courts of last resort regarding important or unsettled questions of federal law. The California Supreme Court's decision upholding the constitutionality of the City's Ordinance rests on the long-held standard that, pursuant to their police powers, local governments may enact legislation reasonably related to a legitimate public purpose.

Petitioners contend that the California Supreme Court "created a rule of federal law that allows the government to circumvent the nexus and proportionality analysis set out" in *Nollan/Dolan.* Pet. at 12. It did not. The California Supreme Court properly found that the Ordinance did not impose an exaction tantamount to a taking under the doctrine of unconstitutional conditions and thus determined *Nollan/Dolan* inapplicable.

Finally, the question of whether the Ordinance authorizes a taking as a condition of a development approval is premature because the Ordinance has yet to be applied to any development. This Court has long admonished that the constitutionality of a law should "not be decided except in an actual factual setting[,]" especially in the context of a takings challenge. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U. S. 264, 294-295 (1981).

I. THE CALIFORNIA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT

This Court made clear in *Lingle v. Chevron U.S.A., Inc.* that the *Nollan/Dolan* heightened standard of review applies only to takings challenges to the application of permit conditions that would require a dedication of a compensable property interest without just compensation. 544 U.S. 528 (2005). Takings attacks on general development regulations and legislation, this Court held, are measured by the standard articulated in *Penn Central Transp. Co. v. New York City* to determine whether the burden imposed by the regulation goes "too far." 438 U.S. 104, 127 (1978). *Koontz* did not change this basic analysis, only extending *Nollan/Dolan* to imposition of a fee as an alternative to a conveyance of a property interest as condition for issuance of a permit.

Petitioner first argues that the Ordinance sanctions a taking of property because it requires a transfer of an interest in property and it is therefore subject to *Nollan/Dolan* scrutiny. Pet. at 14. But, as the California Supreme Court correctly found, the Ordinance requires no transfer of property and, therefore, no review under *Nollan/Dolan*. Pet. App. A—33-37. As the California Court pointed out, this Court in *Lingle* emphasized that "*Nollan* and *Dolan* both involved 'dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings.'" *Id.* at A—35, quoting *Lingle*, 544 U.S. at 547. And in *Monterey v. Del Monte Dunes at Monterey, Ltd.*, this Court stated categorically that "we have not extended the rough proportionality test of *Dolan* beyond the special context of exactions—land use decisions conditioning approval of development on the dedication of property to public use." 526 U.S. 687, 702 (1999). Outside of land use conditions requiring a dedication of a property interest, regulatory takings challenges

are governed by *Penn Central*. *Lingle*, 544 U.S. at 538.

A. The Ordinance Does Not Compel a Transfer of Property Under the Decisions of This Court.

All of the decisions cited by Petitioner for the proposition that California Supreme Court's decision conflicts with decisions of this Court are inapposite. Like *Nollan, Dolan,* and *Koontz*, all the cited decisions involved a compelled transfer of a real or personal property interest for which the government is required to pay compensation if compelled outside of the permit process. *See* Pet. at 14 (cases cited).

To take one example, Petitioner's reliance on *Horne v. Dep't of Agric.* does not support its allegation of a conflict of decisions. 135 S. Ct. 2419 (2015). *Horne* addressed a takings challenge to the Department of Agriculture order requiring that California producers of raisins divert a percentage of their annual crop to a reserve and authorizing the Secretary of Agriculture to impose a monetary penalty for noncompliance. *Id.* at 2424-25. This Court took the opportunity to clarify takings jurisprudence, holding that the diversion of personal property constituted a *per se* physical transfer of property without just compensation in violation of the Fifth Amendment just as would transfer of real property. *Id.* at 2427. In contrast, the San Jose's Ordinance requires no diversion of housing to the City for later sale or rental by the City to low- and moderate-income households.

Petitioner and *amici*, including Amicus Center for Constitutional Jurisprudence,[7] essentially contort the ordinary price controls of the Ordinance into

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[7] Amicus brief of Center for Constitutional Jurisprudence ("CCJ AB") at 11.

what they characterize as a dedication of property imposed as a condition of land use permit approval. By this bootstrap they reason that the Ordinance is subject to the *Nollan/Dolan* heightened takings test. *See* Pet. at 15. But the Ordinance does not require conveyance for public use of any of the property interests that Petitioner lists. And, as the California Supreme Court noted, Petitioner did not claim below that any of the requirements imposed by the Ordinance would have a "confiscatory effect." Pet. App. A—42.

B. The Ordinance Does Not Compel a Conveyance of a Property Interest.

Petitioner and some *amici*[8] allege that the Ordinance compels conveyances of property interests. Petitioner lists four interests that are purportedly conveyed:

(1) "[A] financial interest in the dedicated homes" defined as the below-market price requirement secured by recorded covenants;
(2) "[T]he right to freely alienate property; and"
(3) "[T]he right to sell property at fair market price; or"
(4) The payment of "a fee in lieu" in the alternative to construction of affordable units.

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[8] *See generally* amicus curiae briefs of Mountain States Legal Foundation ("MSLF AB") at 4, 20; California Association of Realtors and National Association of Realtors at 8; CCJ AB at 11; National Federation of Independent Business Small Business Legal Center ("NFIB AB") at 5; and National Association of Home Builders ("NAHB AB") at 17.

Pet. at 15. None are conveyances of a property interest.

1. Neither the Regulation of Sales Prices nor the Recording of Covenant to Enforce the Ordinance's Affordability Requirements Effects a Dedication of a Property Interest.

The first and third purported conveyances listed by Petitioner are essentially the same, stated differently—the obligation to sell at below market prices. However, restrictions on price do not amount to a transfer of a property interest. This Court has long upheld price restrictions that are reasonably related to a legitimate purpose and would not have a confiscatory result. *See, e.g.*, *Block v. Hirsh,* 256 U.S. 135, 156 (1921); *Nebbia v. New York*, 291 U.S. 502, 539 (1934); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-308 (1989). A potential reduction in profit or revenue does not amount to a dedication. *Penn Central*, 438 U.S. at 125-126; *Permian Basin Area Rate Cases,* 390 U.S. 747, 768-769 (1968). *See also Yee v. City of Escondido* describing rent control as a regulation of the *use* of property. 503 U.S. 519, 532 (1992). [9]

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[9] Amicus National Association of Home Builders argues that the Ordinance is not like other local laws regulating rents, citing language in *Yee* that a "different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Yee*, 503 U.S. at 528; NAHB AB at 17. This is *not* a "different case," however. The developer is not compelled to rent or sell its units, rather if it chooses to rent or sell, it must rent or sell a portion of the units at a reduced price. The developer also is not prohibited from terminating the tenancy of any tenant.

Addressing the constitutionality of rent control after *Nollan*, in *Pennell v. City of San Jose,* the Court generally acknowledged the constitutional validity of reasonable price controls when faced with a facial attack on San Jose's rent control ordinance. 485 U.S. 1, 11 (1988). In considering a takings claim, the Court notably found it premature to decide the landlord's takings challenge to a provision allowing consideration of tenant hardship in setting rents because there was no record that rent had been actually reduced pursuant to the hardship factor. *Id.* at 9-10. (*See also* discussion *infra.*, § IV.)

Moreover, the requirement that sales and re-sale price restrictions be recorded against the property as a condition of sale does not transform the restrictions into exactions as Petitioners and some *amici* assert.[10] The recording serves the objectives of the recording statutes to provide notice to future buyers of the price restrictions (*see* Cal. Gov't Code, §§ 1468, 27281.5)—restrictions that would apply *regardless* of the recording because their source is the requirement of the Ordinance. The recording serves the non-confiscatory purpose of the Ordinance and the general welfare of the community by increasing the transparency and enforceability of the Ordinance's requirements.

2. The Ordinance Does Not Prevent Alienation of Property.

The second supposed conveyance Petitioner attributes to the Ordinance is "the right to freely alienate property." Pet. at 15. The Ordinance has no such restriction. Beyond restricting the price of a percentage of the units, the owner may sell or rent the units to qualified buyers or renters. Resp.-Intv. App. A—23-26 (San Jose Mun. Code, § 5.08.400). As was explained in *Horne*, it was the requirement of

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[10] *See supra* text accompanying note 8.

physical surrender, transfer of title, *and* the grower's loss of the right to control the sale of their raisins that resulted in the taking. *Horne,* 135 S. Ct. at 2429.

San Jose's Ordinance is much less intrusive, compelling no surrender, transfer of title, or loss of control over sales beyond placing limitations on the maximum price and the income of buyers eligible for the affordable inclusionary units. Otherwise, the developer retains the right to freely sell the units.

The arguments along these lines in the briefs of *amici curiae* are similarly inapposite. Like Petitioners, for example, NFIB invokes *United States v. General Motors Corp.*, but in that case a commercial lessee was compelled to temporarily *cede possession* to the government. 323 U.S. 373, 378-384 (1945). San Jose's Ordinance compels no possession by the City.

3. The In-lieu Fee and Other Alternatives Are Not Compelled Transfers of Property Interests.

The last forced conveyance suggested by Petitioner and two *amici*[11] is the alternative of paying a fee in lieu of building affordable homes. Pet. at 15. Petitioner cites to *Koontz*, which held that a monetary fee imposed as a substitute for a dedication of property required as a condition for issuance of a development permit is subject to *Nollan/Dolan* heightened scrutiny. *Koontz*, 133 S. Ct. at 2598-2599. But here the requirements of the Ordinance involve no dedication of property. Consequently, the in-lieu fee is simply an alternative to a non-confiscatory land use condition rather than a "monetary exaction" as described in *Koontz*. The fee, therefore, is not subject to heightened scrutiny under *Nollan/Dolan*

[11] *See* MSLF AB at 14-16; NAHB AB at 18-19.

and only needs to be reasonably related to the underlying inclusionary housing requirement. And, because the fee is not an exaction, if it were challenged as a taking, the appropriate test would be the *Penn Central* regulatory takings test, not *Nollan/Dolan*. The same analysis applies to the other *alternative* methods of performance provided by the Ordinance, which some *amici* identify as compelled conveyances[12] –off site development, land dedications, and acquisition of off-site units. All, however, are voluntary alternatives that are directly related to facilitating the provision of the affordable inclusionary housing the developer elects not to produce.

II. THE CALIFORNIA SUPREME COURT'S DECISION NOT TO APPLY *NOLLAN/DOLAN* SCRUTINY TO THE ORDINANCE'S INCLUSIONARY HOUSING REQUIREMENTS RAISES NO QUESTION OF UNSETTLED FEDERAL LAW.

The California Supreme Court did not "carve out a massive exception to *Nollan* and *Dolan*." Pet. at 17.[13] It did not decide the issue some have argued was left unaddressed in *Koontz*—whether *Nollan/Dolan* scrutiny applies to land use legislation of general application rather than only to conditions imposed on an ad hoc basis to an individual permit applicant where the potential for abuse is greater due to the lack of public review. It did not reach the issue because it did not need to. After correctly deciding that none of the Ordinance's requirements for below-market rate housing require a conveyance of a protected property interest as a condition of a development permit, the court properly concluded

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[12] *Id.*

[13] Some *amici* make similar assertions. *See* Cato AB at 5, 10; NFIB AB at 17.

that *Nollan/Dolan* scrutiny was inapplicable. Pet. App. A—33-36, 33-34 n.11.

