



FAIRFAX TOWN COUNCIL MEETING

STAFF REPORT

MEETING DATE November 1, 2023

PREPARED FOR Mayor and Town Council

PREPARED BY Jeffrey Beiswenger, AICP, Planning and Building Services Director

SUBJECT Second Reading by Title only and Adoption of an Ordinance Adding Chapter 17.140 “Affordable Housing” to Title 17 “Zoning” of the Fairfax Municipal Code Relating to Inclusionary Housing Requirements; CEQA exempt per CEQA Guidelines § 15061(b)(3).

RECOMMENDATION

Waive second reading and read by title only “An Ordinance Adding Chapter 17.140 ‘Affordable Housing’ to Title 17 ‘Zoning’ of the Fairfax Municipal Code Relating to Inclusionary Housing Requirements.”

BACKGROUND

Staff is recommending the adoption of a group of affordable housing policies and related fees that will promote and provide affordable housing in the Town of Fairfax. As explained further below, these policies and fees were developed in conjunction with five other Marin jurisdictions working with a consultant team to establish common inclusionary requirements among the jurisdictions. The policies are critical to providing housing to households of all income levels within the Town of Fairfax. The policies are designed to work in conjunction with each other to help alleviate the housing crisis that exists throughout the State and in the Town.

The [October 4, 2023](#) reading served as a first reading, and this is the second reading for adoption at a regular Council meeting. If adopted, the ordinance would take effect in 30 days.

Summary of Affordable Housing

Inclusionary housing ordinances and policies, and related affordable housing in-lieu fees, and commercial/nonresidential linkage fees are tools to increase affordable housing within a jurisdiction. Inclusionary housing requirements (or inclusionary zoning) aim to increase the supply of affordable housing that is deed-restricted for lower-income households by requiring private housing developers to include a certain percentage of deed restricted affordable units in a market rate housing development project, effectively integrating affordable housing units into market rate developments. Inclusionary provisions include setting the minimum project size and number and level of affordable units required. Inclusionary requirements also help a jurisdiction satisfy its Regional Housing Needs Allocation (RHNA) for units at various affordability income levels.

State law also requires alternative(s) to providing on-site inclusionary units for rental projects, and it is considered a best-practice to consider alternatives regarding for-sale units. Alternatives can include in-lieu fees, off-site construction, and land dedication.

Affordable housing in-lieu fees and commercial/nonresidential linkage fees promote affordable housing by providing monies to an affordable housing fund, which are used to promote, procure, and facilitate affordable housing within a community.

AB 602 Fee Study Requirement Satisfied

Assembly Bill 602 (AB 602) imposes new requirements for housing development impact fees. AB 602 requires an impact fee study that is adopted after July 1, 2022, to either calculate a fee levied or imposed on a housing development project proportionately to the square footage of the proposed unit or make specified findings explaining why square footage is not an appropriate metric to calculate fees. In part, the intent is to allow smaller housing units by making the fees proportional to size, thereby reducing the fee amount. AB 602 also imposes certain procedural adoption requirements, such as adoption of the nexus study at a public hearing with 30 days' notice.

A development impact fee is defined as a monetary exaction, other than a tax or special assessment, that is charged by a jurisdiction in connection with the approval of a project in order to defray the costs of "public facilities" related to the project.¹ (Gov. Code, § 66000(b).) Public facilities include public improvements, services, and community amenities. (Gov. Code, §66000(c).) A nexus study provides the legal findings necessary to impose a development impact fee. Fees are adopted by Resolution.

Affordable housing in-lieu fees are required instead of the provision of on-site affordable units and therefore not considered a development impact fee or subject to AB 602. However, the Commercial/nonresidential linkage fees are considered development impact fees and therefore are subject to AB 602. A Commercial/nonresidential linkage fee is a fee imposed on non-residential and commercial development projects. The monies collected from both fees are deposited into an affordable housing fund (described below in this staff report).

The fee studies entitled the "Inclusionary Program and In-Lieu Fee Study for Fairfax" dated February 10, 2023 and "Commercial Linkage Fee Study" dated February 18, 2023 were completed under the SB 2 Grant satisfy the requirement of Assembly Bill 602 (AB 602) and support the commercial/nonresidential linkage fee.

