



Date: December 8, 2021  
To: The Milpitas community and housing developers  
From: Sharon Goei, Director of Building Safety and Housing  
RE: Update to the Milpitas Affordable Housing Ordinance (AHO)

**Overview:**

On June 19, 2018, the Milpitas City Council adopted Affordable Housing Ordinance No. 297. Under this ordinance, new residential developments with 10 or more housing units approved by the City Council must include 15% of very-low or low-income units for rental development and 15% of very-low, low, or moderate-income units for ownership development. These units must remain affordable for a minimum of forty-five to fifty-five years. If the 15% calculation results in a fractional unit, an in-lieu fee can be paid for that fractional unit. The Ordinance allows several alternatives to building the required affordable housing on-site including payment of fees in-lieu, building affordable housing off-site, dedicating land for affordable housing, and credit transfers when a developer builds more affordable units than are required.

On December 15, 2020, the City Council directed staff to explore changes to the in-lieu fee provisions in the ordinance. The City Council was interested in delivering new affordable housing more efficiently by building it on-site concurrently with the market rate housing. Currently, the City needs to gather fee revenue for several years before it can support a new affordable housing project. On January 5, 2021, staff provided an [information memorandum](#) on the Affordable Housing Ordinance in-lieu fee options to the City Council. At the March 16, 2021 City Council meeting, Council directed staff to proceed with work on this item.

City staff is proposing changes to the ordinance to encourage more on-site housing construction, to help the City meet its Regional Housing Needs Allocation goals, and to add clarity and consistency throughout the ordinance. A summary of these proposed changes is included below along with a copy of the ordinance with marked changes.

**Upcoming Meetings to discuss proposed changes:**

**December 16, 2021, 8:30 AM – 9:30 AM**

Virtual Community Development Roundtable Meeting

To register please visit the City's webpage at: [www.ci.milpitas.ca.gov/AHO](http://www.ci.milpitas.ca.gov/AHO)

**December 17, 2021, 11:00 AM – 12:00 PM**

Virtual Community Meeting

To register please visit the City's webpage at: [www.ci.milpitas.ca.gov/AHO](http://www.ci.milpitas.ca.gov/AHO)

**January 18, 2022**

City Council Hearing (discussion and first reading)

**February 1, 2022**

City Council Hearing (second reading and adoption)

**Attachments:**

1. Policy Discussion: Rental Inclusionary Alternatives
2. Summary of Proposed Changes to the Milpitas Affordable Housing Ordinance
3. Affordable Housing Ordinance Proposed Changes (Redlined)
4. Affordable Housing Ordinance Proposed Changes (Clean)

**Contact Us:**

For more information visit the AHO webpage at: [www.ci.milpitas.ca.gov/AHO](http://www.ci.milpitas.ca.gov/AHO). For questions or to share comments, please email the Department of Building Safety and Housing at [housing@ci.milpitas.ca.gov](mailto:housing@ci.milpitas.ca.gov) or call (408) 586-3240.

## **Policy Discussion: Rental Inclusionary Alternatives**

City Council directed staff to encourage more on-site affordable housing and State law requires that an affordable housing ordinance include alternatives to providing on-site units. For rental developments, the ordinance currently allows developers to utilize any of the listed alternatives (i.e., pay in-lieu fees, construct units off-site, or make a land dedication) at their discretion. City staff are evaluating a different set of options for rental projects to encourage on-site construction while providing flexibility for developers:

- (A) Developer may construct 50% of required units on-site, and pay 50% of requirement in-lieu fees without City Council findings;
- (B) Developer may pay 100% in in-lieu fees if the City Council makes the same findings required for ownership alternatives (i.e., that the fees will result in a greater amount of affordable housing and/or deeper affordability, or will provide other community benefits that are greater than constructing on-site units);
- (C) Developer may meet the requirement through land dedication or off-site construction, provided that the standards in the AHO are met.

## Summary of Proposed Changes to the Milpitas Affordable Housing Ordinance

| Ordinance Section | Proposed Change to the Ordinance   | Reason for Proposed Change  |
|-------------------|--|---|
| Entire document   | Minor numbering and text changes have been made throughout the document. | To update the numbering and to maintain consistency. These minor changes are highlighted in the “red line” of the ordinance but are not included in this summary table.         |
| XII-1-2.01        | Updated reference to Accessory Dwelling Unit (ADU) definition            | To match changes in the Municipal Code.   |
| XII-1-2.02        | Added definition for “Affordable Housing Cost”                           | To clarify that affordable housing cost includes utilities cost and is determined using official HCD income limits.   |
| XII-1-2.04        | Updated definition for an “Affordable Unit”                              | To clarify that ADUs shall not be counted as an affordable unit to satisfy on-site affordable housing requirements.   |
| XII-1-2.07        | Created separate definition for “Low Income Household”                   | To further clarify that “Low Income Household” is defined the same as in state law and that state HCD income limits apply to this program, not federal TCAC income limits.      |
| XII-1-2.08        | Added a definition for mixed use development.                            | Clarify that the ordinance applies to both vertical and horizontal mixed-use projects.  |
| XII-1-2.09        | Created separate definition for “Moderate Income Household”              | To further clarify that “Moderate Income Household” is defined the same as in state law and that state HCD income limits apply to this program, not federal TCAC income limits. |
| XII-1-2.11        | Add definition for “on-site” development of affordable housing           | To further clarify that on-site development must be within the boundaries of the proposed development. Otherwise it is considered to be off-site.                               |
| XII-1-2.16        | Created separate definition for “Very Low Income Household”              | To further clarify that “Very Low Income Household” is defined the  |

|                        |  |  |
|------------------------|--|--|
|                        |  | same as in state law and that state HCD income limits apply to this program, not federal TCAC income limits.   |
| XII-1-3.00             | Sometimes 15% of the total units results in a fraction. This change would require developers to round up the number of affordable units they are required to build if the fraction is equal to or greater than 0.5. If the fraction is less, the developer could pay an in-lieu fee for that fraction of a unit. This change also clarifies that ADUs shall not be included in the calculation of the total number of units subject to the on-site 15% inclusionary requirement. | This change reduces a developer's ability to pay in-lieu fees for fractional units greater than 0.5. It could result in 1 extra affordable unit being built on-site per project. It also clarifies that ADUs are not factored into the calculation of the total number of units subject to the 15% on-site inclusionary requirement. |
| XII-1-3.02             | Added mixed-use to the "Conditions of Approval" section and a list of documents needed for staff to review.  | To further clarify that this ordinance applies to mixed-use projects that include residential and to clarify key documents that must be provided for staff to review.  |
| XII-1-3.03             | Added language to explain how concurrent construction of affordable housing units must be carried out for phased developments before final discretionary permits are issued. If extenuating circumstances exist, a developer must provide a schedule showing how the affordable units will be built expeditiously and this schedule must be approved by the City Manager or designee.  | To further clarify that affordable units must be constructed in advance of or concurrently with market rate units within each phase.   |
| XII-1-3.04             | Added more specific language on how the design and distribution of affordable units should be ensured.   | To further clarify how the quality of affordable units shall be reasonably consistent with the market rate units.  |
| Section 4A (Ownership) | Made substantial changes to the process for granting exceptions to building affordable <u>ownership</u>  | To clarify the City Council findings required for certain exceptions to on-site construction of affordable   |

|                     |   |   |
|---------------------|---|---|
|                     | units on-site. Added more specific findings for Council approval.   | units and to encourage the production of more on-site ownership units.  |
| Section 4B (Rental) | Added text relating to rental projects and exceptions to the on-site requirement.   | To clarify that developers of rental projects do not need City Council approval to utilize alternative forms of compliance as set forth in Subsections XII-1-4.00-XII-1-4.02. However, staff is exploring options for an alternative approach to providing alternatives to development of on-site affordable units. |
| XII-1-4.00          | Clarifies how to calculate in-lieu fees and that ADUs are included when calculating the gross square footage for the in-lieu fee.   | The existing ordinance does not explain how in-lieu fees are calculated.  |
| XII-1-4.01          | Added text clarifying that off-site projects must be located within the City of Milpitas.   | Clarifies where off-site projects can be located.   |
| XII-1-4.01          | Added new language that would allow developers flexibility to build off-site affordable units with a different tenure from the market rate units. The current ordinance is silent about this. The proposed change would require more square footage of affordable units off-site at an equivalent or lower income category. | Provides flexibility so developers can creatively develop more market rate and affordable housing while encouraging on-site construction.   |
| XII-1-4.02          | Added text clarifying that dedicated land must be within the City of Milpitas and must be zoned and useable for the required amount of housing.   | Provides specifics on what land is acceptable for dedication under the ordinance. Dedicating non-residentially zoned land is unacceptable as it would require the conversion of employment lands.   |
| XII 1-4.03          | Removed credit transfers as a compliance option.  | To date this option has not been used and would be very staff intensive to administer. Instead, staff has proposed allowing mixed tenure off-site compliance for added flexibility.   |