Moreover, contrary to Petitioner's contention (Pet. at 22), the court did not hold that a takings attack under the Fifth Amendment or unconstitutional conditions doctrine is subject only to a "reasonable relationship" test. Rather, it simply recognized that, to come within the parameters of the local police power, a local law must be reasonably related to a legitimate public purpose.

A. The California Supreme Court Did Not Reach the Question of Whether Legislation Of General Application Can Be Subject to *Nollan/Dolan* Scrutiny.

After first finding that the Ordinance was reasonably related to legitimate purposes under the police powers (Pet. App. A—29), the California Supreme Court went on to find, relying in part on *Koontz*, that the Ordinance "does not violate the unconstitutional conditions doctrine because there is no exaction—the ordinance does not require a developer to give up a property interest for which the government would have been required to pay just compensation under the *takings clause* outside of the permit process." *Id.* at A—35-36 (emphasis added); *see also supra* Statement of the Case, Section II, C.

The court noted that "the *Koontz* decision explicitly acknowledges that '[a] predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing.'" Pet. App. A—33-35 (quoting *Koontz*, 133 S. Ct. at 2598). Thus, having found that the Ordinance required no unconstitutional dedication of a property interest, the court properly held the Ordinance did not trigger the application of the *Nollan/Dolan* tests. *Id.* at A—36.

Because no property interest is transferred and no physical taking is effected by the Ordinance, the California Supreme Court correctly concluded that the Ordinance could not violate the takings clause "except in the unusual circumstance in which the use restriction is properly found to go 'too far' and to constitute a 'regulatory taking'" under the *Penn Central* test. *Id.* at A—37-38. As the court pointed out, however, "CBIA has expressly disclaimed any reliance on the *Penn Central* doctrine." *Id.* at A—43.

Petitioner's and amicus Cato's[14] observation that the permit conditions involved in *Nollan, Dolan,* and *Koontz* were imposed pursuant to state and/or local legislation is therefore irrelevant to the California Supreme Court's decision. In addition to mischaracterizing the court's opinion, this line of argument ignores the fact that each of these cases was an as-applied challenge to a permit condition imposed on a particular development. All three were specific instances of two or more parties negotiating over a permit. In each case, the Court was able to assess whether there was a nexus and rough proportionality between the condition imposed and the anticipated impact. This case, in contrast, is a facial challenge. The Ordinance's conditions are generally applicable, have never been imposed on any developer, and may be reduced or waived at the developer's request to avoid an unconstitutional result.

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[14] *See* Cato AB at 17.

B. The Decision Did Not Hold That a Takings Attack Under the Fifth Amendment or Unconstitutional Conditions Doctrine Is Subject Only to a "Reasonable Relationship" Test.

Petitioner asserts that the California Supreme Court "ruled that a Fifth Amendment challenge to a legislatively-imposed condition on a development permit is subject to a rational basis review to determine whether the condition reasonably relates to the public welfare." Pet. at 22 (citing Pet. App. A—26, 73). The court said no such thing. It first accurately explained that "[a]s a general matter, so long as a land use restriction or regulations bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible." Pet. App. A—26-27. (citing this Court's decisions in *Schad v. Mount Ephraim*, 452 U.S. 61, 68 (1981) and the seminal *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926)). Next, it turned to CBIA's facial constitutional takings challenges pursuant to the Fifth Amendment and unconstitutional conditions doctrine and, after a comprehensive examination, found the *Penn Central* test rather than the *Nolan/Dolan* test to be the appropriate test for requirements like those of the Ordinance. Pet. App. A—28-29.

Petitioner inaccurately conflates the California Supreme Court's application of the reasonable relationship test with the disapproved "substantially advances" takings test. As Petitioner acknowledges, this Court disapproved the substantially advances test in *Lingle*, finding the *Penn Central* test more apt for regulatory takings challenges because it strives to measure the relative *burden* of a law on property rights rather than the *efficacy* of the policy in achieving its public purpose. *Lingle*, 544 U.S. at 542-543. The California Supreme Court's decision embraces the *Lingle* analysis rather

than substituting a reasonable relationship test for the *Penn Central* test. Pet. App. A—35.

III. THE CALIFORNIA SUPREME COURT'S DECISION DOES NOT RAISE ANY MEANINGFUL CONFLICT WITH THE DECISIONS OF OTHER COURTS ON FEDERAL CONSTITUTIONAL QUESTIONS.

A. The California Supreme Court's Decision Does Not Implicate Any Meaningful Split of Authority Among the States.

In asserting that the California Supreme Court's decision implicates a split in authority among the states, CBIA relies on cases that are largely irrelevant to the questions raised in this case.

First, CBIA's line of argument rests on the faulty premise (addressed *supra*) that San Jose's inclusionary housing requirement exacts money or property from a developer. In support of its assertion that the supreme courts of several states "do not distinguish between legislatively and administratively imposed exactions" CBIA cites primarily to as-applied challenges to monetary impact fees levied to mitigate the impacts of a particular development. Pet. at 27; *Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995); *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995).[15]

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[15] Amicus Mountain States Legal Foundation relies on these cases as well. MSLF AB at 24-25.

However, as the California Supreme Court noted, the Ordinance's terms "do not require a developer to pay a monetary fee but rather place a limit on the way a developer may use its property." *California Bldg. Indus. Ass'n*, 61 Cal. 4th at 444; Pet. App. A—6. Further, the Ordinance's . . .

> . . . conditions are intended not only to mitigate the effect that the covered development projects will have on the city's affordable housing problem but also to serve the distinct, but nonetheless constitutionally legitimate, purposes of (1) *increasing the number of affordable housing units in the city* in recognition of the insufficient number of existing affordable housing units in relation to the city's current and future needs, and (2) assuring that new affordable housing units that are constructed *are distributed throughout the city as part of mixed-income developments* in order to obtain the benefits that flow from economically diverse communities and avoid the problems that have historically been associated with isolated low-income housing.

Pet. App. A—6-7. (emphasis in original). Other states' decisions to apply *Nollan/Dolan* scrutiny to monetary fees that were imposed on specific developments for the purpose of mitigating the impacts of those developments, therefore, are not relevant to the California Supreme Court's interpretation of the Ordinance.

The other cases cited by CBIA in its attempt to demonstrate a split in authority are likewise unavailing. *Curtis v. Town of South Thomaston* involved an easement for the town to use and maintain the pond and fire pumping on the developer's property for public purposes. 708 A.2d 657 (Me. 1998). It was a condition that amounted to a physical occupation of the land by the government, which is not the case here. *See id.* at 659.

Similarly, CBIA overstates the holding of *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W. 3d 620 (Tex. 2004). Although the Texas Supreme Court applied *Nollan/Dolan* scrutiny to a permit condition that was authorized as part of a legislative scheme to ensure adequate public roads for new residential developments, the court was careful to state that it was not holding that all legislative decisions are subject to *Nollan/Dolan*.[16] *Id.* at 642. Rather, the court found that the particular condition as applied to the Stafford Development warranted *Nollan/Dolan* scrutiny. *Id.*

Nearly every case that CBIA cites in support of the purported split in opinion was decided prior to this Court's clarification of its takings jurisprudence in *Lingle.* Pet. at 27. Indeed, *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1994), which Petitioner cites for the proposition that the New York Supreme Court has applied *Nollan/Dolan* to legislation of general application, was actually an application of the *Agins* "substantially advances" test to a regulatory takings claim, the very test that *Lingle* since abrogated. *See generally Lingle,* 544 U.S. 528; *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

Courts that *have* addressed the specific question of whether inclusionary housing requirements are subject to *Nollan/Dolan*-type essential nexus test are relatively consistent in their conclusion that heightened scrutiny does not apply. *See Mead v. City of Cotati,* 389 Fed. App'x 637, 638-639 (9th Cir. 2010), *cert. denied* 131 U.S. 2900 (2011); *Kamaole Pointe Dev. LP v. County of Maui*, 573 F. Supp. 2d 1354, 1361 (D. Haw. 2008); *Holmdel*

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[16] Notably, the decision observes that *every other state court of last resort* that had decided the issue had held that *Dolan* was limited to adjudicative (as opposed to legislative) decisions. *Town of Flower Mound,* 135 S.W. 3d at 640.

Builders Ass'n v. Holmdel, 583 A.2d 277, 288 (N.J. 1990)(reasonable relationship standard rather than the "strict rational-nexus standard" applied in upholding inclusionary housing ordinances that imposed an affordable-housing fee on new development). *See also Alto Eldorado P'ship v. County of Santa Fe*, 634 F.3d 1170 (10th Cir. 2011)(holding that a takings challenge to Santa Fe County's affordable housing ordinance was not ripe because developers had not sought compensation for the alleged taking). By holding San Jose's Ordinance to be a legitimate exercise of the city's police power, and by declining to apply the *Nollan/Dolan* essential nexus and rough proportionality tests to the Ordinance's inclusionary housing requirements, the California Supreme Court reached the same conclusion that other courts have reached regarding the validity of inclusionary housing policies.

B. The Ninth Circuit's Decisions Regarding Land Use Legislation of General Application Are Consistent with the California Supreme Court's Decision in This Case.

CBIA argues that the Ninth Circuit is "internally conflicted" on the question of whether *Nollan/Dolan* applies to legislation of general application. Pet. at 28. But an intra-Circuit split—whether real or perceived—is not grounds for a grant of certiorari.

Additionally, the California Supreme Court's decision is consistent with the decisions of the Ninth Circuit. In *Mead*, the Ninth Circuit expressly found that a city's affordable housing requirement for new market-rate development was not subject to *Nollan/Dolan*. 389 Fed. App'x at 638-639. Speaking specifically to the in-lieu fee portion of the requirement, the court held that *Penn Central*, not *Nollan/Dolan*, provided the proper test for determining whether the requirement worked a

taking. This decision was consistent with the Ninth Circuit's other decisions regarding the applicability of *Nollan/Dolan* to land use legislation of general application. *See e.g., McClung v. City of Sumner*, 545 F.3d 803, 809-811 (9th Cir. 2008)(requiring increased sewer pipe size is a land use regulation subject to *Penn Central* scrutiny); *Garneau v. City of Seattle*, 147 F.3d 802, 806-811 (9th Cir. 1998) (tenant relocation fee ordinance is subject to *Penn Central* rather than *Nollan/Dolan* scrutiny).

Commercial Builders of Northern California v. City of Sacramento—decided after *Nollan* but before *Dolan or Lingle*—does nothing to disturb this reasoning. 941 F.2d 872 (9th Cir. 1991). In *Commercial Builders*, the challenged condition was an affordable housing impact fee charged to commercial developers in order to mitigate the need for new affordable housing created by new commercial development. *Id.* at 873. The Ninth Circuit upheld the fee after finding that it was reasonably related in both use and amount to the impact it set out to mitigate. *Id.* at 876. *Commercial Builders* did not broach the question of whether *Penn Central* or *Nollan* provided the appropriate test for the fee requirement, or whether *Nollan* ought to be applied to an inclusionary housing requirement.