DISCUSSION

A description of the above policies and regulations are described as follows:

A. Project Size Threshold.

Pursuant to collaboration among participating Marin jurisdictions, staff recommends a 3-unit minimum project size threshold similar to other participating jurisdictions. A project size threshold of 3 will leverage more affordable units for large projects and while not burden medium projects. Accessory dwelling units and junior accessory dwelling units (ADU/JADU) would not count towards the minimum project threshold. Additionally, reconstruction of any structures that have been destroyed due to an act of nature; or residential building additions, repairs, or remodels are not subject to the Ordinance provided existing units are not increased by three or more units.

B. Percentage Affordable/Set-Aside Requirement.

Inclusionary zoning requires housing developers to include a certain percentage of affordable units in a market rate housing development project and/or pay an in-lieu fee or take an approved alternative action. As a policy matter, the percentage required should be high enough to impact housing supply but must not be so high to discourage development.

¹ A development project fee does not include fees for processing applications and approvals, which are collected in order to cover the costs of processing an application.

After analysis, the Consultants working with the participating jurisdictions recommended an inclusionary housing requirement of 20% for both for-sale and rental housing development projects. This is consistent with the requirements of many other jurisdictions in the Bay Area. However, during the approval of the Inclusionary Study by Town Council, it was determined that a more reasonable percentage of units should be 20% for Single Family Subdivision projects and 15% set-aside for Rental projects.

The affordable/set aside units are based on housing affordability levels and are established by HUD based on a percentage of Area Median Income. For Marin, the following affordability levels apply.²

Current Marin County HUD Affordability Levels

Income Category	% Median Income	Annual Income 1-person	Annual Income 3-person	Annual Income 4-person
Very low	50%	\$63,950	\$82,250	\$91,350
Low	80%	\$102,450	\$131,750	\$146,350
Median	100%	\$104,700	\$134,650	\$149,600
Moderate	120%	\$125,650	\$161,550	\$179,500

The target Area Median Income (AMI), which determines the maximum rent or sales price that can be charged for each unit required to be affordable is set forth below. AMI price levels would be consistent for both rental and for-sale units in order to ease implementation. The very-low income of 50% AMI is at the top of the range consistent with State density bonus law. The remaining categories are mid-point within the range.

Target AMIs for Rental and For-Sale Units

Income Category	Income Range	Target AMI Rental Level	Target AMI Sales Price Level
Very Low	30-50% AMI	50% AMI	n/a
Low	50-80% AMI	65% AMI	65% AMI
Moderate Income	80-100% AMI	100% AMI	100% AMI
Above Moderate	120-150% AMI	n/a	135% AMI

C. Affordable Housing In-lieu Fee and Commercial/nonresidential Linkage Fee.

An affordable housing in-lieu fee is a fee that is paid by the developer instead of constructing the required affordable units. A commercial/nonresidential linkage fee is a fee that is imposed on non-residential

² <https://www.hcd.ca.gov/grants-funding/income-limits/state-and-federal-income-limits/docs/income-limits-2021.pdf>

development in order to mitigate the housing-related impacts on the community of the non-residential development. These fees are paid into the Affordable Housing Fund, which is dedicated to promoting and facilitating affordable housing within the Town.

As supported by the Consultants studies (see Attachments 4 and 5), the affordable housing in-lieu fee was calculated based on the housing affordability gap, which is the difference between what households at different income levels can pay for housing and the cost of developing market rate housing. This is the per unit amount that a housing developer would pay instead of building affordable unit(s) as part of the project. With respect to for-sale projects, the gap is the difference between annual mortgage costs and monthly housing payments at affordable levels. For rental housing the gap is the difference between market rate rents and affordable rents.

The in-lieu study calculated 3 development types: 1) for-sale single family subdivisions; 2) for sale condominiums; and 3) rental apartment projects. The types were based on recent and proposed projects in Marin and through meetings with developers. The affordable housing in-lieu fee proposed is based on the affordability gap for 90% AMI. Setting the in-lieu fee towards the maximum affordability gap level encourages developers to provide on-site units.