|            |  |  |
|------------|--|--|
| XII-1-4.04 | Removed “Transfer of square foot equivalent” section.  | No longer needed as addressed in other sections.   |
| XII-1-6.00 | Change affordability covenant for ownership from 45 to 55 years.   | To be consistent with the rental affordability term and to gain a longer-term affordability.   |
| XII-1-6.02 | Change affordability covenant for ownership from 45 to 55 years.   | To be consistent with the rental affordability term and to gain a longer affordability term. The change would apply 55 years to all affordable units created under this ordinance.           |
| XII-1-6.03 | Updated selection criteria to ensure that prioritization conforms with state and federal fair housing laws. Added broader language about setting aside some of the affordable units for households that live, are employed in, or have been displaced from Milpitas. | To clarify the need to conform with fair housing laws and to apply local preferences for the affordable housing units under the ordinance.   |
| Section 7  | Removed.   | The credits option has not been used and would be very staff intensive to administer. As an alternative, staff has proposed allowing mixed tenure off-site compliance for added flexibility. |

**Affordable Housing Ordinance Proposed Changes**  
**(REDLINED)**

**DRAFT**

- **Chapter 1 - AFFORDABLE HOUSING ORDINANCE**

**Sections:**

- **Section 1 - Purpose**

This Chapter shall be known as the "Affordable Housing Ordinance."

- **XII-1-1.00 - Purpose**

Purpose of this Chapter is to:

(a)

(a) Enhance the public welfare and assure that further housing development contributes to the attainment of the City's housing goals by increasing the production of residential units affordable by households of very low, low and moderate income.

(b)

Assure that the limited remaining developable land in the City's planning area is utilized in a manner consistent with the City's housing policies and needs.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-1.01 - Applicability**

All land use entitlement applications not determined or deemed "complete" as defined in Government Code Section 65943 by the effective date of the ordinance are subject to the requirements of this Chapter.

(Ord. No. 297, § 3, 6/19/18)

- **Section 2 - Definitions**

- **XII-1-2.00**

As used in this Chapter, each of the following terms shall be defined as follows:

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.01**

"Accessory dwelling unit" shall have the meaning set forth in Section XI-10-13.8 of this Code.

- **XII-1-2.02**

"Affordable Housing Cost" means the maximum amount that a household may be required to pay to live in an affordable unit. The City shall determine affordable housing costs for each affordable unit type within a proposed development at the time of project approval, and the affordable housing cost may be adjusted annually to reflect the current area median income for Santa Clara County.

For rental units, Affordable Housing Cost shall be an annual rent amount, inclusive of an allowance for tenant payment of utilities, that does not exceed 30% of maximum gross income level for very low or low income households as defined herein (as applicable to the affordable unit), adjusted for household size.

For ownership units, Affordable Housing Cost shall be a sales price that results in annual housing expenses that do not exceed 35% of the maximum gross income level for very low, low or moderate income households as defined herein (as applicable to the affordable unit) adjusted for household size.

The City may adopt administrative guidelines to establish criteria to be utilized in calculating affordable housing cost pursuant to this Section.

- **XII-1-2.03**

"Affordable Housing Fund" or "Fund" means a fund established pursuant to the Chapter as described in Section XII-1-9.00, et seq., and in which all fees collected through this Chapter shall be placed.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.022.04**

"Affordable unit" means an ownership or ~~rental housing~~rental dwelling unit, including senior housing, that is rented or sold at an affordable housing cost to households with ~~very low~~very low, low, or moderate incomes as defined in this Chapter, provided, however, that an accessory dwelling unit shall not be counted as an affordable unit for purposes of satisfying the affordability requirements set forth in Section 3 of this Chapter.

1. ~~Rental units are deemed affordable units if the annual rent does not exceed 30% of maximum income level for very low-, low- and moderate-income households, adjusted for household size and as defined below.~~
2. ~~Ownership units are deemed affordable units if the sales price results in annual housing expenses that do not exceed 35 percent of the maximum income level for very low-, low-, and moderate-income households, adjusted for household size and as defined below.~~

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.032.05**

"Applicant" means any person, firm, partnership, association, joint venture, corporation, or any entity or combination of entities (including but not limited to a "developer") that seeks city real

property development permits or approvals or bears any responsibility with respect to the subject real property.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.042.06**

"Dwelling unit" means a dwelling designed and intended for occupancy by one household.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.052.07**

~~"Very-Low, Low-, and Moderate-income levels" means those income and eligibility levels determined periodically by the California Department of Housing and Community Development based on Santa Clara County median income levels adjusted for family size. Such levels shall be calculated on the basis of gross annual household income considering household size and number of dependents, income of all wage earners, elderly or disabled family members, and all other sources of household income and will be recertified as set forth by local standards, and state and federal housing law. For purposes of this Chapter, "Very-Low" shall include income and eligibility levels identified as "Extremely Low" by the California Department of Housing and Community Development as described in the foregoing sentence.~~

"Low Income Household" shall have the same definition as set forth for the term "lower income household" in California Health & Safety Code section 50079.5. The income limits for low income households in Santa Clara County are published and updated periodically by the State Department of Housing and Community Development in California Code of Regulations, Title 25, Section 6932.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.062.08**

"Mixed Use Development" means a development that includes residential and non-residential uses in a vertical or horizontal orientation. All of the provisions of this Chapter that pertain to residential development shall apply to the residential uses and all of the provisions of Section 5 of this Chapter shall apply to the non-residential uses, respectively.

- **XII-1-2.09**

"Moderate Income Household" shall have the definition as set forth in California Health & Safety Code section 50093(b). The income limits for moderate income households in Santa Clara County are published and updated periodically by the State Department of Housing and Community Development in California Code of Regulations, Title 25, Section 6932.

- **XII-1-2.10**

"Non-Residential development project" means any planned district, subdivision map, conditional use permit or other discretionary or non-discretionary City land use approval, which authorizes new construction of gross square feet of nonresidential space, the conversion of residential use to a nonresidential use, or the conversion of exempt space to non-exempt space, including, but not limited to, retail, hotel, motel (including motel, motor hotel, inn and auto court), office, professional office, other commercial, light industrial, data centers and warehouses.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.072.11**

"On-site" means that the affordable units are provided within the boundaries of the proposed development

- **XII-1-2.12**

"Residential Ownership Project" means any residential project that includes the creation of residential dwelling units that may be sold individually. A residential ownership project also includes condominium conversions.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.082.13**

"Residential Rental Project" means a residential project or property under common ownership, or portion thereof that creates living units that cannot be sold individually.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.092.14**

"Resale controls and/or rent restrictions" means legal restrictions by which the affordable units shall be restricted to ensure that the unit remains affordable to ~~very low, low, or moderate income~~ very low-, low, or moderate income households, as applicable, for a period of not less than 55 years. With respect to rental units, such rent restrictions shall be in the form of a regulatory agreement recorded against the applicable property. With respect to owner-occupied units, such resale controls shall be in the form of resale restrictions, deeds of trust, and/or other similar documents recorded against the applicable property.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.102.15**

"Residential development" includes, without limitation, detached single-family dwellings, multiple-dwelling structures, groups of dwellings, condominium or townhouse developments, condominium conversions, cooperative developments, mixed use developments that include ~~housing~~dwelling units, and residential land subdivisions intended to be sold to the general public.

- **XII-1-2.16**

"Very Low Income Household" shall have the definition as set forth in California Health & Safety Code section 50105. The income limits for very low income households in Santa Clara County are published and updated periodically by the State Department of Housing and Community Development in California Code of Regulations, Title 25, Section 6932.

(Ord. No. 297, § 3, 6/19/18)

- **Section 3 - Minimum Residential Development General Requirements**

- **XII-1-3.00 - 15 Percent Affordability Requirement**

All new residential development projects of ten units or more designed and intended for permanent occupancy shall construct 15 percent of the total number of dwelling units within the development as affordable units, except as otherwise provided by this Chapter. Accessory dwelling units shall not be included to calculate the total number of dwelling units that must be constructed pursuant to this section. The foregoing requirement shall be applied no more than once to an approved development (and generally at the tentative map stage), regardless of the changes in the character or ownership of the development, provided the total number of units does not change. In applying and calculating the affordability requirement, any decimal fraction will be required to pay the appropriate impact fee for the fractional unit. If the 15 percent calculation results in a fractional unit that is less than 0.5 (i.e., less than half a unit), the developer may pay an in-lieu fee for that fractional unit, as more specifically outlined in Section 4 of this Chapter. A fractional unit equal to 0.5 or greater shall be rounded up, and the project must provide one affordable unit on-site to satisfy any fractional obligation where an in-lieu fee is not paid..