Finally, *Levin v. City & County of San Francisco* applied *Koontz*'s extension of *the Nollan/Dolan* test to monetary exactions to a legislatively imposed tenant relocation payment requirement. 71 F. Supp. 3d 1072, 1074 (N.D. Cal. 2014). The District Court's application was misplaced, however, because the relocation requirements could have been imposed outside of the permit application process without constituting a taking per se. The developer's concern with the amount of the fee, therefore, is appropriately tested under *Penn Central,* not *Nollan/Dolan*. The decision in *Levin*, far from suggesting an internal conflict within the Ninth Circuit Court of Appeals' jurisprudence, is wholly inconsistent with Ninth

Circuit precedent and represents an anomaly in which the newly published *Koontz* decision was wrongly applied. *See Garneau*, 147 F.3d at 806-811.

IV. THE PETITION DOES NOT WARRANT REVIEW BECAUSE THE ORDINANCE HAS YET TO BE IMPLEMENTED, DEPRIVING THIS COURT OF AN ACTUAL FACTUAL CONTEXT FOR DECIDING THE ORDINANCE'S CONSTITUTIONALITY.

This Court has generally cautioned that questions of the constitutionality of a law are most appropriately resolved through examination of the actual effect of the law. Indeed, this Court invoked this guiding principle in a case where the Court was asked to address a takings challenge to San Jose's rent control ordinance. In *Pennell*, this Court reminded that . . .

> . . . [g]iven the "essentially ad hoc, factual inquiry' involved in takings analysis, *Kaiser Aetna v. United States*, 44 U.S. 164, 175 (1979), we have found it particularly important in takings cases to adhere to our admonition that 'the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary."

485 U.S. at 10, quoting *Hodel*, 452 U. S. at 294-295. This Court found that it was premature to decide the landlord's takings attack on the tenant hardship provision of the City's rent control ordinance because there was no record that rent had been actually reduced pursuant to the hardship factor. *Id.* at 9-10. "[W]ithout any showing in a particular case as to the consequences . . . [the case] does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here." *Id.* at 10, citing *Congress of Indus. Orgs. v. McAdory*, 325 U.S. 472, 475-476 (1945). Here,

because the Ordinance has yet to be implemented, there could be no showing that the application of the Ordinance to a development would amount to takings under either the *Penn Central* or *Nollan/Dolan* test.

CONCLUSION

This case is a facial takings attack on an inclusionary housing ordinance that has never been operative and that requires no conveyance of property. The California Supreme Court properly found no exaction of property in the Ordinance's requirement that developers sell a small portion of newly developed housing units to low and moderate income households at below-market prices to address the dire lack of affordable housing in the city. It therefore correctly concluded *Nollan/Dolan* heightened scrutiny inapplicable and had no need to reach Petitioner's question regarding the proper standard of review for legislated and ad hoc permit conditions. This decision conflicts with no decisions of this Court, the federal circuits, or other state high courts. Accordingly, the Court should deny the Petition.

DATED: December 4, 2015

Respectfully submitted,

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Appendix

APPENDIX

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ORDINANCE NO. 28689

AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING TITLE 5 OF THE SAN JOSE MUNICIPAL CODE TO ADD A NEW CHAPTER 5.08 ADOPTING A CITYWIDE INCLUSIONARY HOUSING PROGRAM

WHEREAS, the San Jose City Council desires to adopt a Citywide inclusionary housing program 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; and

WHEREAS, a Citywide inclusionary housing program will assist in alleviating the use of available residential land solely for the benefit of households that are able to afford market rate housing because such market-rate development will be required to contribute to the provision of affordable housing for the entire San Jose community; and

WHEREAS, a Citywide inclusionary housing program will also assist in alleviating the demand for housing affordable to very low, lower, and moderate income households caused by the service demands of new residents in market-rate residential units; and

WHEREAS, the San Jose City Council desires to include Redevelopment Project Areas in the Citywide inclusionary housing program in order to continue to comply with the requirements of California Health and Safety Code section 33413(b) and to provide for greater ease of access to, and administration of, inclusionary housing requirements for Residential Development; and

WHEREAS, a Use of a Final Environmental Impact Report and Addendum thereto for the San Jose 2020 General Plan (the "FEIR"), which FEIR was certified by the City Council on August 16, 1994 in conformance with the California Environmental Quality Act of 1970, as amended ("CEQA"), was prepared for the ordinance under File No. PP08-258; and

WHEREAS, the City Council, on August 16, 1994, adopted Resolution No. 65459 making certain findings in connection with the approval of the San Jose 2020 General Plan concerning that project's significant environmental effects, the feasibility of alternatives, and adopting a statement of overriding considerations identifying the project benefits that outweighed and made acceptable the identified significant environmental effects, and those findings remain valid in light of the proposed Inclusionary Housing Ordinance; and

WHEREAS, said Use of a FEIR and Addendum thereto was prepared and approved by the Director of Planning, Building and Code Enforcement on November 17, 2008, and was reviewed and considered by the Planning Commission on November 19, 2008, none of which actions were challenged, appealed, or protested; and

WHEREAS, the City Council of the City of San Jose is the decision-making body for the proposed ordinance, and has considered and approves of the information contained in such Use of a FEIR and Addendum thereto, together with related Resolution No. 65459, prior to acting upon the proposed ordinance.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

Title 5 of the San Jose Municipal Code is hereby amended by adding a Chapter to be numbered, entitled and to read as follows:

CHAPTER 5.08

INCLUSIONARY HOUSING

Part 1

Purpose and Findings

5.08.010 Findings and Declarations

The City Council finds and declares as follows:

A. Rental and owner-occupied housing in San Jose has become steadily more expensive. Although San Jose has historically provided much of the housing affordable to Santa Clara County's workforce, in recent years housing costs have escalated sharply, increasing faster than incomes for many groups in the community. As a result, there is a severe shortage of adequate, affordable housing for Extremely Low, Very Low, Lower, and Moderate Income Households, as evidenced by the following:

1. The 2000-2007 Regional Housing Needs Plan for Santa Clara County, mandated by California Governaient Code section 65584 and prepared by the Association of Bay Area Governments, shows that fifty-six percent (56%) percent of new housing in San Jose should be affordable to Extremely Low, Very Low, Lower, and Moderate Income Households.

2. According to the most recent 2007-2014 regional housing needs allocation

(RHNA) determined by the Association of Bay Area Governments (ABAG), the City of San Jose has a total housing need of 34,721 units through the year 2014, out of which nearly sixty percent (60%) is for Lower- and Moderate-Income Households (19,271 units). Of the affordable units: 3,876 units (20%) are for Extremely Low Income Households; 3,875 units (20%) for Very Low Income Households; 5,322 units (28%) for Lower Income Households; and 6,198 units (32%) for Moderate Income Households. These housing needs represent substantial increases from the previous RHNA. In particular, the Lower Income and Very Low Income housing need increased by forty-five percent (45%) and one hundred twenty-one percent (121%) respectively. Yet, as described below, these goals fall far short of the actual need for households in these income categories.

3. Because of the shortage of affordable housing in San Jose, many households overpay for their housing. The 2006 American Community Survey found that approximately forty-six percent (46%) of San Jose households who own their homes pay more than thirty percent (30%) of income for their mortgage, while forty-eight percent (48%) of renter households pay more than thirty percent (30%) of income for housing. These households are

overpaying for their housing, according to standards of the United States Department of Housing and Urban Development. Additionally, the 2000 U.S. Census reports that, in San Jose, nearly 27,000 Extremely Low Income, 23,000 Very Low Income, and 20,000 Lower Income Households experienced a housing problem, which means a household is either spending more than 30% of its household income on housing costs or is living in overcrowded or substandard conditions, or both. Providing decent housing at affordable costs allows households to utilize their resources for other necessary pursuits, such as education, food, investment, and saving for retirement. Providing decent rental housing at affordable costs allows households to save money to purchase a home.

B. As stated in the City of San Jose 2020 General Plan (Appendix 3, Housing), it is the City's policy to enhance the public welfare by encouraging a variety of housing prices throughout the City to give households of all income levels the opportunity to find suitable housing. It is also the City's policy to identify adequate sites for the City's existing and projected housing needs (Appendix 3) and to encourage the geographic dispersal of affordable housing throughout the City to enhance the social and economic well-being of all residents (Appendix 3). The City can achieve its goals of providing more affordable housing and achieving an economically balanced community only if part of the new housing built in the City is affordable to households with limited incomes.

C. In order to meet the needs of San Jose households, dwelling units will need to house a variety of household types, incomes, and age groups. Pursuant to the San Jose 2020 General Plan, new homes should be located where adequate transportation, sanitation, water, and other infrastructure is available, and within reasonable proximity of education, recreation, and other amenities.

D. The San Jose 2020 General Plan also includes a policy that affordable housing be distributed throughout the City of San Jose, and not concentrated in any particular area or areas. To further this goal, this Chapter provides incentives for affordable housing to be constructed on the same site as the Market Rate Units in a development project.

E. The inclusionary ordinance codified in this Chapter will substantially advance the City's legitimate interest in providing additional housing affordable to all income levels and dispersed throughout the City because Inclusionary Units required by the ordinance codified in this Chapter, including both rental and ownership units, must be affordable to either Very Low, Lower, and Moderate Income Households.

F. The ordinance codified in this Chapter is being adopted pursuant to the City's police power authority to protect the public health, safety, and welfare. Requiring affordable units within each development is consistent with the community's housing element goals

of protecting the public welfare by fostering an adequate supply of housing for persons at all economic levels and maintaining both economic diversity and geographically dispersed affordable housing. Requiring builders of new market rate housing to provide some housing affordable to Very Low, Lower, and Moderate Income Households is also reasonably related to the impacts of their projects, because:

1. Rising land prices have been a key factor in preventing development of new affordable housing. New market-rate housing uses available land and drives up the price of remaining land. New development without affordable units reduces the amount of land development opportunities available for the construction of affordable housing.

2. New residents of market-rate housing place demands on services provided by both public and private sectors, creating a demand for new employees. Some of these public and private sector employees needed to meet the needs of the new residents earn incomes only adequate to pay for affordable housing. Because affordable housing is in short supply in the City, such employees may be forced to live in less than adequate housing within the City, pay a disproportionate share

of their incomes to live in adequate housing in the City, or commute ever increasing distances to their jobs from housing located outside the City. These circumstances harm the City's ability to attain employment and housing goals articulated in the City's General Plan and place strains on the City's ability to accept and service new market-rate housing development.

5.08.020 Purpose

The purpose of this Chapter is 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 goals and objectives of the General Plan and Housing Element.

The adoption of a Citywide inclusionary housing program will also assist in alleviating the use of available residential land solely for the benefit of households that are able to afford market rate housing because such market-rate development will be required to contribute to the provision of affordable housing for the entire San Jose community, and will assist in alleviating the impacts of the service needs of households in new market-rate residential development by making additional affordable housing available.

Redevelopment Project Areas are included in the Citywide inclusionary housing program in order to comply with the requirements of California Health and Safety Code section 33413(b), and in order to provide a single source for affordable housing requirements for all Residential Development and administration of the program.

The City Council desires to provide incentives in this Chapter for Inclusionary Units to be located upon the same site as market rate Residential Development to provide for integration of Very Low, Lower, and Moderate Income households with households in market rate neighborhoods and to disperse Inclusionary Units throughout the City where new residential development occurs.