Income Level	For Sale Gap; Single Family Subdivision	For-Sale Gap; Condominium	Rental Gap
Affordable Housing In-Lieu Fee	\$362,817	\$288,650	\$362,817

The affordable housing in-lieu fee will be adjusted to the year-over-year change in the California Construction Cost Index (CCCI). It is recommended that the CCCI is used rather than the Consumer Price Index because the difference of what households can pay is tied directly to construction costs. All in-lieu fees shall be calculated and paid at issuance of the first building permit for the project.

Commercial/nonresidential linkage fees proposed are as follows:

Type of Project	Fee per Square Foot of Net New Gross Floor Area
Office	\$3
Retail/Restaurant	\$3
Hotel	\$3
Other	\$3

The fee applies to commercial/non-residential components of mixed-use projects. All fees will be calculated and paid at issuance of the first building permit for the project. The fee will also be adjusted annually based on the yearly change in the CCCI.

D. Affordable Housing Fund.

The proposed Ordinance Amendment includes the establishment of an Affordable Housing Fund (Fund). This Fund is established to receive housing impact fees including affordable housing in-lieu fees and commercial/nonresidential linkage fees. The monies deposited into the Fund, along with interest earned, shall be used only to increase and improve the supply of affordable housing in the Town of Fairfax. The Planning Director is responsible for administering the Fund consistent with the Town Municipal Code and may develop procedures to implement the Fund.

E. Alternative Means of Compliance.

It is considered best-practice to include alternative compliance methods regarding for-sale housing projects, and State law requires alternative methods for rental projects. (Gov. Code, §65850(g).) Alternatives to the provision of on-site inclusionary housing units include in-lieu fees (above) and actions such as off-site construction, land dedication and/or the rehabilitation, acquisition, or preservation of off-site units.

Here, alternative methods of compliance include the payment of affordable housing in-lieu fees, donation of land to the Town or a non-profit, and construction of affordable units on another site within ½ mile of the project that is subject to the inclusionary housing requirement.

Planning Commission Discussion and Recommendation

The Commission discussed this agenda item and the primary concern was the future use of in-lieu funds. One concern was with the wording in Section 17.140.130 (Affordable Housing Fund), that gives the Planning Director the authority to administer the fund. Staff explained that the Planning Director’s role would only be to administer the funds and not dictate the use. Any use of the funds would come in front of Town decisionmakers, typically as part of an affordable housing project proposal.

A second concern with this same section was the relation between the use of affordable funds and income categories. The section currently states that the fund will be used to improve the supply of affordable housing for moderate, low and very low-income households. Members of the Planning Commission would prefer to focus funds on low and very low-income households, but this was not a consensus. Other members of the Commission would prefer that the use of the funds remain flexible.

The Commission also found a few errors in the text and some confusing language. The Planning Commission recommended that the Town Council approve the ordinance and both resolutions subject to corrections identified in an errata sheet. All errors identified by the Commission have been corrected in the version of the ordinance attached to this staff report.

CALIFORNIA ENVIRONMENTAL QUALITY ACT

The Ordinance Amendment is exempt from the California Environmental Quality Act (“CEQA”) pursuant to CEQA Guidelines section 15061(b)(3) because it can be seen with certainty that there is no possibility that the Amendment will have a significant effect on the environment.

FISCAL IMPACT

n/a

ATTACHMENT

Proposed Affordable Housing Ordinance

ORDINANCE NO. ____

**AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF FAIRFAX
ADDING CHAPTER 17.140 “AFFORDABLE HOUSING” TO TITLE 17 “ZONING” OF
THE FAIRFAX MUNICIPAL CODE RELATING TO INCLUSIONARY HOUSING
REQUIREMENTS**

WHEREAS, the Town Council finds that the Town of Fairfax faces a significant shortage of affordable housing and the lack of access to affordable housing has a direct impact upon the health, safety, and welfare of the residents of the Town; and

WHEREAS, the California Legislature has consistently recognized the continuing need for affordable housing in California, stating in Government Code Section 65580, that “the availability of housing is of vital statewide importance, and the early attainment of decent housing ... is a priority of the highest order” and, further, that, “local ... governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community;” and