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-3.01 - Allocation of units to income levels**

Affordable units provided pursuant to this Section shall be allocated to households with a minimum percentage of very ~~low-low~~, ~~low-low~~, and ~~moderate-income~~moderate income levels as follows:

|   | Rental Units | Ownership Units |
|---|--------------|-----------------|
| Very <del>low-or low-income</del> <u>low or low income</u> households                     | 100%         | 0%              |
| Very <del>low, low-or moderate-income</del> <u>low, low or moderate income</u> households | 0%           | 100%            |

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-3.02 - Conditions of approval**

Any tentative map, conditional use permit, or site development review approving residential or mixed-use development projects subject to this Chapter shall contain conditions sufficient to ensure compliance with the provisions of this Chapter. Such conditions shall detail the number of affordable units required, specify the schedule of construction of affordable units, set forth the applicant's manner of compliance with this Chapter, and require the execution of an agreement imposing appropriate resale controls and/or rental restrictions on the affordable units. Any omission or failure to adopt conditions of approval or any of the details or other specifications regarding compliance with this Chapter shall not waive the City's rights to enforce any provision, nor relieve any applicant of its obligations to comply with, all requirements of this Chapter.

At the time of filing a planning application for a residential development subject to this article, the developer shall provide the following information in addition to information specified elsewhere for the applicable planning permit(s):

~~(Ord. No. 297, § 3, 6/19/18)~~

1. The number of market rate and affordable units proposed on-site, which should include the distribution of units by bedroom size (i.e., studio, one bedroom, two bedroom, etc.) for the total project, market rate units, and affordable units.
2. The tenure of the market rate and affordable units.
3. Gross square footage of building by each use including parking uses.
4. Gross square footage of project's proposed total residential area and gross square footage of existing residential area.
5. Gross square footage of project's proposed non-residential floor area, gross square footage of existing non-residential floor area that will remain as is, and any square footage of new or proposed to be converted non-residential floor area that is exempt from paying affordable housing impact fees pursuant to Section 5 of this Chapter.
6. Habitable square feet for residential units, and net residential square feet of the total project, affordable units and market rate units.
7. The unit sizes (net residential square feet per unit) for the total project, market rate units, and affordable units.
8. The proposed location of the market rate and affordable units by building and location on each floor of a building.
9. Any interior amenities in the affordable units that would differ from market rate units, including, but not limited to, floor coverings, appliances, plumbing and electrical fixtures.
10. The schedule for production of affordable units in phased residential development.
11. Any exceptions or alternatives proposed to comply with this article, including reasons why the findings required to approve such exceptions or alternatives can be met.

- **XII-1-3.03 - Concurrent construction of affordable units**

All affordable units in a project or phase of a project shall be constructed prior or concurrently with market-rate units, unless the City Manager or designee determines in writing that extenuating circumstances exist that make concurrent construction infeasible or impractical. In phased developments, the affordability requirement will be calculated on the basis of the whole development, but affordable units shall be developed in advance or concurrently with market rate units in each phase unless the City Manager or designee determines in writing that extenuating

circumstances exist that make concurrent construction infeasible or impractical. If this occurs, a schedule must be developed by the applicant and approved by the City Manager to ensure that affordable units are built expeditiously and before final discretionary permits are issued. Each phase must include the required number of affordable units based on the number of market-rate units in that phase, and on-site affordable housing units must be developed concurrently with the market-rate units in each phase.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-3.04 - Design and distribution of affordable units**

~~All affordable units shall reflect the range of numbers of bedrooms provided in the project as a whole and shall not be distinguished by exterior design, construction, or materials. Affordable units may be of smaller size than the units in the project and may have fewer amenities than the market rate units in the project. All affordable units shall be reasonably dispersed throughout the project.~~

Affordable units shall meet the following requirements:

1. The bedroom mix of the affordable units should be proportionate to the bedroom mix of market rate units, provided that the City may allow a different unit mix to meet other City goals as determined by the City Council.
2. The square footage of the affordable housing units must be reasonably consistent with the market rate units in the development although smaller unit sizes may be allowed by the Director or Building Safety and Housing if the developer provides adequate justification and reasons why the provision of small unit sizes would further the City's housing goals and this Chapter.
3. All affordable units shall be reasonably comparable in terms of floor plan and base finish amenities to market rate units in the proposed development.
4. The quality of the exterior design, landscaping, and construction of the affordable units shall be consistent with the other units in the proposed development. When affordable units are built off-site they shall be of equivalent or of higher quality compared with the market rate units.
5. Affordable units shall have the same access to common entrances from the exterior as market rate units;
6. Affordable units shall have the same access to all project amenities and recreational facilities available to market rate units. Off-site projects shall have convenient access to equivalent project amenities and recreational facilities compared to the market rate units.
7. All affordable units shall be reasonably dispersed throughout the project and for residential structures higher than eight stories, the affordable units shall be evenly distributed throughout the bottom 60% of the floors or higher.

(Ord. No. 297, § 3, 6/19/18)

- **Section 4 - Exceptions to On-Site Development 15 Percent Affordable Units**

Project applicants' projects shall construct 15 percent of the total number of dwelling units within any development as affordable units, ~~unless subject to an exception obtained in accordance with the procedures set forth in~~ except as provided pursuant to this Section. All exceptions to the requirement to construct affordable units on-site for a project with ownership units shall require

City Council approval, which shall be obtained at or prior to the last discretionary approval for development of the project. ~~Second family units as defined in Section XI-10-13.0 of the Milpitas Municipal Code are exempt from this requirement.~~

~~Prior A, Ownership Projects: The City may allow an exception to the requirement to construct on-site affordable units for a residential ownership project when the applicant contributes to the City's affordable housing needs through one of the alternatives set forth in Subsections XII-1-4.00-XII-1-4.02, provided that prior to City Council approval to the requested exception, affirmative findings to the City Council must make the following must be made findings:~~

~~1. The exception requested exceeds the minimum affordable requirements; and~~

~~1. The development as proposed with the exception as provided pursuant to this Section would further the City's low and/or moderate income housing goals as contained in the Housing Element; and~~

~~2. The project is better served development with the exception either (i) will result in at least two of the following; or~~

~~a. The development of a larger number of deed-restricted affordable units than would be created under the on-site requirement;~~

~~b. The development of a larger number of deed-restricted affordable bedrooms than would be created under the on-site requirement;~~

~~c. The development of a larger amount of deed restricted affordable living area than would be created under the on-site requirement;~~

~~d. The development of deed-restricted affordable units at a lower average income target as compared to the affordable units that would be created under the on-site requirement;~~

~~3. The or (ii) will provide other community benefits that exceed the project benefits benefit of constructing on-site affordable units.~~

~~Exceptions the applicant may request include:~~

~~B. Rental Projects: The City may allow an exception to the requirement to construct on-site affordable units for a residential rental project if requested by the applicant, provided that as a condition of such exception that applicant shall be required to contribute to the City's affordable housing needs through one of the alternatives set forth in Subsections XII-1-4.00-XII-1-4.02.~~

- **XII-1-4.00 - Payment of fees in lieu of creation of affordable units**

Upon request of the applicant and subject to the requirements of this Section 4 as set forth above, the City Council may permit the applicant to pay a fee in lieu of constructing the affordable units

that the applicant would otherwise be required to construct pursuant to this Chapter. In-lieu fees shall also be paid for requirements to construct fractional units of less than 0.5 units as set forth in Section XII-1-3.00. The City shall adopt, by resolution, current affordable housing ~~impact~~in-lieu fee levels as well as administrative guidelines necessary for the implementation of this Chapter. ~~To the extent State law may require, applicants for development of rental units will not require the approval of City Council for the payment of in-lieu fees, but shall otherwise be subject to all requirements herein.~~

Fees paid in-lieu of constructing affordable units must be paid prior to the issuance of the building permit for the project, and fees shall be deposited into the City's Affordable Housing Ordinance Fund. The in-lieu fee shall be calculated based on the gross square footage constructed for each new residential use, taking into account any fee credits that would be applicable based on existing building area. While accessory dwelling units are not counted towards either calculating or meeting the 15% on-site affordable housing requirement pursuant to Section XII-1-3.00, any payment of in-lieu fees must be based on the total gross square footage of all dwelling units developed as part of the project, including any accessory dwelling units.