The City Council also desires to provide and maintain affordable housing opportunities in the community through an inclusionary housing program for both ownership and rental housing, and, in furtherance of that goal, includes rental inclusionary housing requirements in this Chapter that shall become operative at such time as there is a change in the current law as expressed in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2nd Dist. 2009) 175 Cal.App.4th 1396.

The City Council also desires to provide the residential development community with alternatives to construction of the Inclusionary Units on the same site as the market rate Residential Development. Therefore, Part 5 of this Chapter, entitled Developers' Compliance Options, includes a menu of options from which a Developer may select an alternative to the construction of Inclusionary Units on the same site as the market rate Residential Development as required by Part 4 of this Chapter. Nothing in this Chapter shall deem or be used to deem the compliance options in Part 5, including but not limited to the in lieu fee authorized pursuant to Section 5.08.520, as an *ad* hoc exaction, as a mandated fee required as a condition to developing property, or as a fee subject to the analysis in *Building Industry Association of Central California v. City of Patterson* (5th Dist. 2009) 171 Cal.App.4th 886.

Part 2

Definitions

5.08.100 Definitions

The definitions set forth in this Part shall govern the application and interpretation of this Chapter. Words and phrases not defined in this Part 2 shall be interpreted so as to give this Chapter its most reasonable application.

5.08.105 Affordable Housing Cost

"Affordable Housing Cost" means the housing cost for Dwelling Units as defined by California Health & Safety Code section 50052.5 for owner-occupied housing and the affordable rent for rental units as defined by California Health & Safety Code section 50053, as applicable, except that the affordable rent for Moderate Income Rental Inclusionary Units that are located upon the same site as the Market Rate Residential Development shall be no more than thirty percent (30%) of eighty percent (80%) of Area Median Income.

5.08.110 Affordable Housing Dispersion Policy

"Affordable Housing Dispersion Policy" means the collective goals and policies in the San Jose 2020 General Plan and other policies adopted by the City Council to encourage the distribution of affordable income housing throughout all areas of the City of San Jose in order to avoid concentrations of low income households and encourage racial and economic integration. The Affordable Housing Dispersion Policy includes, but is not limited to, the following sections of the San Jose 2020 General Plan and any amendments thereto, and the following related policies adopted by the City Council as may be amended or supplemented from time to time:

A. San Jose 2020 General Plan, Chapter IV "Goals and Policies," Distribution and Low/Moderate Income Housing Policies;

B. San Jose 2020 General Plan, Chapter VI "Implementation," Housing Policy Goals of the Housing Assistance Program Objectives;

C. San Jose 2020 General Plan, Chapter VI "Implementation," Housing Programs Balanced Community Policy #2;

D. San Jose 2020 General Plan, Chapter VI "Implementation," Equal Housing Opportunities;

E. San Jose 2020 General Plan, Appendix C "Housing" (p. C67); and

F. San Jose City Council Resolution No. 67604, adopted August 26, 1997.

5.08.115 <u>Affordable Housing Fund</u>

"Affordable Housing Fund" means a fund or account designated by the City to maintain and account for all monies received pursuant to this Chapter and which shall comply with all of the requirements of the Community Redevelopment Law (California Health and Safety Code section 33000 *et seq.).*

5.08.120 <u>Affordable Housing Plan</u>

"Affordable Housing Plan" means a plan containing all of the information specified in and submitted in conformance with Section 5.08.610 of this Chapter specifying the manner in which Inclusionary Units will be provided in conformance with this Chapter and the Inclusionary Housing Guidelines, and consistent with the San Jose

General Plan and Title 20 of the San Jose Municipal Code.

5.08.125 Applicant

"Applicant" or "Developer" means a person, persons, or entity that applies for a Residential Development and also includes the owner or owners of the property if the Applicant does not own the property on which development is proposed.

5.08.130 Area Median Income

"Area Median Income" or "AMI" means the annual median income for Santa Clara County, adjusted for household size, as published periodically in the California Code of Regulations, Title 25, Section 6932, or its successor provision, or as established by the City of San Jose in the event that such median income figures are no longer published periodically in the California Code of Regulations.

5.08.135 Building Permit

The term "Building Permit" includes full structural building permits as well as partial permits such as foundation-only permits.

5.08.140 City Manager

"City Manager" means the City Manager of the City of San Jose or his or her designee.

5.08.145 Certificate of Occupancy

"Certificate of Occupancy" is the permit issued by the San Jose Building Division authorizing the initial occupancy of a residential unit, including a temporary certificate of occupancy.

5.08.150 Common Ownership or Control

"Common Ownership or Control" refers to property owned or controlled by the same person, persons, or entity, or by separate entities in which

any shareholder, partner, member, or family member of an investor of the entity owns ten percent (10%) or more of the interest in the property.

5.08.155 Construction Phase

"Construction Phase" means either:

A. The area included within one City approved tentative subdivision map for Residential Development where a single final map implements the entire approved tentative map;

B. The area included within each separate final map for Residential Development where multiple final maps implement the entire approved tentative map; or

C. An area designated as a Construction Phase in an approved Affordable Housing Plan.

5.08.160 Contiguous Property

"Contiguous Property" means any parcel of land that is:

A. Touching another parcel at any point;

B. Separated from another parcel at any point only by a public right of way, private street or way, or public or private utility, service, or access easement; or

C. Separated from another parcel only by other real property of the Applicant which is not subject to the requirements of this Chapter at the time of the Planning Permit application by the Applicant.

5.08.165 Deemed Substantially Complete

"Deemed Substantially Complete" is a term that applies to an application for a specific land use entitlement or entitlements that is requested by the Applicant and in accordance with Title 20 (Zoning) and Title 21 (Environmental Clearance) herein, and means that such application:

A. Accurately includes all data required on the appropriate Planning Permit checklist that is utilized upon the date of receipt of the application;

B. Is duly executed by the Applicant or the Applicant's authorized representative;

C. Includes the full payment of all required fees;

D. Includes an accurate and complete application for environmental clearance; and

E. Includes the Affordable Housing Plan required by Section 5.08.610.A.

5.08.170 Density Bonus Units

"Density Bonus Units" means Dwelling Units approved in a Residential Development pursuant to California Government Code section 65915 et *seq*. that are in excess of the maximum residential density otherwise permitted by the San Jose General Plan or zoning ordinance.'

5.08.175 Dwelling Unit

"Dwelling Unit" shall have the definition given for dwellings in Section 20.200.320, Section 20.200.330, and Section 20.200.340 of Chapter 20.200 of Title 20 of the San Jose Municipal Code.

5.08.180 Extremely Low Income Household

"Extremely Low Income Household" shall have the definition given in California Health & Safety Code section 50106.

5.08.185 First Approval

"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.

5.08.190 For-Sale

"For-Sale" means and refers to any Dwelling Unit, including a condominium, stock cooperative, community apartment, or attached or detached single family home, for which a parcel or tentative and final map is required for the lawful subdivision of the parcel upon which the Dwelling Unit is located or for the creation of the unit in accordance with the Subdivision Map Act (California Government Code section 66410 et seg.), or any Residential Development including such For-Sale Dwelling Units.

5.08.195 Inclusionary Housing Agreement

"Inclusionary Housing Agreement" means an agreement in conformance with Section 5.08.600 of this Chapter between the City and an Applicant, governing how the Applicant shall comply with this Chapter.

200 Inclusionary Housing Guidelines

"Inclusionary Housing Guidelines" means the requirements for implementation and administration of this Chapter adopted by the City Manager, in conjunction with the Executive Director of the San Jose Redevelopment Agency, pursuant to Section 5.08.730.A of this Chapter.

5.08.205 Inclusionant Unit

"Inclusionary Unit" means a Dwelling Unit required by this Chapter to be affordable to extremely low, very low, lower, or moderate income households.

5.08.210 Lower Income Household

"Lower Income Household" shall have the definition given in California Health & Safety Code section 50079.5.

5.08.215 Market Rate Unit

"Market Rate Unit" means a new Dwelling Unit in a Residential Development that is not an Inclusionary Unit as defined by Section 5.08.205.

5.08.220 Moderate Income Household

"Moderate Income Household" shall have the definition given in California Health & Safety Code section 50093(b), except that for the purposes of moderate income rental Inclusionary Units that are located upon the same site as the Market Rate Residential Development rental units, "Moderate Income Household" means a household earning no more than eighty percent (80%) of Area Median Income.

5.08.225 Operative Date

"Operative Date" shall have the definition given in Section 5.08.300.1 6

5.08.230 Physical Needs Assessment

"Physical Needs Assessment" means a report by a qualified housing professional identifying those items that are necessary repairs, replacements and maintenance at the time of the assessment or that will likely require repair or replacement within three (3) years of the assessment, and the estimated cost of all such items, which repair replacement and maintenance

must be completed prior to the approval of the unit as an Inclusionary Unit. For the purposes of this Section, a "qualified housing professional" is a Physical Needs Assessment firm that is approved for that purpose by the California Housing Finance Agency, or as may otherwise be approved as qualified pursuant to criteria in the Inclusionary Housing Guidelines.

5.08.235 Planning Permit

"Planning Permit" means a tentative map, parcel map, conditional use permit, site development permit, planned development permit, development agreement, or special use permit, or any discretionary permit excluding general plan amendments, zoning and rezoning, annexation, specific plans, and area development policies.

5.08.240 Redevelopment Project Area

"Redevelopment Project Area" means any area designated as a Redevelopment Project Area by the Council of the City of Jose pursuant to the provisions of the Community Redevelopment Law in California Health & Safety Code section 33000 et *seq*.

5.08.245 Rental

"Rental" means and refers to a Dwelling Unit that is not a For-Sale Dwelling Unit, and does not include any Dwelling Unit, whether offered for rental or sale, that may be sold as a result of the lawful subdivision of the parcel upon which the Dwelling Unit is located or creation of the unit in accordance with the Subdivision Map Act (California Government Code section 66410 et *seq.),* or any Residential Development including such Rental Dwelling Units.

5.08.250 Residential Development

"Residential Development" means any project requiring a Planning Permit for which an

application has been submitted to the City, and where the Residential Development:

A. Would create twenty (20) or more new, additional, or modified Dwelling Units by:

   1. The construction or alteration of structures,

   2. The conversion of a use to residential from any other use, or

   3. The conversion of a use to For-Sale residential from Rental residential use.

B. Is contiguous to property under Common Ownership or Control where the combined residential capacity of all of 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 twenty (20) or more residential units.

5.08.255 Surplus Inclusionary Unit

"Surplus Inclusionary Unit" means any Inclusionary Unit constructed in connection with Residential Development without any City or Redevelopment Agency subsidy which exceeds the numerical requirement for Inclusionary Units for that Residential Development pursuant to this Chapter.

5.08.260 Unit Type

"Unit Type" means any form of dwelling described in Section 20.200.320, Section 20.200.330, or Section 20.200.340 of Chapter 20.200 of Title 20 of the San JosO Municipal Code.

5.08.265 Utilities

"Utilities" means garbage collection, sewer, water, electricity, gas and other heating, cooling, cooking and refrigeration fuels.

5.08.270 Very Low Income Household

"Very Low Income Household" means a household earning no more than the amount defined by California Health & Safety Code section 50105.