WHEREAS, affordable housing is regulated by a variety of state and local laws, ordinances, and policies, and the Regional Housing Needs Assessment (RHNA) requires the Town to provide for the development of a specified number of housing units. The Town’s Housing Production allocation for the next allocation cycle calls for the development of 490 new housing units, including 149 very-low-income units, 86 low-income units, 71 moderate-income units and 184 above-moderate-income units; and

WHEREAS, the Town desires to explore and to the extent feasible, use all available tools to meet its mandated regional housing goals; and

WHEREAS, a lack of new units affordable to very low-, low- and moderate-income households within the Town results in housing located a significant distance away from employment centers, requiring excess commutes by workers and negatively impacting traffic, air and noise pollution.

WHEREAS, the State of California requires each city or town to develop a general plan establishing policies for future development. As specified in the Government Code, the general plan must: (i) encourage the development of a variety of housing types for all income levels; (ii) assist in the development of adequate housing to meet the needs of low- and moderate-income households; and (iii) conserve and improve the condition of the existing affordable housing stock, which may include addressing ways to mitigate the loss of dwelling units demolished by public or private action; and

WHEREAS, the implementation of an inclusionary housing requirement in accordance with this ordinance, will provide a mechanism for all residential development projects containing 3 or more units to provide a contribution to affordable housing consistent with

the goals of the Town's Housing Element; and the implementation of the ordinance will aid the Town in achieving the goal of making affordable housing diverse, dispersed and inclusionary; and

WHEREAS, an affordable inclusionary housing requirement for all new developments containing 3 or more residential units, in the Town of Fairfax will serve to contribute to meeting the Town's overall future need of affordable housing and to help meet its RHNA allocations; and

WHEREAS, on September 14, 2023, the Planning Commission of the Town of Fairfax conducted a duly and properly notice public hearing regarding the Affordable Housing Ordinance and voted to recommend Town Council adoption of the ordinance; and

WHEREAS, a duly and properly noticed public hearing regarding the Affordable Housing Ordinance was conducted by the Town Council on October 4, 2023, and the Town Council carefully considered all pertinent testimony and the staff report offered at the public hearing.

NOW, THEREFORE, the Town Council of the Town of Fairfax, California, does hereby ordain as follows:

SECTION 1: Environmental Review. The Ordinance Amendment is exempt from the California Environmental Quality Act ("CEQA") pursuant to CEQA Guidelines section 15061(b)(3) because it can be seen with certainty that there is no possibility that the Amendment will have a significant effect on the environment.

SECTION 2: The above recitals are true and correct and are incorporated as findings herein.

SECTION 3: Ordinance Amendment. Chapter 17.140 "Affordable Housing" is hereby added to Title 17 "Zoning" of the Fairfax Municipal Code as follows:

17.140.010 Purpose and Intent.

- (A) The purpose of this chapter is to ensure that new residential and nonresidential development projects contribute to the availability and attainment of decent, affordable housing to a broad range of households with varying income levels throughout the Town of Fairfax.
- (B) These requirements implement the Town's Housing Element by assisting in meeting the Town's Regional Housing Needs Allocations, providing funding to facilitate affordable housing development, and affirmatively furthering fair housing by ensuring that affordable housing is constructed in all parts of the Town.
- (C) The Town Council desires to provide and maintain affordable housing opportunities through an affordable Housing In-Lieu Fee, the funds of which will be deposited into the Affordable Housing Fund to be used in the development of affordable housing and related programs in the Town. The

commercial/nonresidential linkage fee requirements will assist in alleviating the impacts of the demand for new affordable housing created by new nonresidential developments.

17.140.020 Definitions.

See Chapter 17.008 (Definitions) for terms related to this Chapter.

17.140.030 Affordable Housing Requirements.

Residential development projects that include three or more Dwelling Units shall include the construction of Inclusionary Units in accordance with this chapter, unless an alternative means of compliance is permitted in accordance with this chapter.