Unless otherwise specified by resolution of the City Council or amendment to this Chapter, every July 1, or the following business day, if applicable, the City will adjust the affordable housing fees for inflation using the Engineering ~~New~~News Record ~~McGraw Hill Construction Weekly~~ Building Cost Index for San Francisco. If this index ceases to exist, the Director of Building Safety and Housing shall substitute another construction cost index, which in his/her judgment is as nearly equivalent to the original index as possible.

~~The applicant shall pay any in-lieu fees authorized pursuant to this Chapter prior to issuance of the building permit. Applicable fees will be determined at time of payment. All payment of in-lieu fees and other penalties and payments made to the City under this Chapter shall be deposited into the Affordable Housing Ordinance Fund.~~

(Ord. No. 301 , § 22, 8/20/19; Ord. No. 297, § 3, 6/19/18)

- **XII-1-4.01 - Off-site projects**

Upon request of the applicant, the City Council may permit an applicant to comply with the requirements of this Chapter by constructing the affordable units not physically within the development but within the City of Milpitas in lieu of constructing some or all of the affordable units within the development, with the approval of the City Council, if the City Council finds that:

1. Construction of the units off-site in lieu of constructing units on-site is consistent with the Chapter's goal of creating, preserving, maintaining, and protecting housing for very ~~low, low and moderate-income~~low, low and moderate income households.
2. The units to be constructed off site are consistent with Section XII-1-3.04 above.
3. It would be infeasible or impractical to construct affordable units on-site.
4. Conditions of approval for the project require that the off-site affordable units would be governed by the terms of a deed restriction and, if applicable, rental restrictions similar to that used for the on-site affordable units.

5. The conditions of approval for the project, or other security such as a cash deposit, bond, or letter of credit, are adequate to require the construction of the off-site affordable units prior or concurrently with the completion of the construction of the residential development.

Affordable units can be built off-site using a different tenure than the subject development (i.e., rental affordable units for an ownership residential project) provided that the square footage of livable space of affordable units provided off-site is greater than what would be required on-site. In this case, the above requirements shall be met and the income-category shall be equivalent to or lower than what would be required for affordable units with the same tenure. The term of the affordable housing and/or resale restrictions shall be determined by the tenure of the affordable units and shall be consistent with sections XII-1-6.00 through XII-1-6.02 of this Chapter as applicable.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-4.02 - Land dedication**

Upon request of the applicant, the City Council may permit an applicant to dedicate land within the City of Milpitas to the City or a City-designated local non-profit housing developer in lieu of construction of some or all of the required affordable units, if the Council finds that:

1. Dedication of land in lieu of constructing units is consistent with the Chapter's goal of creating, preserving, maintaining, and protecting housing for very ~~low, low and moderate-income~~ low, low and moderate income households.
2. The dedicated land is zoned and useable for its intended purpose, is free of toxic substances and contaminated soils, and is fully improved, with infrastructure, adjacent utilities, grading, and all development-impact fees paid, including development-impact fees required by the Milpitas Unified School District but excluding any inclusionary zoning ordinance fees.
3. The proposed land dedication property includes a minimum of 0.75 acres of developable area, and is of sufficient size and value to meet the following requirements:
  - a. The dedication property includes land sufficient to construct the number of units that the applicant would otherwise be required to construct by Section XII-1-3.00 based on (i) the size of lots in the subdivision for which the applicant is meeting its obligation; and if the applicant's project is an ownership project, or (ii) the size of the parcel needed to construct the required number of affordable units if the applicant's project is a rental project and assuming the affordable rental units are of comparable size to the market rate units; and
  - b. In addition, the dedication property includes ~~such~~ additional land the market value for which is equal to or exceeds the difference between the value of a market-rate, 1200-square foot for-sale unit and the price at which such a unit could be sold as an affordable moderate income unit (which amount shall be set forth in a resolution adopted from time to time by the City Council) times the number of on-site affordable units that would otherwise be required for the development.

~~(Ord. No. 297, § 3, 6/19/18)~~

- **XII-1-4.03 - Credit transfers**

~~An applicant may fully or partially satisfy the requirements of XII-1-3.00 through the use of transfer credits created pursuant to XII-1-7.00. Credit certificates shall be presented to the Director of Building Safety and Housing, who shall note at the time of project approval the credit certificate by number. Credit certificates may only be used to satisfy the requirements for inclusionary units for the income category (i.e., very low, low, or moderate) and number of bedrooms for which they are issued.~~

(Ord. No. 301, § 22, 8/20/19; Ord. No. 297, § 3, 6/19/18)

- **XII-1-4.04 - Transfer of square foot equivalent**

~~The applicant may choose to provide more units in an overall development; however the gross square footage of the proposed affordable units cannot be less than the square footage of the required affordable units.~~

(Ord. No. 301, § 22, 8/20/19; Ord. No. 297, § 3, 6/19/18)

**Editor's note**— Ord. No. 297 codified provisions numbered as XII-1-4.03. Subsequently, Ord. No. 301, § 22, adopted August 20, 2019, amended the Code by renumbering said section as XII-1-4.04.

- **XII-1-4.054.03 - Waiver of requirements**

As part of the development application, the applicant may request and the City Council, at its discretion, may waive, wholly or partially, the requirements of this Chapter and approve alternate methods of compliance with this Chapter if the applicant demonstrates, and the City Council finds, either (1) that such alternate methods meet the purposes of this Chapter and the Council can make the findings for such alternative methods as set forth in Section 4.A of this Chapter; or (2) that there is no reasonable relationship between the impact of the proposed development and the contested requirement or that applying the requirements of this Chapter would take property in violation of the United States Constitution or California Constitution or would result in any other unconstitutional result.

(Ord. No. 301, § 22, 8/20/19; Ord. No. 297, § 3, 6/19/18)

**Editor's note**— Ord. No. 297 codified provisions numbered as XII-1-4.04. Subsequently, Ord. No. 301, § 22, adopted August 20, 2019, amended the Code by renumbering said section as XII-1-4.05.

- **Section 5 - Non-Residential Affordable Housing Impact Fee**

- **XII-1-5.01 - Applicability**

Any non-residential development, applicable under the definition set forth in Section XII-1-2.05, is subject to payment of a non-residential affordable housing impact fee. The City shall adopt, by resolution, current non-residential affordable housing impact fee levels. Every July 1, or the following business day, if applicable, the City will adjust affordable housing fees for inflation

annually using the Engineering [NewNews](#) Record [McGraw-Hill Construction Weekly](#) Building Cost Index for San Francisco. If this index ceases to exist, the Director of Building Safety and Housing shall substitute another construction cost index, which in his/her judgment is as nearly equivalent to the original index as possible.

The applicant shall pay the non-residential impact fees prior to issuance of the building permit. Applicable fees will be determined at time of payment. All payment of fees made to the City under this Chapter shall be deposited into the City Affordable Housing Ordinance Fund.

(Ord. No. 301 , § 22, 8/20/19; Ord. No. 297, § 3, 6/19/18)

- **XII-1-5.02 - Calculation of impact fee**

The impact fee will be calculated on a per square foot basis for net new gross floor area. The formula below shall be used in calculating the amount of the housing impact fee: (Gross square feet of total non-residential floor area) minus (square feet of existing non-residential floor area) multiplied by (per square foot fee) equals (total housing impact fee).

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-5.03 - Exemptions**

The following non-residential uses that will be exempt from the fee include:

- a. New construction of non-residential uses of less than 5,000 square feet.
- b. Additions to existing non-residential uses where the square footage increase is less than 5,000 square feet.
- c. Assembly uses.
- d. Day care, nursery and school facilities.
- e. Hospitals.
- f. Other non-residential uses not listed above, but which the City Council determines will have a minimal impact upon the demand for affordable housing and to be exempt pursuant to City Council resolution.