Part 3

Operative Date and Applicability

5.08.300 Operative Date of Chapter

This Chapter shall be operative:

A. Six (6) months after the first day of the month following the first twelve (12) month consecutive period prior to January 1, 2013 in which two thousand five hundred (2,500) residential building permits have been issued by the City, with a minimum of one thousand two hundred fifty permits issued for Dwelling Units outside of the North San Jose Development Policy Area; or

B. January 1, 2013.

5.08.310 Applicability

The provisions of this Chapter shall apply to:

A. All Residential Development, as defined in Section 5.08.250 of this Chapter, except for any Residential Development exempt under Section 5.08.320 of this Chapter;

B. All Residential Development and Contiguous Property that is under Common Ownership or Control; and

C. Residential Development in Redevelopment Project Areas prior to the Operative Date of this ordinance by written agreement of the owner of the Residential Development and the San Jose Redevelopment Agency, or by adopted written policy of the San Jose Redevelopment Agency. In the event that this Chapter is implemented by the Redevelopment Agency in Redevelopment Project Areas prior to the Operative Date pursuant to this Subsection 5.08.310.C, the Redevelopment Agency may delegate to the City the administration of this Chapter as applied to Redevelopment Project Areas, including monitoring and reporting to the Redevelopment Agency and the State Department of Housing and Community Development such information as is required by law on outcome and affordability of Inclusionary Units in the Redevelopment Project areas.

5.08.320 <u>Exemptions</u>

This Chapter shall not apply to any of the following:

A. Projects that are not Residential Developments as defined in Section 5.08.250 of this Chapter.

B. Residential Developments with a total of less than twenty (20) Dwelling Units.

C. Residential Developments which are developed in accordance with the terms of a development agreement adopted by ordinance pursuant to the authority and provisions of California Government Code section 65864 et *seq*. and City Ordinance No. 24297, and that is executed prior to the Operative Date of the ordinance codified in this Chapter, provided that such Residential Developments 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.

D. Residential Developments which are developed in accordance with the terms of a disposition and development agreement pursuant to the authority and provision of California Health and Safety Code section 33000 et *seq.,* and that is approved by the Board of the San Jose Redevelopment Agency and is executed prior to the Operative Date of this Chapter, provided that such Residential Development shall comply with any affordable housing requirements included in the disposition and development agreement or any other law or policy in effect at the time of execution of the disposition and development agreement.

E. Residential Developments exempted by California Government Code section 66474.2 or 66498.1, provided that such Residential Developments shall comply with any

predecessor ordinance, resolution, or policy in effect on the date the application for the development was Deemed Substantially Complete.

F. Residential Developments for which a Planning Permit has been approved by the City no later than the Operative Date of this Chapter.

G. Residential Development in a Planned Community, as specified in the San Jose 2020 General Plan, and:

1. The Residential Development is not in the Redevelopment Project Area;

2. A Specific Plan was adopted by the City for the Planned Community prior to 1993;

3. The Specific Plan and/or a Planning Permit specifies that the Residential Development will occur in phases and authorizes the phased construction of new on-site and off-site infrastructure; and

4. One or more phases of the Residential Development, 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.

H. Planning Permit Expiration. Upon the expiration of any Planning Permit, and unless otherwise exempted, the Residential

Development shall be subject to the inclusionary housing requirements of this Chapter, and shall not proceed until such time as an Affordable Housing Plan is approved in conjunction with any other required Planning Permit or amendment thereto. This exemption shall not apply to any discretionary extension of a Planning Permit or Land Use approval beyond its initial term.

I. Limited Extension of Exemption Due to Delay. The City Manager, with the concurrence of the Redevelopment Executive Director whenever the Residential Development is in a Redevelopment Project Area, may grant a request for an extension of the timelines in this Section exempting Residential Development from this Chapter where a change in federal, state or local law would cause the need for a material redesign of the approved Residential Development that would render any of the approved land use entitlements, if implemented as approved, in violation of federal, state, or local law and would require amendment or revision of the Planning Permit.

Part 4

Affordable Housing Requirements

5.08.400 Inclusionary Housing Requirement

All new Residential Developments and Contiguous Property under Common Ownership and Control shall include Inclusionary Units. Calculations of the number of Inclusionary Units required by this Section shall be based on the number of Dwelling Units in the Residential Development, excluding any Density Bonus Units as defined in Section 5.08.170 of this Chapter.

A. On-Site Inclusionary Requirement. Unless otherwise exempted or excepted from this Chapter, Residential Developments shall include Inclusionary Units upon the same site as the Residential Development as follows:

a. For-Sale Residential Development: Fifteen percent (15%) of the total Dwelling Units in the Residential Development shall be made available for purchase at an Affordable Housing Cost to those households earning no more than one hundred ten percent (110%) of the Area Median Income. Such units may be sold to households earning no more than one hundred twenty percent (120%) of the Area Median Income.

b. Rental Residential Development: Nine percent (9%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Moderate Income Households, and six percent (6%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Very Low Income Households.

This Subsection 5.08.400.A.1.b shall be operative at such time as current appellate case law in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2nd Dist. 2009) 175 Cal.App.4th 1396, is overturned, disapproved, or depublished by a court of competent jurisdiction or modified by the state legislature to authorize control of rents of Inclusionary Units.

B. Limited Waiver. Excepted from the requirements of this Section is any Dwelling Unit that would otherwise be required to be a Moderate Income Inclusionary Unit for which an application for waiver of the terms of the subordinate shared appreciation documents required by Section 5.08.600.A herein has been granted by the City Manager. Such an application shall be granted when the Affordable Housing Cost is within five percent (5%) of the appraised unrestricted market value of the unit. The approval of any application pursuant to this Subsection 5.08.400.B shall terminate upon the earlier of the sale in accordance with Subsections 1 through 3 herein of the Inclusionary Unit for which the limited waiver has been granted pursuant to this Section, or six (6) months following approval of the limited waiver by the City Manager, unless such term is extended by the City Manager because the unit continues to qualify for the waiver in accordance with the requirements of this Section. An Inclusionary Unit that is subject to an approved subordinate shared appreciation waiver shall:

1 Be sold at or below the Affordable Housing Cost;

2. The Inclusionary Unit shall initially be owner-occupied;

3. No income verification shall be required by the City of the purchaser of such an Inclusionary Unit; and

4. The requirements of the subordinate shared appreciation documents executed pursuant to Section 5.08.600 of this Chapter shall be waived by the City. The subordinate shared appreciation waiver in this Subsection B shall be administered in accordance with this Chapter and the Inclusionary Housing Guidelines.

5.08.410 Fractional Units

In computing the total number of Inclusionary Units required in a Residential Development, 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.

5.08.420 Contiguous Property under Common Ownership and Control

An Applicant for a Planning Permit shall not avoid the requirements of this Chapter by submitting piecemeal Planning Permit applications. At the time of the application for First Approval for the Residential Development, the Applicant shall identify all Contiguous Property under Common Ownership and Control. The Applicant shall not be required to construct dwelling units upon the Contiguous Property at the time of the application

for First Approval; however, the Applicant shall be required to include the Contiguous Property under Common Ownership or Control in its Affordable Housing Plan. The Inclusionary Housing Agreement shall be recorded against the Residential Development and all Contiguous Property under Common Ownership or Control and shall require compliance with this Chapter upon development of each Contiguous Property at such time as there are Planning Permit applications that would authorize a total of twenty (20) or more residential units for the Residential Development and the Contiguous Property under Common Ownership or Control.

5.08.430 Residential Development With Overlapping Inclusionary Requirements

When overlapping inclusionary housing requirements could be applied to a Residential Development pursuant to this Chapter because the Residential Development is located upon a parcel or parcels subject to more than one of the requirements in this Section, the entire Residential Development shall be subject to the requirement that results in the production of the greatest amount and greatest depth of affordability of Inclusionary Dwelling Units.

5.08.440 Residential Development with Both For-Sale and Rental Units

When a Residential Development includes both For-Sale and Rental Dwelling Units, the provisions of this Chapter that apply to For-Sale Residential Development shall apply to that portion of the development that consists of For-Sale Dwelling Units, while the provisions of this Chapter that apply to Rental Residential Development shall apply to that portion of the development that consists of Rental Dwelling Units.

5.08.450 On-Site Inclusionary Housing Incentives

The Developer of a Residential Development providing all required Inclusionary Units upon the same site as the market-rate units pursuant to Section 5.08.400 may, at the Developer's sole option and concurrently with the submittal of the Affordable Housing Plan, and the earlier of the zoning or Planning Permit application for requests pursuant to Subsections 2 and 3 herein, submit a written request for one or more of the following on-site inclusionary housing development incentives:

1. Density Bonus. The Residential Development may receive a density bonus if the Residential Development includes the provision of affordable Inclusionary Units within the Residential Development that meets the minimum thresholds for density bonus pursuant to California Government Code section 65915 et *seq*. For Residential Projects qualifying for a density bonus pursuant to this Subsection 1, the City shall, upon request of the Applicant at the time of application for the First Approval, authorize a density bonus in the amount specified in California Government Code section 65915 unless such a density bonus would cause a specific adverse impact to the public health, safety and welfare, including but not limited to historic or natural resources or the environment. The City shall not provide any other

incentives or concessions, other than those listed in this Section 5.08.450, in addition to such density bonus.

2. Flexible Parking Standards. The Developer may request a reduction in the maximum number of parking spaces required or other parking requirements for the Residential Development pursuant to Title 20 herein, which shall not cause a specific adverse impact to the public health, safety and welfare, including but not limited to historic or natural resources or the environment, and which also complies with the minimum requirements for the provision of parking for the disabled.

3. Reduction in Minimum Setback Requirements. The Developer may request a reduction in the minimum setback requirements for the Residential Development, which shall not cause a specific adverse impact to the public health, safety and welfare, including but not limited to historic or natural resources or the environment.

4. Alternative Unit Type. The Developer may request to provide Inclusionary Units within the Residential Development that are of a different Unit Type than the Market Rate Units within the Residential Development. The Inclusionary Units shall have the

same bedroom count and percentage distribution among the units as the Market Rate Units.

5. Alternative Interior Design Standards. Except as may otherwise be required by federal or state law, the Developer shall provide the same amenities for the Inclusionary Units as the Market Rate Units, but may request to provide different but functionally equivalent amenities for the Inclusionary Units within the Residential Development than the Market Rate Units.

6. City Process Assistance. The Developer may request the City to provide assistance to the Developer by explaining the City's development review process for the Residential Development, financing alternatives, and assistance in the sale or rental of the Inclusionary Units to qualified households at an Affordable Housing Cost. The City shall provide assistance as to the City's requirements for such Inclusionary Housing only, and shall not be considered in any manner an employee, agent or consultant of the Developer.

7. Financial Subsidies. The Developer may apply for financial subsidies for the Inclusionary Units from any available federal and state funding

sources, or may work with the City to apply for such sources on its behalf. The Developer may also apply for financial subsidy from City-administered funds for the difference in costs that results if the Developer provides more Inclusionary Housing Units or all units in the Residential Development as Inclusionary Units at an Affordable Housing Cost to households in income classifications that are lower than required for the Residential Development pursuant to Section 5.08.400.