(A) *Inclusionary Requirements for For-Sale Dwelling Units.* Residential development projects that include for-sale dwelling units shall provide Inclusionary Units through one of the following means:

(1) For-sale residential development projects shall include deed restricted, for-sale moderate-income units equal to twenty (20%) percent of the total number of dwelling units in the project. The developer may, at its discretion, provide very low-income units or low-income units instead of moderate-income units.

(2) As an alternative to developing for-sale Inclusionary Units within the residential development project as set forth above, for-sale residential development projects may satisfy the requirements of this chapter by developing rental low-income units included within the residential development equal to twenty (20%) percent of the total number of for-sale and rental units included in the residential development. The developer may create a separate legal parcel within the residential development project upon which the rental low-income units may be located. The developer may, at its discretion, provide very low-income units instead of low-income units.

(B) *Inclusionary Requirements for Rental Units.* Residential development projects that are comprised of rental units shall provide low-income Inclusionary Units included within the project equal to fifteen (15%) percent of the total number of rental units in the residential development. The developer may, at its discretion, provide rental very low-income units instead of low-income units.

(C) Residential Development Projects with a Combination of For-sale and Rental Dwelling Units: When a project includes a combination of for-sale and rental units, the number and income levels for Inclusionary Units required for the project shall be calculated for each category of dwelling units (i.e., for-sale and rental) individually, and combined to comprise the residential development project's total inclusionary housing requirement pursuant to this chapter.

(D) *Density Bonus Units*. For purposes of calculating the number of Inclusionary Units required, any additional units authorized as density bonus units will not be counted in determining the required number of Inclusionary Units.

(E) *Fractional Units*. If in computing the total number of Inclusionary Units required in a residential development project, there is a fractional unit required, the Applicant shall pay a Housing In-Lieu Fee in the amount determined in accordance with section 17.140.120 of this chapter, equal to the amount calculated for that fractional unit on a per dwelling unit basis, unless the Applicant elects to round up to the nearest whole number of units and provide that unit.

17.140.040 Exemptions.

The requirements of this chapter do not apply to:

(A) The reconstruction of any structures that have been destroyed by fire, flood, earthquake or other act of nature provided that the reconstruction of the site does not increase the number of residential units by three or more.

(B) Residential building additions, repairs or remodels; provided that such work does not increase the number of existing units by three or more.

(C) Residential development projects that have been deemed complete by the Town in accordance with Government Code Section 65589.5 or 65943 as of the effective date of this chapter.

(D) Any Accessory Dwelling Unit or Junior Accessory Dwelling Unit approved by the Town.

(E) Any residential development project exempted by State law as may be amended from time to time.

17.140.050. Duration of Affordability Covenants.

(A) For-sale Inclusionary Units produced pursuant to this chapter shall be legally restricted to sale to and occupancy by households of the income levels for which the units were designated for a single cumulative term of fifty-five (55) years. During that term, the for-sale Inclusionary Units may only be sold and resold to Moderate or Low-Income Households at an Affordable Sales Price for Moderate-Income Households.

(B) Rental units produced pursuant to this chapter shall be legally restricted to rental to and occupancy by households in the income level for which the Inclusionary Units are developed for a term of not less than fifty-five (55) years. At the end of the fifty-five year term, the restrictions on rental of the Inclusionary Units may only be removed in the event that the property upon which the rental Inclusionary Unit or units are located is rezoned and used for a non-residential use.

(C) To ensure compliance with the durational requirement, Affordable Housing Agreements, and resale restriction agreements for For-sale Inclusionary Units, shall be recorded in the chain of title for every Inclusionary Unit.

17.140.060 Alternative Means.

The following are alternative means of fulfilling inclusionary housing obligations:

(A) Payment of Housing In-Lieu Fee.

(1) As an alternative to constructing Inclusionary Units as required by this chapter, all or a portion of the inclusionary housing requirement may be fulfilled through the payment of a Housing In-lieu Fee pursuant to an In-lieu Fee schedule adopted by the Town pursuant to this chapter, subject to the following:

- i. For-sale and Rental units may pay a Housing in-lieu fee.
- ii. The Housing In-Lieu fee shall be paid at the time that the first building permit is obtained for the residential development.
- iii. All in-lieu fess collected under this chapter shall be deposited in the Inclusionary Housing Fund established pursuant to this chapter.