(Ord. No. 297, § 3, 6/19/18)

- **Section 6 - General Procedures for Implementing Inclusionary Zoning Requirements**

- **XII-1-6.00 - Agreements**

Prior to the issuance of a building permit for an affordable unit, resale restrictions or rental controls, or both, as the case may be, shall be set forth in an agreement between the City and the applicant, which agreement shall be recorded against the property containing the affordable units. The agreement shall be executed by the City Manager or designee, and its requirements shall run with the land and bind the applicant's successors. Covenants on the affordable ~~rental~~ units shall not be less than 55 years.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-6.01 - Rental units; occupancy; annual report**

Agreements involving rental units shall require the owner of the affordable units to ensure that the units are occupied by tenants whose monthly income levels do not exceed very low-, low-, or moderate income levels, as the case may be, and shall preclude tenants from subletting or subleasing the unit. The agreement shall also require the owner of the affordable unit to submit an annual report to the City Manager, in a format approved by the City. The report shall include, but not be limited to the following information: an identification of the affordable units within the project; the monthly rents charged and proposed to be charged; vacancy information for the prior year; and the monthly income for tenants of each affordable unit throughout the prior year.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-6.02 - Ownership Units; Occupancy; City's Purchase Option**

Agreements for ownership units shall specify that the inclusionary units must be occupied by the owner or owners and may not be leased or rented without the written approval of the City. The resale restrictions shall provide that in the event of the sale of an affordable unit, the City shall have the right to purchase any affordable owner-occupant unit at the maximum price that could be charged to an eligible household. Ownership units will have a ~~45~~55-year resale restriction covenant with a purchase option to the City. Homeowners will be subject to the City's monitoring program for owner-occupancy.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-6.03 - Selection criteria**

No household shall be permitted to occupy a unit that is required under this Chapter to be affordable unless the City Manager or designee has approved the household's eligibility. Eligible potential occupants of affordable units will be qualified on the basis of household income, the median combined household income statistics for Santa Clara County published periodically by the California Department of Housing and Community Development, all sources of household income and assets, the relationship between household size and the size of available units, and any further criteria required by law. The applicant shall use an equitable selection method established in conformance with the terms of this Chapter and subject to approval by the City. The selection criteria may not distinguish between adults and children. The Subject to the requirements of state and federal fair housing laws and regulations, the City shall endeavor to make housing available for Milpitas residents ~~and employees~~, former Milpitas residents who have been displaced, households with children enrolled in the Milpitas Unified School District that have inadequate housing as defined in the federal McKinney-Vento Homeless Assistance Act, and employees employed within the boundaries City of Milpitas, and may develop selection criteria to

implement these goals. The applicant will pursue active marketing, conduct affordable housing workshops, extensive advertising and other measures to ensure that residents and employees are informed and educated about the availability of affordable units.

To qualify as "Employed within the boundaries of the City of Milpitas," the person shall ~~have been currently be~~ employed within the City of Milpitas ~~for at least six months or have been offered employment for a job within the City of Milpitas.~~

To qualify as a "Milpitas resident," the person shall have been a resident of the City of Milpitas for at least a one-year period prior to the eligibility determination. Residency may be demonstrated by providing a rent or utility bill, or similar documentation.

(Ord. No. 297, § 3, 6/19/18)

## • ~~Section 7 - Affordable Unit Credits~~

### • ~~XII-1-7.00 - Creation~~

~~An applicant may apply to the City affordable unit credits, which may be granted by the City Council, in its discretion. One affordable unit credit certificate shall be issued for each affordable unit constructed in excess of the number of affordable units required to be constructed for the project by Section XII-1-3.00. The certificate shall designate a specific income category (i.e., very low, low, or moderate income) and number of bedrooms for which they are issued.~~

(Ord. No. 297, § 3, 6/19/18)

### • ~~XII-1-7.01 - Ownership and use of credits~~

~~If granted, affordable unit credit certificates are issued to and become the possession of the project owner, who may then use them to satisfy the requirements of this Chapter for another project in the City. If a project owner proposes to sell credit certificates, the parties shall first obtain the consent of the City Manager or designee, who will document the transfer by certificate number.~~

(Ord. No. 297, § 3, 6/19/18)

## • **Section ~~8~~7 - Incentives to Encourage On-Site Construction of Affordable Units**

### • ~~XII-1-8.00~~7.00

Applicants shall receive incentives as specified in this Section 8 to encourage the on-site construction of affordable units. If an applicant provides affordable units in excess of 20 percent of the total number of units in the project the City will provide the following incentives to include:

A. Planning Waivers. In addition to waivers, incentives and/or concessions that may be provided pursuant to density bonus law as outlined in Section XI-10-54.15 in the Milpitas Municipal Code if the applicant provides affordable units in excess of 20 percent of the total number of units in the development, the Director of Planning shall grant up to two of the waivers listed below in this Section that help increase the feasibility of the construction of affordable units. The applicant will receive an additional two waivers from the list below for every additional five percent of affordable units provided above the 20 percent. The applicant may choose from the following waivers:

1. Priority processing.
2. Reduced setback requirements not to exceed 50 percent of the minimum required setback.
3. Greater floor area ratio (FAR) not to exceed 50 percent of the maximum FAR for commercial space in mixed use zoning.
4. Reduced landscaping requirements.
5. Reduced interior or exterior amenities.
6. A maximum 20 percent reduction in parking requirements.
7. Height restriction waivers not to exceed 20 percent of the maximum zoning height limitations and in no event to exceed the general plan height limitations.

B. Fee Deferral.

1. Development Processing Fees. The City Manager may approve deferred payment of City processing fees applicable to the review and processing of the project. The terms and payment schedule of the deferred fees shall be subject to the approval of the City Manager.
2. Development Impact Fees. The City Manager may authorize the deferred payment of development impact fees applicable to the affordable units. Approval of this incentive requires demonstration by the Applicant that the deferral increases the project's feasibility. The applicant must provide appropriate security to ensure future payment of such fees.

(Ord. No. 301, § 23, 8/20/19; Ord. No. 297, § 3, 6/19/18)

- **Section 98 - Affordable Housing Ordinance Fund**

- **XII-1-9.008.00 - Affordable Housing Ordinance Fund**

In lieu fees shall be deposited into a fund known as the "Affordable Housing Ordinance Fund" ("Fund").

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-~~9.01~~8.01 - Use of Funds**

All monies in the Fund, together with any interest earnings on such monies less reasonable administrative charges, shall be used or committed to use by the City for the purpose of providing ~~very low~~very low, ~~low~~low, and ~~moderate income~~moderate income ownership or rental housing in the City of Milpitas.

(Ord. No. 297, § 3, 6/19/18)

- **Section ~~109~~10 - Violations**

- **XII-1-~~10.00~~9.00**

It shall be unlawful for any person, firm, corporation, partnership or other entity to violate or fail to comply with any provision of this Chapter. In addition to other fines, penalties or other remedies provided by State municipal law, including without limitation, those provided in Title I, Chapter 1, Section 4 of the Milpitas Municipal Code, the City may revoke or suspend any permit issued to an applicant, owner or any other party who violates this Chapter, as set forth in Section XII-I-11.00. The City's right to take action pursuant to this section shall exist in addition to, and independent of, any other rights and remedies available to the City and shall exist notwithstanding the existence or lack thereof of any condition of approval imposed on an individual development project.

(Ord. No. 297, § 3, 6/19/18)

- **Section ~~1110~~11 - Enforcement**

- **XII-1-~~11.00~~10.00 - General**

The City Manager shall enforce this Chapter, and its provisions shall be binding on all agents, successors, and assigns of an applicant. The City Manager may suspend or revoke any building permit or approval upon finding a violation of any provision of this Chapter. No land use approval, building permit, or certificate of occupancy shall be issued for any development unless in compliance with this Chapter or unless expressly exempted by action of the City Council. Not in limitation of any other authorization, right or remedy, the City may institute any appropriate legal actions or proceedings necessary to ensure compliance herewith, including, but not limited to, actions to revoke, deny, or suspend any permit or development approval.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-~~11.01~~10.01 - Excessive rents/legal action**

If the City Manager determines that rents in excess of those allowed by operation of this Chapter have been charged to a tenant residing in an affordable unit, the City may take appropriate legal

action to recover, and the project owner shall be obligated to pay to the tenant, or to the City in the event the tenant cannot be located, any excess rents charged.

(Ord. No. 297, § 3, 6/19/18)

**Affordable Housing Ordinance Proposed Changes**  
**(CLEAN)**

**DRAFT**

- **Chapter 1 - AFFORDABLE HOUSING ORDINANCE**

**Sections:**

- **Section 1 - Purpose**

This Chapter shall be known as the "Affordable Housing Ordinance."

- **XII-1-1.00 - Purpose**

Purpose of this Chapter is to:

(a) Enhance the public welfare and assure that further housing development contributes to the attainment of the City's housing goals by increasing the production of residential units affordable by households of very low, low and moderate income.

(b) Assure that the limited remaining developable land in the City's planning area is utilized in a manner consistent with the City's housing policies and needs.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-1.01 - Applicability**

All land use entitlement applications not determined or deemed "complete" as defined in Government Code Section 65943 by the effective date of the ordinance are subject to the requirements of this Chapter.

(Ord. No. 297, § 3, 6/19/18)

- **Section 2 - Definitions**

- **XII-1-2.00**

As used in this Chapter, each of the following terms shall be defined as follows:

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.01**

"Accessory dwelling unit" shall have the meaning set forth in Section XI-10-13.8 of this Code.