B. Affordable Housing Plan. The incentives requested by the Developer of the Residential Development shall be included in the proposed Affordable Housing Plan submitted at the time of application for the First Approval, and any incentives authorized by the City pursuant to this Section 5.08.450 shall be included in the Affordable Housing Plan, if approved by the City, for the Residential Development.

C. Inclusionary Housing Guidelines. The provision of incentives pursuant to this Section 5.08.450 shall also be in accordance with the Inclusionary Housing Guidelines.

5.08.460 Timing of Construction of Inclusionary Units

A. All required Inclusionary Units shall be made available for occupancy concurrently with the Market Rate Units. For the

purposes of this subsection, "concurrently" means:

1. When the Inclusionary Units require construction and building permits therefor, for each Building Permit issued for an Inclusionary Unit the City may issue no more than six (6) Building Permits for Market Rate Units, and the City may not approve any final inspections for single-family detached homes, or any certificates of occupancy for all other residences, unless at least fifteen percent (15%) of all final inspections or certificates of occupancy, as appropriate, in the Residential Development have been approved for Inclusionary Units.

2. When the Inclusionary Units do not require construction and Building Permits therefor, upon authorization for occupancy by the City of each Inclusionary Unit at an Affordable Housing Cost, the City may issue no more than five (5) Building Permits for Market Rate Units, and the City may not approve any final inspections for single-family detached homes, or any certificates of occupancy for all other residences, unless at least twenty percent (20%) of all Inclusionary Units for the Residential Development have been authorized for occupancy at an Affordable Housing Cost by the City.

B. The City may not issue Building Permits for more than ninety percent (90%) of the Market Rate Units within a Construction Phase in a Residential Development until it

has issued Building Permits, or authorized for occupancy at an Affordable Housing Cost as applicable, for all of the Inclusionary Units to be included in that Construction Phase. The City may also not approve final inspections for single-family detached homes, or certificates of occupancy for all other residences, for more than ninety percent (90%) of the Market Rate Units within a Construction Phase until it has approved final inspections or certificates of occupancy, as appropriate, or authorized for occupancy at an Affordable Housing Cost as applicable, for all of the Inclusionary Units within that Construction Phase.

C. The Applicant may elect to comply with the requirements of this Chapter by utilizing any of the Applicant's options under Part 5 of this Chapter. The phasing requirements of Subsections A and B shall not apply to any in lieu Inclusionary Unit credit pursuant to Sections 5.08.520 (In Lieu Fee), 5.08.530 (Dedication of Land), and 5.08.560 (HUD-Restricted Units).

D. Subject to the approval of the City Manager, the Applicant may alternatively elect to contract with an affordable housing Developer with experience in obtaining tax-exempt bonds, low income housing tax credit financing, and other competitive sources of financing, that is approved by the City to construct all or part of the Inclusionary Units required by Section 5.08.400. The

Inclusionary Housing Agreement required in Section 5.08.600 of this Chapter shall contain specific assurances guaranteeing the timely completion of the required Inclusionary Units, including satisfactory assurances that construction and permanent financing will be secured for the construction of the units within a reasonable time. The Inclusionary Housing Agreement shall include provisions for the payment of the City's costs of monitoring and administration of compliance with the requirements of this Chapter. After the Inclusionary Housing Agreement is approved by the City, then the phasing requirements of Subsection B apply only to Inclusionary Units not included in the contract with the City-approved affordable housing Developer. Off-site projects by a City-approved affordable housing Developer where all units are affordable to Lower Income Households are exempted from the timing requirements of this Section 5.08.460.

5.08.470 <u>Standards for Inclusionary Units</u>

A. Single-family detached Inclusionary Units shall be dispersed throughout the Residential Development. Townhouse, row-house, and multifamily Inclusionary Units shall be located so as not to create a geographic concentration of Inclusionary Units within the Residential Development.

B. The quality of exterior design and overall quality of construction of the Inclusionary

Units shall be consistent with the exterior design of all Market Rate Units in the Residential Development and meet all site, design, and construction standards included in Title 17 (Buildings and Construction), Title 19 (Subdivisions), and Title 20 (Zoning) of this Code, including but not limited to compliance with all design guidelines included in applicable specific plans or otherwise adopted by the City Council, and the Inclusionary Housing Guidelines.

Inclusionary Units shall have functionally equivalent parking when parking is provided to the Market Rate Units.

C. Inclusionary Units may have different interior finishes and features than Market Rate Units in the same Residential Development, as long as the finishes and features are functionally equivalent to the Market Rate Units and are durable and of good quality and comply with the Inclusionary Housing Guidelines.

The Inclusionary Units shall have the same amenities as the Market Rate Units, including the same access to and enjoyment of common open space and facilities in the Residential Development.

E. The Inclusionary Units shall have the same proportion of Unit Types as the Market Rate Units in the Residential Development except:

1. Single family detached Residential Projects may include single family attached Inclusionary Units;

2. Single-family detached Inclusionary Units may have smaller lots than

single-family detached Market Rate Units in a manner consistent with Title 20 of this Code; and

3. Inclusionary Units made available for rent may consist of any Unit Type selected by the Applicant.

F. The Inclusionary Units shall have a comparable square footage and the same bedroom count and bedroom count ratio as the Market Rate Units.

5.08.480 Minimum Requirements

The requirements of this Chapter are minimum requirements and shall not preclude a Residential Development from providing additional affordable units or affordable units with lower rents or sales prices than required by this Chapter.

Part 5

Developers' Compliance Options

5.08.500 Developers' Compliance Options

A. On-Site. A Developer may construct on-site inclusionary rental units where the Developer would otherwise be required by this Chapter to construct on-site inclusionary for-sale units. If a Developer desires to construct on-site inclusionary rental units in lieu of on-site inclusionary for-sale units, the requirement for such on-site rental inclusionary units shall be:

1. Nine percent (9%) of the total Dwelling Units in the Residential Development shall be made available for rent at an

Affordable Housing Cost to Moderate Income Households, and six percent (6%) of the total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Very Low Income Households.

B. Off-Site. As an alternative to providing Inclusionary Units upon the same site as the Market Rate Residential Development required by Part 4 of this Chapter, the Developer may select any of the compliance options in Sections 5.08.510 through 5.08.570 of this Chapter. If the Developer selects any of the compliance options in Sections 5.08.510 through 5.08.570 of this Chapter, the basis for the inclusionary housing requirement shall be that no less than twenty percent (20%) of the total of all units in the Residential Development shall be Inclusionary Units, unless otherwise specified.

Where the market rate Residential Development is located in a Redevelopment Project Area, the off-site Inclusionary Units for the Residential Development shall be located within the same Redevelopment Project Area unless, at the time of submission of the Affordable Housing Plan, the Developer has petitioned and provided credible documentation in writing to the City and the San Jose Redevelopment Agency that there is insufficient available land within the Redevelopment Project Area to construct the off-site Inclusionary Units, in which event such Inclusionary Units shall be

constructed upon a site approved by the City and the San Jose Redevelopment Agency in another Redevelopment Project Area in the City.

5.08.510 Off-Site Construction

The inclusionary housing requirement in Section 5.08.400 may be satisfied by the construction of affordable housing on a site different from the site of the Residential Development in lieu of constructing the affordable units within the Residential Development as follows:

A. For-Sale Residential Development:

1. Off-site for-sale inclusionary units numbering no less than twenty percent (20%) of the total dwelling units in the Residential Development shall be made available for purchase at an Affordable Housing Cost to those households earning no more than one hundred ten percent (110%) of the Area Median Income; or

2. Off-site rental inclusionary units numbering no less than twelve percent (12%) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Lower Income Households, and off-site rental dwelling units numbering no less than eight percent (8%) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Very Low Income Households.

B. Rental Residential Development: Off-site rental inclusionary units numbering no less

than twelve percent (12%) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to Lower Income Households, and off-site rental inclusionary units numbering no less than eight percent (8%) of the total dwelling units in the Residential Development shall be made available for rent at an Affordable Housing Cost to those Very Low Income Households.

C. Additional Requirements for Off-Site For-Sale and Rental Residential Inclusionary Units. All Inclusionary Units constructed off-site of the Residential Development shall also comply with all of the following criteria:

1. The site of the inclusionary housing conforms to the City's Affordable Housing Dispersion Policy;

2. The site has a General Plan designation that authorizes residential uses and is zoned for Residential Development at a density to accommodate at least the number of otherwise required Inclusionary Units within the Residential Development.

3. The site is suitable for development of the Inclusionary Units in terms of configuration, physical characteristics, location, access, adjacent uses, and other relevant planning and development criteria.

Environmental review for the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and all such hazards are or shall be mitigated to the satisfaction of the City prior to acceptance of the site by the City.

4. The construction schedule for the off-site Inclusionary Units shall be included in the Affordable Housing Plan and the Inclusionary Housing Agreement.

5. Construction of the off-site Inclusionary Units shall be completed prior to or concurrently with the Market Rate Residential Development pursuant to Section 5.08.460.

5.08.520 <u>In Lieu Fee</u>

A. The inclusionary housing requirement in Section 5.08.400 may be satisfied by the payment of a fee to the City in lieu of constructing the affordable units within the Residential Development, provided that such fee is received by the City after the issuance of the development permit for the project, but prior to the issuance of the certificate of occupancy for the first Market Rate Unit in the Residential Development.

B. In lieu fees shall be as follows:

1. <u>For-Sale Residential Development:</u> The in lieu fee for each For-Sale Inclusionary Unit shall be no greater

than the difference between the median sales price of an attached Market Rate Unit in the prior thirty six (36) month reporting period specified in the Inclusionary Housing Guidelines and the Affordable Housing Cost for a household of 2.5 persons earning no more than one hundred ten percent (110%) of the Area Median Income.

2. Rental Residential Development:

a. The in lieu fee for each Rental Inclusionary Unit shall be:

(1) No greater than the average City subsidy required for new construction of a rental residential unit at an Affordable Housing Cost for a Lower Income Household, with changes in the fee based upon commitments of City affordable housing development funding in the prior twelve (12) month reporting period specified in the Inclusionary Housing Guidelines when there are three (3) or more such City-subsidized rental affordable new construction projects

during the reporting period; or

(2) In the event that there are less than three (3) City-subsidized rental affordable housing new construction projects within any twelve (12) month reporting period, the in lieu fee shall be updated annually using the change in the Northern California Real Estate Construction Report published by the Real Estate Research Council of Southern California at California State Polytechnic University, Pomona. The change in the in lieu fee shall be based upon the percentage difference in the New Home Prices in Santa Clara County published in the fourth quarter for the then current year from the immediately preceding year as published in the Northern California Real Estate Construction Report.

b. Subsection 5.08.520.6.2.a shall be operative at such time as current appellate case law in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2nd Dist. 2009) 175 Cal.App.4th 1396, is overturned, disapproved, or depublished by a court of competent jurisdiction or modified by the state legislature to authorize control of rents of Inclusionary Units.

C. The amount of in lieu fees shall be established in accordance with the provisions of this Section 5.08.520 by the City Council's annual resolution establishing the Schedule of Fees and Charges, or as established otherwise by resolution of the City Council, and may include in the fee the actual estimated costs of administration and the estimated cost of increases in the price of housing and construction from the time of payment of the in lieu fee to the estimated time of provision of the affordable units by the City. The amount of the in lieu fee shall be updated periodically, as required.