(B) Off-site Development of Affordable Units.

(1) As an alternative to constructing Inclusionary Units on site, all or a portion of the inclusionary housing requirement may be fulfilled through the off-site construction of the unit pursuant to this chapter, subject to the following:

- i. Off-site development of the required affordable units is permitted provided the Off-site units are located within one-half mile of the market-rate development that is the subject of the inclusionary housing requirement.
- ii. The off-site units shall not create an over-concentration of deed-restricted affordable dwelling units in any one neighborhood. For purposes of this chapter, “over concentration” is defined as more than fifty (50) deed restricted very low or low-income dwelling units within ¼ mile of the site of the proposed Inclusionary Units, or more than two hundred (200) of such units within one-half (½) mile of the site of the proposed Inclusionary Units.

(C) Land Dedication.

(1) As an alternative to constructing Inclusionary Units as required by this chapter, all or a portion of the inclusionary housing requirement may be fulfilled through the dedication of land to the Town or a non-profit at no cost, subject to the following:

- i. The land dedicated shall be zoned to allow residential use;
- ii. The land shall be of sufficient size to accommodate the required units;
- iii. The applicant shall provide evidence satisfactory to the Town that the property does not contain any hazardous materials at the time of conveyance; shall disclose whether any hazardous materials

were previously found on the property; and if hazardous materials were previously remediated from the property, the applicant shall provide evidence satisfactory to the Town that such hazardous materials were remediated in accordance with all applicable laws and regulations;

- iv. The land shall be fully improved with access infrastructure, adjacent utilities, and grading; and
- v. A non-profit shall enter into an agreement with the Town to construct the units within an agreed upon time period and the units constructed shall be subject to the affordability covenant as set forth in section 17.140.050.

(D) The alternative means of compliance set forth herein are intended to implement the Town's authority to promote the development of affordable housing, in accordance with California Government Code § 65850, subdivision (g), and shall not be considered or construed as an ad hoc exaction, a mandated fee required to develop a specific property, or a fee imposed to offset the development impacts of a specific project.

17.140.070. Development Standards of Inclusionary Units.

Unless otherwise specified by the Town Council, Inclusionary Units shall be developed in a manner consistent with the following requirements:

(A) For-Sale and Rental Inclusionary Units.

- (1) Inclusionary Units shall be reasonably dispersed throughout a Residential Development and not clustered in a specific portion of the development, and the location of the Inclusionary Units within a Residential Development shall be designated before issuance of the first building permit for the Residential Development.
- (2) Inclusionary Units shall be built concurrently with the Market Rate Units in the Residential Development. The Inclusionary Units may be constructed in phases if the Market Rate Units are constructed in phases, provided that the percentage of Inclusionary Units developed in each phase shall be equivalent to or greater than the total percentage of Inclusionary Units to be developed as part of the Residential Development until such time that all the Inclusionary Units have been built.
- (3) Inclusionary Units shall be comparable in infrastructure (including sewer, water and other utilities), construction quality and exterior design to the market-rate units.
- (4) The bedroom mix for the Inclusionary Units shall be proportional to the bedroom mix of the Market Rate Units, but the Inclusionary Units may be smaller in square footage than the Market Rate Units.
- (5) The interior finishes and features for the Inclusionary Units shall be comparable to the base level interior finishes for the market-rate units, and

the appliance packages in the Inclusionary Units shall be the same as the appliance packages provided in the base level Market Rate Units.

- (6) Residents and tenants of Inclusionary Units located within the Residential Development shall be provided the same rights and access to common amenities in the development project as residents and tenants occupying market-rate units.

(B) Off-site Inclusionary Units.