- **XII-1-2.02**

"Affordable Housing Cost" means the maximum amount that a household may be required to pay to live in an affordable unit. The City shall determine affordable housing costs for each affordable unit type within a proposed development at the time of project approval, and the affordable

housing cost may be adjusted annually to reflect the current area median income for Santa Clara County.

For rental units, Affordable Housing Cost shall be an annual rent amount, inclusive of an allowance for tenant payment of utilities, that does not exceed 30% of maximum gross income level for very low or low income households as defined herein (as applicable to the affordable unit), adjusted for household size.

For ownership units, Affordable Housing Cost shall be a sales price that results in annual housing expenses that do not exceed 35% of the maximum gross income level for very low, low or moderate income households as defined herein (as applicable to the affordable unit) adjusted for household size.

The City may adopt administrative guidelines to establish criteria to be utilized in calculating affordable housing cost pursuant to this Section.

- **XII-1-2.03**

"Affordable Housing Fund" or "Fund" means a fund established pursuant to the Chapter as described in Section XII-1-9.00, et seq., and in which all fees collected through this Chapter shall be placed.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.04**

"Affordable unit" means an ownership or rental dwelling unit, including senior housing, that is rented or sold at an affordable housing cost to households with very low, low, or moderate incomes as defined in this Chapter, provided, however, that an accessory dwelling unit shall not be counted as an affordable unit for purposes of satisfying the affordability requirements set forth in Section 3 of this Chapter.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.05**

"Applicant" means any person, firm, partnership, association, joint venture, corporation, or any entity or combination of entities (including but not limited to a "developer") that seeks city real property development permits or approvals or bears any responsibility with respect to the subject real property.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.06**

"Dwelling unit" means a dwelling designed and intended for occupancy by one household.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.07**

"Low Income Household" shall have the same definition as set forth for the term "lower income household: in California Health & Safety Code section 50079.5. The income limits for low income households in Santa Clara County are published and updated periodically by the State Department of Housing and Community Development in California Code of Regulations, Title 25, Section 6932.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.08**

"Mixed Use Development" means a development that includes residential and non-residential uses in a vertical or horizontal orientation. All of the provisions of this Chapter that pertain to residential development shall apply to the residential uses and all of the provisions of Section 5 of this Chapter shall apply to the non-residential uses, respectively.

- **XII-1-2.09**

"Moderate Income Household" shall have the definition as set forth in California Health & Safety Code section 50093(b). The income limits for moderate income households in Santa Clara County are published and updated periodically by the State Department of Housing and Community Development in California Code of Regulations, Title 25, Section 6932.

- **XII-1-2.10**

"Non-Residential development project" means any planned district, subdivision map, conditional use permit or other discretionary or non-discretionary City land use approval, which authorizes new construction of gross square feet of nonresidential space, the conversion of residential use to a nonresidential use, or the conversion of exempt space to non-exempt space, including, but not limited to, retail, hotel, motel (including motel, motor hotel, inn and auto court), office, professional office, other commercial, light industrial, data centers and warehouses.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.11**

"On-site" means that the affordable units are provided within the boundaries of the proposed development

- **XII-1-2.12**

"Residential Ownership Project" means any residential project that includes the creation of residential dwelling units that may be sold individually. A residential ownership project also includes condominium conversions.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.13**

"Residential Rental Project" means a residential project or property under common ownership, or portion thereof that creates living units that cannot be sold individually.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.14**

"Resale controls and/or rent restrictions" means legal restrictions by which the affordable units shall be restricted to ensure that the unit remains affordable to very low-, low, or moderate income households, as applicable, for a period of not less than 55 years. With respect to rental units, such rent restrictions shall be in the form of a regulatory agreement recorded against the applicable property. With respect to owner-occupied units, such resale controls shall be in the form of resale restrictions, deeds of trust, and/or other similar documents recorded against the applicable property.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-2.15**

"Residential development" includes, without limitation, detached single-family dwellings, multiple-dwelling structures, groups of dwellings, condominium or townhouse developments, condominium conversions, cooperative developments, mixed use developments that include dwelling units, and residential land subdivisions intended to be sold to the general public.

- **XII-1-2.16**

"Very Low Income Household" shall have the definition as set forth in California Health & Safety Code section 50105. The income limits for very low income households in Santa Clara County are published and updated periodically by the State Department of Housing and Community Development in California Code of Regulations, Title 25, Section 6932.

(Ord. No. 297, § 3, 6/19/18)

- **Section 3 - Minimum Residential Development General Requirements**

- **XII-1-3.00 - 15 Percent Affordability Requirement**

All new residential development projects of ten units or more designed and intended for permanent occupancy shall construct 15 percent of the total number of dwelling units within the development as affordable units, except as otherwise provided by this Chapter. Accessory dwelling units shall not be included to calculate the total number of dwelling units that must be constructed pursuant to this section. The foregoing requirement shall be applied no more than once to an approved development (and generally at the tentative map stage), regardless of the changes in the

character or ownership of the development, provided the total number of units does not change. If the 15 percent calculation results in a fractional unit that is less than 0.5 (i.e., less than half a unit), the developer may pay an in-lieu fee for that fractional unit, as more specifically outlined in Section 4 of this Chapter. A fractional unit equal to 0.5 or greater shall be rounded up, and the project must provide one affordable unit on-site to satisfy any fractional obligation where an in-lieu fee is not paid. .

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-3.01 - Allocation of units to income levels**

Affordable units provided pursuant to this Section shall be allocated to households with a minimum percentage of very low, low, and moderate income levels as follows:

|   | Rental<br>Units | Ownership<br>Units |
|---|-----------------|--------------------|
| Very low or low income households           | 100%            | 0%                 |
| Very low, low or moderate income households | 0%              | 100%               |

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-3.02 - Conditions of approval**

Any tentative map, conditional use permit, or site development review approving residential or mixed-use development projects subject to this Chapter shall contain conditions sufficient to ensure compliance with the provisions of this Chapter. Such conditions shall detail the number of affordable units required, specify the schedule of construction of affordable units, set forth the applicant's manner of compliance with this Chapter, and require the execution of an agreement imposing appropriate resale controls and/or rental restrictions on the affordable units. Any omission or failure to adopt conditions of approval or any of the details or other specifications regarding compliance with this Chapter shall not waive the City's rights to enforce any provision, nor relieve any applicant of its obligations to comply with, all requirements of this Chapter.

At the time of filing a planning application for a residential development subject to this article, the developer shall provide the following information in addition to information specified elsewhere for the applicable planning permit(s):

1. The number of market rate and affordable units proposed on-site, which should include the distribution of units by bedroom size (i.e., studio, one bedroom, two bedroom, etc.) for the total project, market rate units, and affordable units.
2. The tenure of the market rate and affordable units.
3. Gross square footage of building by each use including parking uses.

4. Gross square footage of project's proposed total residential area and gross square footage of existing residential area.
5. Gross square footage of project's proposed non-residential floor area, gross square footage of existing non-residential floor area that will remain as is, and any square footage of new or proposed to be converted non-residential floor area that is exempt from paying affordable housing impact fees pursuant to Section 5 of this Chapter.
6. Habitable square feet for residential units, and net residential square feet of the total project, affordable units and market rate units.
7. The unit sizes (net residential square feet per unit) for the total project, market rate units, and affordable units.
8. The proposed location of the market rate and affordable units by building and location on each floor of a building.
9. Any interior amenities in the affordable units that would differ from market rate units, including, but not limited to, floor coverings, appliances, plumbing and electrical fixtures.
10. The schedule for production of affordable units in phased residential development.
11. Any exceptions or alternatives proposed to comply with this article, including reasons why the findings required to approve such exceptions or alternatives can be met.

- **XII-1-3.03 - Concurrent construction of affordable units**

All affordable units in a project or phase of a project shall be constructed prior or concurrently with market-rate units, unless the City Manager or designee determines in writing that extenuating circumstances exist that make concurrent construction infeasible or impractical. In phased developments, the affordability requirement will be calculated on the basis of the whole development, but affordable units shall be developed in advance or concurrently with market rate units in each phase unless the City Manager or designee determines in writing that extenuating circumstances exist that make concurrent construction infeasible or impractical. If this occurs, a schedule must be developed by the applicant and approved by the City Manager to ensure that affordable units are built expeditiously and before final discretionary permits are issued. Each phase must include the required number of affordable units based on the number of market-rate units in that phase, and on-site affordable housing units must be developed concurrently with the market-rate units in each phase.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-3.04 - Design and distribution of affordable units**

Affordable units shall meet the following requirements:

1. The bedroom mix of the affordable units should be proportionate to the bedroom mix of market rate units, provided that the City may allow a different unit mix to meet other City goals as determined by the City Council.
2. The square footage of the affordable housing units must be reasonably consistent with the market rate units in the development although smaller unit sizes may be allowed by the Director or Building Safety and Housing if the developer provides adequate justification and reasons why the provision of small unit sizes would further the City's housing goals and this Chapter.
3. All affordable units shall be reasonably comparable in terms of floor plan and base finish amenities to market rate units in the proposed development.