D. The in lieu fee pursuant to this Section 5.08.520 may be reduced for Residential Development of ten (10) or more floors or stories in height not including any non-residential uses (High Rise Residential Development) in any specified area of the City by City Council resolution or policy providing incentives for the provision of

high density Residential Development. The reduction of in lieu fees pursuant to this Subsection 5.08.520.D shall only apply through the adoption by the City Council of a resolution or policy for all such development and shall not apply to individual High Rise Residential Development projects.

E. No certificate of occupancy shall be issued by the City for any Market Rate Unit in the Residential Development prior to the payment in full of all in lieu fees to the City. The Developer shall provide both notice by recorded document against the Residential Development and, additionally, for each For-Sale Dwelling Unit therein, the Developer shall provide specific written notice to any purchaser of any Dwelling Unit prior to the acceptance of any offer to purchase, and shall obtain executed acknowledgement of the receipt of such notice, that purchaser shall not have any right to occupy the Dwelling Unit until such time as all in lieu fees owing for the Residential Development are paid to the City.

F. All in lieu fees collected under this Section shall be deposited in the City of San Jose Affordable Housing Fee Fund established pursuant to Section 5.08.700 of this Chapter.

5.08.530 <u>Dedication of Land In Lieu of Construction of Inclusionary Units</u>

A. The inclusionary housing requirement in Section 5.08.400 may be satisfied by the dedication of land in lieu of constructing

Inclusionary Units within the Residential Development if the City Manager determines that all of the following criteria, as implemented by in the Inclusionary Housing Guidelines, have been met:

1. Marketable title to the site is transferred to the City, or an affordable housing Developer approved by the City, prior to the commencement of construction of the Residential Development pursuant to an agreement between the Developer and the City and such agreement is in the best interest of the City.

2. The site has a General Plan designation that authorizes residential uses and is zoned for Residential Development at a density to accommodate at least the number of otherwise required Inclusionary Units within the Residential Development, and conforms to City development standards.

3. The site is suitable for development of the Inclusionary Units in terms of configuration, physical characteristics, location, access, adjacent uses, and other relevant planning and development criteria including, but not limited to, factors such as the cost of construction or development arising from the nature, condition, or location of the site.

4. Infrastructure to serve the dedicated site, including but not limited to

streets and public utilities, must be available at the property line and have adequate capacity to serve the maximum allowable residential development pursuant to zoning regulations.

5. Environmental review of the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and all such hazards are or will be mitigated to the satisfaction of the City prior to acceptance of the site by the City.

6. The value of the site upon the date of dedication is equal to or greater than the in lieu fee in effect at the date of dedication multiplied by the number of otherwise required Inclusionary Units within the Residential Development.

7. The dedicated site complies with the City's Affordable Housing Dispersion Policy, or meets other City General Plan policies such as being located near transit.

B. The City shall not be required to construct restricted income units on the site dedicated to the City, but may sell, transfer, lease, or otherwise dispose of the dedicated site. Any funds collected as the result of a sale, transfer, lease, or other disposition of sites dedicated to the City shall be deposited into the City of San Jose Affordable Housing Fee

Fund and used in accordance with the provisions of Section 5.08.700.

5.08.540 Credits and Transfers

The inclusionary housing requirement in Section 5.08.400 may be satisfied by the purchase of credits for Inclusionary Units from a Developer of inclusionary housing in lieu of constructing Inclusionary Units within the Residential Development if the City Manager determines that all of the following criteria are met:

A. A Developer who constructs a Surplus Inclusionary Unit may utilize such Surplus Inclusionary Unit to satisfy the inclusionary housing requirement for future Residential Development for a period of no more than five (5) years after issuance of the certificate of occupancy for the Surplus Inclusionary Unit.

B. A Developer who constructs a Surplus Inclusionary Unit may sell or otherwise transfer the Surplus Inclusionary credit to another Developer in order to satisfy, or partially satisfy, the transferee Developer's inclusionary housing requirement.

C. The inclusionary housing restrictions shall be recorded against the market rate Residential Development and the Inclusionary Unit pursuant to this Chapter and the Inclusionary Housing Guidelines. The restrictions on the Inclusionary Unit shall commence upon the initial sale or rental of the Inclusionary Unit at the Affordable Housing Cost occurring subsequently to the approval of the

Affordable Housing Plan in which the Inclusionary Unit is offered to satisfy the requirements of this Chapter.

D. The transferee Developer who utilizes any Surplus Inclusionary Housing credit shall comply with the timing requirements for Inclusionary Units to be made available for occupancy concurrently with the Market Rate Units in the Residential Development pursuant to Section 5.08.460.

5.08.550 <u>Acquisition and Rehabilitation of Existing Units</u>

The inclusionary housing requirement in Section 5.08.400 may be satisfied by the acquisition and rehabilitation of existing Market Rate Units for conversion to units affordable to Lower or Very Low Income Households only, in lieu of constructing Inclusionary Units within the Residential Development, if the City Manager determines that all of the following criteria are met:

A. The value of the rehabilitation work is twenty five percent (25%) or more than the value of the Dwelling Unit prior to rehabilitation, inclusive of land value. The Inclusionary Housing Guidelines shall include criteria for the determination of value.

Two (2) Dwelling Units shall be rehabilitated, in lieu of each single Inclusionary Unit required pursuant to this Part 5.

B. The Developer is providing all costs of notice to and relocation of existing residents in the residential units to be rehabilitated, and as further required by the Inclusionary Housing Guidelines.

C. The site has a General Plan designation that authorizes residential uses and is zoned for Residential Development at a density to accommodate at least the number of rehabilitated units.

D. The use of the site of the Dwelling Units to be rehabilitated shall not constitute a nonconforming use.

E. The rehabilitated Dwelling Units shall comply with all current applicable Building and Housing Codes.

F. A Physical Needs Assessment to the satisfaction of the City shall be performed on each Dwelling Unit to be acquired and rehabilitated, the property upon which it is located, and any associated common area, and all items identified in the Physical Needs Assessment needing repair, replacement and maintenance at the time of the Assessment or that will likely require repair or replacement within three (3) years of the Assessment shall be completed prior to the approval of the Dwelling Unit as an Inclusionary Unit. The Developer shall include in the Affordable Housing Plan the method 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.

G. Environmental review of the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and is clear of all such hazards to the satisfaction of the City.

The construction schedule for the units to be rehabilitated in lieu of providing Inclusionary Units shall be included in the Affordable Housing Plan.

J. The rehabilitation of the Dwelling Units shall be completed prior to or concurrently with the Market Rate Residential Development pursuant to Section 5.08.460.

K. The inclusionary housing restrictions shall be recorded against the Market Rate Residential Development and the rehabilitated Dwelling Units pursuant to this Chapter and the Inclusionary Housing Guidelines. The restrictions on the rehabilitated Dwelling Units shall commence upon the initial sale or rental of the rehabilitated Dwelling Unit at the Affordable Housing Cost occurring subsequent to the approval of the Affordable Housing Plan in which the rehabilitated units are offered to satisfy the requirements of this Chapter.

L. Rehabilitated Dwelling Units shall be owner-occupied in lieu of the provision of Inclusionary Units for owner-occupied Residential Development; while rehabilitated Dwelling Units shall be rental

units in lieu of the provision of Inclusionary Units for rental Residential Development.

M. The bedroom count of the Dwelling Units to be rehabilitated shall be substantially the same as the Market Rate Residential Development, as set forth in the Inclusionary Housing Guidelines.

N. The term of affordability of the Inclusionary Units to be provided pursuant to this Section 5.08.550 shall be as set forth in Section 5.08.600.B. and shall commence upon initial occupancy of the Inclusionary Units to the targeted income group at an Affordable Housing Cost.

0. Inclusionary Units provided pursuant to this Section 5.08.550 shall not be eligible for use for credits and transfers pursuant to Section 5.08.540.

5.08.560 <u>HUD Restricted Units</u>

The inclusionary housing requirement in Section 5.08.400 may be satisfied through the provision of units that are restricted to Affordable Housing Cost for Lower or Very Low Income Households by agreement between the Applicant and the U.S. Department of Housing and Urban Development (HUD) in lieu of constructing Inclusionary Units within the Residential Development, if the City Manager determines that all of the following criteria are met:

A. The agreement between the Applicant and HUD for the provision at the Affordable Housing Cost of the residential unit to Lower or Very Low Income Households shall expire after the Operative Date of this Chapter.

B. Two (2) HUD-restricted Dwelling Units shall be provided in lieu of each single Inclusionary Unit required pursuant to this Part 5.

C. The use of the site of any unit proposed to be provided as an Inclusionary Unit pursuant to this Section 5.08.560 shall not constitute a nonconforming use.

D. The Dwelling Units shall comply with all current applicable Building and Housing Codes.

E. The Affordable Housing Plan and Inclusionary Housing Agreement shall include provision for a Physical Needs Assessment to be performed to the satisfaction of the City no more than six (6) months prior to the termination of the agreement between the Applicant and HUD. Such an assessment shall be performed on each Dwelling Unit to be occupied as an Inclusionary Unit, the property upon which it is located, and any associated common area. All items identified in the Physical Needs Assessment needing repair, replacement and maintenance at the time of the Assessment or that will likely require repair or replacement within three (3) years of the Assessment shall be completed prior to the acceptance of the Dwelling Unit as an Inclusionary Unit. The Developer shall include in the Affordable Housing Plan and the Inclusionary Housing Agreement the method 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.

F. Environmental review of the site has been completed for the presence of hazardous materials and geological review for the presence of geological hazards and is clear of all such hazards to the satisfaction of the City.

G. The units to be provided as Inclusionary Units shall be included in the Affordable Housing Plan.

H. The inclusionary housing restrictions shall be recorded against the Market Rate Residential Development and the Inclusionary Units to be provided pursuant to this Section 5.04.560 in accordance with this Chapter and the Inclusionary Housing Guidelines. Unless otherwise specified in this Section 5.08.560, the restrictions on the Inclusionary Units shall be for 40 years and shall commence upon the initial sale or rental of the first Market Rate Unit in the Residential Development subsequent to the approval of the Affordable Housing Plan in which the Inclusionary Units are offered to satisfy the requirements of this Chapter.

I. The restrictions on the Inclusionary Units to be provided pursuant to this Section 5.08.560 shall run concurrently with the agreement between the Applicant and HUD providing

the unit at an Affordable Housing Cost to Lower or Very Low Income Household. However, if the agreement between the Applicant and HUD terminates prior to the prior to 40 year term required by Subsection 5.08.560.F, then the Developer shall provide the Inclusionary Units for the balance of the term in accordance with the requirements of this Chapter, unless the agreement between the Applicant and HUD terminates because federal funding for the program is no longer available in which event the Developer shall provide the Inclusionary Units for five (5) years after the termination of the HUD agreement.

J. Inclusionary Units provided pursuant to this Section 5.08.560 shall not be eligible for use for credits and transfers pursuant to Section 5.08.540.