4. The quality of the exterior design, landscaping, and construction of the affordable units shall be consistent with the other units in the proposed development. When affordable units are built off-site they shall be of equivalent or of higher quality compared with the market rate units.
5. Affordable units shall have the same access to common entrances from the exterior as market rate units;
6. Affordable units shall have the same access to all project amenities and recreational facilities available to market rate units. Off-site projects shall have convenient access to equivalent project amenities and recreational facilities compared to the market rate units.
7. All affordable units shall be reasonably dispersed throughout the project and for residential structures higher than eight stories, the affordable units shall be evenly distributed throughout the bottom 60% of the floors or higher.

(Ord. No. 297, § 3, 6/19/18)

- **Section 4 - Exceptions to On-Site Development 15 Percent Affordable Units**

Project applicants' projects shall construct 15 percent of the total number of dwelling units within any development as affordable units, except as provided pursuant to this Section. All exceptions to the requirement to construct affordable units on-site for a project with ownership units shall require City Council approval, which shall be obtained at or prior to the last discretionary approval for development of the project.

A. Ownership Projects: The City may allow an exception to the requirement to construct on-site affordable units for a residential ownership project when the applicant contributes to the City's affordable housing needs through one of the alternatives set forth in Subsections XII-1-4.00-XII-1-4.02, provided that prior to City Council approval to the requested exception, the City Council must make the following findings:

1. The development as proposed with the exception as provided pursuant to this Section would further the City's low and/or moderate income housing goals as contained in the Housing Element; and

2. The development with the exception either (i) will result in at least two of the following;

a. The development of a larger number of deed-restricted affordable units than would be created under the on-site requirement;

b. The development of a larger number of deed-restricted affordable bedrooms than would be created under the on-site requirement;

c. The development of a larger amount of deed restricted affordable living area than would be created under the on-site requirement;

d. The development of deed-restricted affordable units at a lower average income target as compared to the affordable units that would be created under the on-site requirement;

or (ii) will provide other community benefits that exceed the benefit of constructing on-site affordable units.

B. Rental Projects: The City may allow an exception to the requirement to construct on-site affordable units for a residential rental project if requested by the applicant, provided that as a condition of such exception that applicant shall be required to contribute to the City's affordable housing needs through one of the alternatives set forth in Subsections XII-1-4.00-XII-1-4.02.

- **XII-1-4.00 - Payment of fees in lieu of creation of affordable units**

Upon request of the applicant and subject to the requirements of this Section 4 as set forth above, the City Council may permit the applicant to pay a fee in lieu of constructing the affordable units that the applicant would otherwise be required to construct pursuant to this Chapter. In-lieu fees shall also be paid for requirements to construct fractional units of less than 0.5 units as set forth in Section XII-1-3.00. The City shall adopt, by resolution, current affordable housing in-lieu fee levels as well as administrative guidelines necessary for the implementation of this Chapter.

Fees paid in-lieu of constructing affordable units must be paid prior to the issuance of the building permit for the project, and fees shall be deposited into the City's Affordable Housing Ordinance Fund. The in-lieu fee shall be calculated based on the gross square footage constructed for each new residential use, taking into account any fee credits that would be applicable based on existing building area. While accessory dwelling units are not counted towards either calculating or meeting the 15% on-site affordable housing requirement pursuant to Section XII-1-3.00, any payment of in-lieu fees must be based on the total gross square footage of all dwelling units developed as part of the project, including any accessory dwelling units.

Unless otherwise specified by resolution of the City Council or amendment to this Chapter, every July 1, or the following business day, if applicable, the City will adjust the affordable housing fees for inflation using the Engineering News Record Building Cost Index for San Francisco. If this index ceases to exist, the Director of Building Safety and Housing shall substitute another construction cost index, which in his/her judgment is as nearly equivalent to the original index as possible.

(Ord. No. [301](#), § 22, 8/20/19; Ord. No. 297, § 3, 6/19/18)

- **XII-1-4.01 - Off-site projects**

Upon request of the applicant, the City Council may permit an applicant to comply with the requirements of this Chapter by constructing the affordable units not physically within the development but within the City of Milpitas in lieu of constructing some or all of the affordable units within the development, with the approval of the City Council, if the City Council finds that:

1. Construction of the units off-site in lieu of constructing units on-site is consistent with the Chapter's goal of creating, preserving, maintaining, and protecting housing for very low, low and moderate income households.

2. The units to be constructed off site are consistent with Section XII-1-3.04 above.
3. It would be infeasible or impractical to construct affordable units on-site.
4. Conditions of approval for the project require that the off-site affordable units would be governed by the terms of a deed restriction and, if applicable, rental restrictions similar to that used for the on-site affordable units.
5. The conditions of approval for the project, or other security such as a cash deposit, bond, or letter of credit, are adequate to require the construction of the off-site affordable units prior or concurrently with the completion of the construction of the residential development.

Affordable units can be built off-site using a different tenure than the subject development (i.e., rental affordable units for an ownership residential project) provided that the square footage of livable space of affordable units provided off-site is greater than what would be required on-site. In this case, the above requirements shall be met and the income-category shall be equivalent to or lower than what would be required for affordable units with the same tenure. The term of the affordable housing and/or resale restrictions shall be determined by the tenure of the affordable units and shall be consistent with sections XII-1-6.00 through XII-1-6.02 of this Chapter as applicable.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-4.02 - Land dedication**

Upon request of the applicant, the City Council may permit an applicant to dedicate land within the City of Milpitas to the City or a City-designated local non-profit housing developer in lieu of construction of some or all of the required affordable units, if the Council finds that:

1. Dedication of land in lieu of constructing units is consistent with the Chapter's goal of creating, preserving, maintaining, and protecting housing for very low, low and moderate income households.
2. The dedicated land is zoned and useable for its intended purpose, is free of toxic substances and contaminated soils, and is fully improved, with infrastructure, adjacent utilities, grading, and all development-impact fees paid, including development-impact fees required by the Milpitas Unified School District but excluding any inclusionary zoning ordinance fees.
3. The proposed land dedication property includes a minimum of .75 acres of developable area, and is of sufficient size and value to meet the following requirements:
  - a. The dedication property includes land sufficient to construct the number of units that the applicant would otherwise be required to construct by Section XII-1-3.00 based on (i) the size of lots in the subdivision for which the applicant is meeting its obligation if the applicant's project is an ownership project, or (ii) the size of the parcel needed to construct the required number of affordable units if the applicant's project is a rental project and assuming the affordable rental units are of comparable size to the market rate units; and
  - b. In addition, the dedication property includes additional land the market value for which is equal to or exceeds the difference between the value of a market-rate, 1200-square foot for-sale unit and the price at which such a unit could be sold as an affordable moderate income

unit (which amount shall be set forth in a resolution adopted from time to time by the City Council) times the number of on-site affordable units that would otherwise be required for the development.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-4.03 - Waiver of requirements**

As part of the development application, the applicant may request and the City Council, at its discretion, may waive, wholly or partially, the requirements of this Chapter and approve alternate methods of compliance with this Chapter if the applicant demonstrates, and the City Council finds, either (1) that such alternate methods meet the purposes of this Chapter and the Council can make the findings for such alternative methods as set forth in Section 4.A of this Chapter; or (2) that there is no reasonable relationship between the impact of the proposed development and the contested requirement or that applying the requirements of this Chapter would take property in violation of the United States Constitution or California Constitution or would result in any other unconstitutional result.

(Ord. No. [301](#), § 22, 8/20/19; Ord. No. 297, § 3, 6/19/18)

**Editor's note**— Ord. No. 297 codified provisions numbered as XII-1-4.04. Subsequently, Ord. No. [301](#), § 22, adopted August 20, 2019, amended the Code by renumbering said section as XII-1-4.05.

- **Section 5 - Non-Residential Affordable Housing Impact Fee**

- **XII-1-5.01 - Applicability**

Any non-residential development, applicable under the definition set forth in Section XII-1-2.05, is subject to payment of a non-residential affordable housing impact fee. The City shall adopt, by resolution, current non-residential affordable housing impact fee levels. Every July 1, or the following business day, if applicable, the City will adjust affordable housing fees for inflation annually using the Engineering News Record Building Cost Index for San Francisco. If this index ceases to exist, the Director of Building Safety and Housing shall substitute another construction cost index, which in his/her judgment is as nearly equivalent to the original index as possible.