5.08.570 <u>Combination of Methods to Provide Inclusionary Housing</u>

The Developer of a Residential Development may propose any combination of basic inclusionary options pursuant to Section 5.08.400 and/or in lieu options pursuant to Part 5 of this Chapter in order to comply with the provisions of this Chapter. Such proposals shall be made in the Affordable Housing Plan, shall be considered by the City in accordance with this Chapter and the Inclusionary Housing Guidelines, and approved 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 is as required pursuant to Section 5.08.400 where all affordable housing will be provided on-site of the Residential Development or pursuant to Part 5

where the affordable housing will be provided both on-site and off-site or entirely off-site of the Residential Development.

5.08.580 Density Bonus Not Applicable

The options for provision of Inclusionary Units pursuant to Part 5 of this Chapter shall not also be used to obtain a Density Bonus for the Residential Development or any site upon which an option pursuant to Part 5 has been exercised by the Applicant for the Residential Development.

Part 6

Continuing Affordability

5.08.600 Continuing Affordability And Initial Occupancy

A. The Inclusionary Housing Guidelines shall include standard documents, in a form approved by the City Attorney, to ensure the continued affordability of the Inclusionary Units approved for each Residential Development. The documents may include, but are not limited to, Inclusionary Housing Agreements, regulatory agreements, promissory notes, deeds of trust, resale restrictions, rights of first refusal, options to purchase, and/or other documents, and shall be recorded against the Residential Development, all Inclusionary Units, and any site subject to the provisions of this Chapter. Affordability documents for For-Sale owner-occupied Inclusionary Units shall also include subordinate shared appreciation documents 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.

B. Unless otherwise specified by the Chapter, all Inclusionary Units shall remain affordable to the targeted income group for no less than the time periods set forth in California Health and Safety Code sections 33413(c)(1) and (2). A longer term of affordability may be required if the Residential Development receives a subsidy of any type, including but not limited to loan, grant, mortgage financing, mortgage insurance, or rental subsidy, and the subsidy program requires a longer term of affordability, or as prescribed in the Inclusionary Housing Guidelines.

C. Unless otherwise required by law, all promissory note repayments, shared appreciation payments, or other payments collected under this Section shall be deposited in the City of San Jose Affordable Housing Fee Fund established pursuant to Section 5.08.700 of this Chapter.

D. Any household that occupies an Inclusionary Unit must occupy that unit as its principal residence, unless otherwise approved in writing by the City Manager for rental to a third party for a limited period of time due to household hardship, as specified in the Inclusionary Housing Guidelines.

E. Nonprofit affordable housing providers and government agencies may apply to the City for purchase of Inclusionary Housing Units for the purpose of sale or rental to eligible

households so long as all of the terms of the Inclusionary Housing Agreement apply.

F. No household may begin occupancy of an Inclusionary Unit until the household has been determined to be eligible to occupy that unit. Rental inclusionary units shall continue to be rented to income eligible households at an Affordable Housing Cost for the entire term of the inclusionary housing restriction. The Inclusionary Housing Guidelines shall establish standards for determining household income, maximum occupancy, Affordable Housing Cost, provisions for continued monitoring of tenant eligibility, and other eligibility criteria.

G. Officials, employees, or consultants of the City or Redevelopment Agency, and members of Boards and Commissions thereof, shall comply with all applicable laws, regulations, and policies relating to conflicts of interest as to their eligibility to develop, construct, sell, rent, lease, occupy, or purchase an Inclusionary Unit. The Inclusionary Housing Guidelines may include conflict of interest provisions relating to the administration of this Chapter and the eligibility of persons to occupy Inclusionary Units pursuant to this Chapter.

5.08.610 <u>Affordable Housing Plan Submittal And Inclusionary Housing Agreement</u>

A. An Affordable Housing Plan shall be submitted as part of the application for First

Approval of any Residential Development. No application for a First Approval for a Residential Development may be deemed complete unless an Affordable Housing Plan is submitted in conformance with the provisions of this Chapter.

B. For each Construction Phase, the Affordable Housing Plan shall specify, at the same level of detail as the application for the Residential Development, all of the following information including, but not limited to:

1. Whether the development is for sale or rental;

2. How the inclusionary housing requirement will be satisfied pursuant to this Chapter;

3. The number, Unit Type, tenure, number of bedrooms and baths, approximate location, size and design, construction and completion schedule of all Inclusionary Units;

4. Phasing of Inclusionary Units in relation to Market Rate Units;

5. Marketing plan, including the manner in which Inclusionary Units will be offered to the public in a nondiscriminatory and equitable manner;

6. Specific methods to be used to verify tenant incomes, when applicable, and to maintain the affordability of the Inclusionary Units;

7. A reliable financing mechanism for the ongoing administration and monitoring of rental Inclusionary Units;

8. The Physical Needs Assessment where applicable, the manner in which repairs shall be made in compliance with this Chapter, and 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

9. Any other information that is reasonably necessary to evaluate the compliance of the Affordable Housing Plan with the requirements of this Chapter and the Inclusionary Housing Guidelines.

C. Upon submittal, the City Manager shall determine if the Affordable Housing Plan is complete and conforms to the provisions of this Chapter and the Inclusionary Housing Guidelines. 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 Jose Municipal Code.

D. The Affordable Housing Plan shall be reviewed as part of the First Approval of any Residential Development. The

Affordable Housing Plan shall be approved if it conforms to the provisions of this Chapter and the inclusionary Housing Guidelines. A condition shall be attached to the First Approval of any Residential Development to require recordation of the Inclusionary Housing Agreement described in Subsection G of this Section prior to the approval of any final or parcel map or building permit for the Residential Development.

E. A request for a minor modification of an approved Affordable Housing Plan may be granted by the City Manager if the modification is substantially in compliance with the original Affordable Housing Plan and conditions of approval. Other modifications to the Affordable Housing Plan shall be processed in the same manner as the original plan.

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 may approve such an alternative if he or she determines, based on substantial evidence, and which determination shall be specified in the Affordable Housing 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.

G. Following the First Approval of a Residential Development, the City shall prepare an Inclusionary Housing Agreement providing for implementation of the Affordable Housing Plan and consistent with the Inclusionary Housing Guidelines. Prior to the approval of any final or parcel map or issuance of any building permit for a Residential Development subject to this Chapter, the Inclusionary Housing Agreement shall be executed by the City and the Applicant and recorded against the entire Residential Development property and any other property used for the purposes of providing Inclusionary Housing pursuant to this Chapter to ensure that the agreement will be enforceable upon any successor in interest. The Inclusionary Housing Agreement shall not be amended without the prior written consent of the City and shall also not be amended prior to any necessary amendments to applicable Planning Permits.

H. The City Council, by resolution, may establish fees for the ongoing administration and monitoring of the Inclusionary Units, which fees may be updated periodically, as required.

Part 7

Implementation, Waiver, and Enforcement

5.08.700 Affordable Housing Fee Fund

A. Unless otherwise required by law, all in lieu fees, fees, promissory note repayments, shared appreciation payments, or other funds collected under this Chapter shall be deposited into a separate account to be designated as the City of San Jose Affordable Housing Fee Fund.

B. The moneys in the Affordable Housing Fee Fund and all earnings from investment of the moneys in the Affordable Housing Fee Fund shall be expended exclusively to provide housing affordable to Extremely Low Income, Very Low Income, Lower Income, and Moderate Income Households in the City of San Jose and administration and compliance monitoring of the Inclusionary Housing program.

5.08.710 Monitoring of Compliance

The Inclusionary Housing Guidelines and each Inclusionary Housing Agreement shall include provisions for the monitoring by the City of each Residential Development and each Inclusionary Unit for compliance with the terms of this Chapter, the Inclusionary Housing Guidelines, the applicable Inclusionary Housing Agreement, and, for Residential Development within a Redevelopment Project Area, the City shall also monitor and submit compliance reports to the Redevelopment Agency and other governmental agencies as required by law. Such provisions shall require annual compliance reports to be submitted to the City by the owner and the City shall conduct periodic on-site audits to insure compliance with all applicable laws, policies, and agreements. The Council may adopt fees for the costs of monitoring

and compliance by the City, which shall be deposited into the Inclusionary Housing Fee Fund for that purpose.

5.08.720 Waiver

A. Notwithstanding any other provision of this Chapter, the requirements of this Chapter may be waived, adjusted, or reduced if an Applicant shows, based on substantial evidence, that there is no reasonable relationship between the impact of a proposed Residential Development and the requirements of this Chapter, or that applying the requirements of this Chapter would take property in violation of the United States or California Constitutions.

B. Any request for a waiver, adjustment, or reduction under this Section shall be submitted to the City concurrently with the Affordable Housing Plan required by Section 5.08.610 of this Chapter. The request for a waiver, adjustment, or reduction shall set forth in detail the factual and legal basis for the claim.

C. The request for a waiver, adjustment, or reduction shall be reviewed and considered in the same manner and at the same time as the Affordable Housing Plan, and is subject to the appeal process for Affordable Housing Plans in Section 5.08.610.C.

D. In making a determination on an application for waiver, adjustment, or reduction, the Applicant shall bear the burden of presenting substantial evidence to support the claim. The City may assume each of the following when applicable:

    1. That the Applicant will provide the most economical Inclusionary Units

feasible, meeting the requirements of this Chapter and the Inclusionary Housing Guidelines.

2. That the Applicant is likely to obtain housing subsidies when such funds are reasonably available.

E. The waiver, adjustment or reduction may be approved only to the extent necessary to avoid an unconstitutional result, after adoption of written findings, based on substantial evidence, supporting the determinations required by this Section.

5.08.730 <u>Implementation and Enforcement</u>

A. The City Manager, in conjunction with the Executive Director of the San Jose Redevelopment Agency, shall adopt guidelines to assist in the implementation and administration of all aspects of this Chapter.

B. The City shall evaluate the effectiveness of the ordinance codified in this Chapter, for review by the City Council, five (5) years after the Operative Date of this Chapter.

C. The City Attorney shall be authorized to enforce the provisions of this Chapter and all Inclusionary Housing Agreements, regulatory agreements, covenants, resale restrictions, promissory notes, deed of trust, and other requirements placed on Inclusionary Units by civil action and any other proceeding or method permitted by law. The City may, at its discretion, take such enforcement action as is authorized under this Code and/or any

other action authorized by law or by any regulatory document, restriction, or agreement executed under this Chapter.

D. Failure of any official or agency to fulfill the requirements of this Chapter shall not excuse any Applicant or owner from the requirements of this Chapter. No permit, license, map, or other approval or entitlement for a Residential Development shall be issued, including without limitation a final inspection or certificate of occupancy, until all applicable requirements of this Chapter have been satisfied.

E. The remedies provided for herein shall be cumulative and not exclusive and shall not preclude the City from any other remedy or relief to which it otherwise would be entitled under law or equity.

PASSED FOR PUBLICATION of title this 12th day of January, 2010, by the following vote:

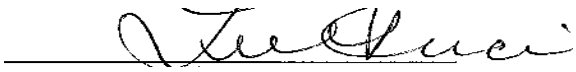
AYES: CAMPOS, CHIRCO, CHU, HERRERA, KALRA, LICCARDO, PYLE, REED.

NOES: CONSTANT, OLIVERIO.

ABSENT: NONE.

DISQUALIFIED: NGUYEN.

Chuck Reed
Mayor



Lee Price
City Clerk25