The applicant shall pay the non-residential impact fees prior to issuance of the building permit. Applicable fees will be determined at time of payment. All payment of fees made to the City under this Chapter shall be deposited into the City Affordable Housing Ordinance Fund.

(Ord. No. [301](#), § 22, 8/20/19; Ord. No. 297, § 3, 6/19/18)

- **XII-1-5.02 - Calculation of impact fee**

The impact fee will be calculated on a per square foot basis for net new gross floor area. The formula below shall be used in calculating the amount of the housing impact fee: (Gross square feet of total non-residential floor area) minus (square feet of existing non-residential floor area) multiplied by (per square foot fee) equals (total housing impact fee).

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-5.03 - Exemptions**

The following non-residential uses that will be exempt from the fee include:

- a. New construction of non-residential uses of less than 5,000 square feet.
- b. Additions to existing non-residential uses where the square footage increase is less than 5,000 square feet.
- c. Assembly uses.
- d. Day care, nursery and school facilities.
- e. Hospitals.
- f. Other non-residential uses not listed above, but which the City Council determines will have a minimal impact upon the demand for affordable housing and to be exempt pursuant to City Council resolution.

(Ord. No. 297, § 3, 6/19/18)

- **Section 6 - General Procedures for Implementing Inclusionary Zoning Requirements**

- **XII-1-6.00 - Agreements**

Prior to the issuance of a building permit for an affordable unit, resale restrictions or rental controls, or both, as the case may be, shall be set forth in an agreement between the City and the applicant, which agreement shall be recorded against the property containing the affordable units. The agreement shall be executed by the City Manager or designee, and its requirements shall run with the land and bind the applicant's successors. Covenants on the affordable units shall not be less than 55 years.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-6.01 - Rental units; occupancy; annual report**

Agreements involving rental units shall require the owner of the affordable units to ensure that the units are occupied by tenants whose monthly income levels do not exceed very low-, low-, or moderate income levels, as the case may be, and shall preclude tenants from subletting or subleasing the unit. The agreement shall also require the owner of the affordable unit to submit an annual report to the City Manager, in a format approved by the City. The report shall include, but not be limited to the following information: an identification of the affordable units within the

project; the monthly rents charged and proposed to be charged; vacancy information for the prior year; and the monthly income for tenants of each affordable unit throughout the prior year.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-6.02 - Ownership Units; Occupancy; City's Purchase Option**

Agreements for ownership units shall specify that the inclusionary units must be occupied by the owner or owners and may not be leased or rented without the written approval of the City. The resale restrictions shall provide that in the event of the sale of an affordable unit, the City shall have the right to purchase any affordable owner-occupant unit at the maximum price that could be charged to an eligible household. Ownership units will have a 55-year resale restriction covenant with a purchase option to the City. Homeowners will be subject to the City's monitoring program for owner-occupancy.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-6.03 - Selection criteria**

No household shall be permitted to occupy a unit that is required under this Chapter to be affordable unless the City Manager or designee has approved the household's eligibility. Eligible potential occupants of affordable units will be qualified on the basis of household income, the median combined household income statistics for Santa Clara County published periodically by the California Department of Housing and Community Development, all sources of household income and assets, the relationship between household size and the size of available units, and any further criteria required by law. The applicant shall use an equitable selection method established in conformance with the terms of this Chapter and subject to approval by the City. The selection criteria may not distinguish between adults and children. Subject to the requirements of state and federal fair housing laws and regulations, the City shall endeavor to make housing available for Milpitas residents, former Milpitas residents who have been displaced, households with children enrolled in the Milpitas Unified School District that have inadequate housing as defined in the federal McKinney-Vento Homeless Assistance Act, and employees employed within the boundaries City of Milpitas, and may develop selection criteria to implement these goals. The applicant will pursue active marketing, conduct affordable housing workshops, extensive advertising and other measures to ensure that residents and employees are informed and educated about the availability of affordable units.

To qualify as "Employed within the boundaries of the City of Milpitas," the person shall currently be employed within the City of Milpitas or have been offered employment for a job within the City of Milpitas.

To qualify as a "Milpitas resident," the person shall have been a resident of the City of Milpitas for at least a one-year period prior to the eligibility determination. Residency may be demonstrated by providing a rent or utility bill, or similar documentation.

(Ord. No. 297, § 3, 6/19/18)

- **Section 7 - Incentives to Encourage On-Site Construction of Affordable Units**

- **XII-1-7.00**

Applicants shall receive incentives as specified in this Section 8 to encourage the on-site construction of affordable units. If an applicant provides affordable units in excess of 20 percent of the total number of units in the project the City will provide the following incentives to include:

A. Planning Waivers. In addition to waivers, incentives and/or concessions that may be provided pursuant to density bonus law as outlined in Section XI-10-54.15 in the Milpitas Municipal Code if the applicant provides affordable units in excess of 20 percent of the total number of units in the development, the Director of Planning shall grant up to two of the waivers listed below in this Section that help increase the feasibility of the construction of affordable units. The applicant will receive an additional two waivers from the list below for every additional five percent of affordable units provided above the 20 percent. The applicant may choose from the following waivers:

1. Priority processing.
2. Reduced setback requirements not to exceed 50 percent of the minimum required setback.
3. Greater floor area ratio (FAR) not to exceed 50 percent of the maximum FAR for commercial space in mixed use zoning.
4. Reduced landscaping requirements.
5. Reduced interior or exterior amenities.
6. A maximum 20 percent reduction in parking requirements.
7. Height restriction waivers not to exceed 20 percent of the maximum zoning height limitations and in no event to exceed the general plan height limitations.

B. Fee Deferral.

1. Development Processing Fees. The City Manager may approve deferred payment of City processing fees applicable to the review and processing of the project. The terms and payment schedule of the deferred fees shall be subject to the approval of the City Manager.
2. Development Impact Fees. The City Manager may authorize the deferred payment of development impact fees applicable to the affordable units. Approval of this incentive requires demonstration by the Applicant that the deferral increases the project's feasibility. The applicant must provide appropriate security to ensure future payment of such fees.

(Ord. No. [301](#), § 23, 8/20/19; Ord. No. 297, § 3, 6/19/18)

- **Section 8 - Affordable Housing Ordinance Fund**

- **XII-1-8.00 - Affordable Housing Ordinance Fund**

In lieu fees shall be deposited into a fund known as the "Affordable Housing Ordinance Fund" ("Fund").

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-8.01 - Use of Funds**

All monies in the Fund, together with any interest earnings on such monies less reasonable administrative charges, shall be used or committed to use by the City for the purpose of providing very low, low , and moderate income ownership or rental housing in the City of Milpitas.

(Ord. No. 297, § 3, 6/19/18)

- **Section 9 - Violations**

- **XII-1-9.00**

It shall be unlawful for any person, firm, corporation, partnership or other entity to violate or fail to comply with any provision of this Chapter. In addition to other fines, penalties or other remedies provided by State municipal law, including without limitation, those provided in Title I, Chapter 1, Section 4 of the Milpitas Municipal Code, the City may revoke or suspend any permit issued to an applicant, owner or any other party who violates this Chapter, as set forth in Section XII-1-11.00. The City's right to take action pursuant to this section shall exist in addition to, and independent of, any other rights and remedies available to the City and shall exist notwithstanding the existence or lack thereof of any condition of approval imposed on an individual development project.

(Ord. No. 297, § 3, 6/19/18)

- **Section 10 - Enforcement**

- **XII-1-10.00 - General**

The City Manager shall enforce this Chapter, and its provisions shall be binding on all agents, successors, and assigns of an applicant. The City Manager may suspend or revoke any building permit or approval upon finding a violation of any provision of this Chapter. No land use approval, building permit, or certificate of occupancy shall be issued for any development unless in

compliance with this Chapter or unless expressly exempted by action of the City Council. Not in limitation of any other authorization, right or remedy, the City may institute any appropriate legal actions or proceedings necessary to ensure compliance herewith, including, but not limited to, actions to revoke, deny, or suspend any permit or development approval.

(Ord. No. 297, § 3, 6/19/18)

- **XII-1-10.01 - Excessive rents/legal action**

If the City Manager determines that rents in excess of those allowed by operation of this Chapter have been charged to a tenant residing in an affordable unit, the City may take appropriate legal action to recover, and the project owner shall be obligated to pay to the tenant, or to the City in the event the tenant cannot be located, any excess rents charged.

(Ord. No. 297, § 3, 6/19/18)