- (1) The off-site Inclusionary Units shall be constructed concurrently with the Market Rate Units in the Residential Development that triggered the requirements for the Inclusionary Units. If the Market Rate Units are constructed in phases, then the off-site Inclusionary Units shall be constructed prior to or concurrently with the first phase of the market rate Residential Development. Construction of the second phase of the Market Rate Units shall not commence until the required off-site Inclusionary Units are completed.
- (2) Off-site inclusionary Units shall be comparable in infrastructure (including sewer, water and other utilities), construction quality and exterior design to the market-rate units.
- (3) The bedroom mix for the off-site Inclusionary Units shall be proportional to the bedroom mix of the Market Rate Units, but the off-site Inclusionary Units may be smaller in square footage than the Market Rate Units.
- (4) The interior finishes and features for the off-site Inclusionary Units shall be comparable to the base level interior finishes for the market-rate units, and the appliance packages in the off-site inclusionary Units shall be the same as the appliance packages provided in the base level Market Rate Units.

Section 17.140.080 Inclusionary Housing Plan

- (A) No Residential Development subject to this chapter shall be approved or deemed approved without approval of an Inclusionary Housing Plan as provided herein.

- (B) Submittal of Inclusionary Housing Plan: The applicant for a residential project subject to this chapter shall submit an Inclusionary Housing Plan in conjunction with its application for discretionary approvals required of the Town for the Residential Development, or if no discretionary approvals are required, in conjunction with the application for the first ministerial permit or approval required for the Residential Development. The Inclusionary Housing Plan shall be in a form as required by the Town and shall include the following information as applicable based on the applicant's method of compliance with this chapter:

- (1) Whether the Residential 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, approximate location, size and design, construction and completion schedule of all Inclusionary Units;

- (4) For off-site development of Inclusionary Units, such information as is required to demonstrate compliance with section 17.140.070;
- (5) Phasing of Inclusionary Units in relation to Market Rate Units;
- (6) The amount of In-lieu Fees to be paid by applicant, if applicable.
- (7) Provide a plan for collecting sufficient reserves for the ongoing repair and maintenance of below-market rate units which shall not compromise the affordability of the below-market rate units.
- (8) Any other information reasonably requested by the Town Manager to assist with evaluation of the plan under the requirements of this ordinance.
- (9) Acknowledgement that an instrument as specified by the Town restricting the Inclusionary Unit(s) as affordable shall be recorded against every Inclusionary Unit and that a recordable Affordable Housing Agreement shall be entered into by the applicant and any other necessary party, and/or that all required In-lieu Fees shall be paid at the time set forth in this chapter.

(C) Approval of Inclusionary Housing Plan.

- (1) In the event that the residential development project requires discretionary approvals in order to be developed, the Inclusionary Housing Plan shall be considered with the application for such inclusionary approvals by the entity responsible for reviewing such discretionary approvals and may be appealed in accordance with the appeals procedures established for such approvals.
- (2) In the event that the residential development project does not require discretionary approvals in order to be developed, the Inclusionary Housing Plan shall be considered by the Town Manager and shall be approved prior to the issuance of any ministerial permits required for the project. The Town Manager's decision is final unless a written appeal is filed with the Town Clerk's office within ten days from the date of issuance of the Town Manager's decision under this title. In the event of an appeal, the Town Council's decision shall be final.
- (3) Notwithstanding the foregoing, in the event the applicant desires to comply with this chapter by means of a method that specifically requires Town Council approval pursuant to this title, the Inclusionary Housing Plan shall be considered by the Town Council either prior to or concurrently with consideration by the required decision-making body for the approvals required for the residential development project.

(D) The forms of the Affordable Housing Agreement and any related declarations, resale restrictions, deeds of trust, and other documents authorized by this chapter shall be in a general form as prescribed by the Town and shall be approved by the Town Manager and approved as to form by the Town Attorney prior to being executed with respect to any residential development project subject to this chapter.

(E) Recording of Affordable Housing Agreements.

- (1) An Affordable Housing Agreement in a form approved by the Town shall be recorded against Inclusionary Units or the residential development project in its entirety, as deemed appropriate by the Town Manager in consultation with the Town Attorney, prior to the issuance of any building permit for the Residential Development. The Affordable Housing Agreement shall ensure that the applicant develops the required Inclusionary Housing Units and complies with all other terms of the approved Inclusionary Housing Plan and this chapter.
 - (2) Resale restrictions, deeds of trust, and/or other documents as deemed necessary or appropriate by the Town Manager shall be recorded against For-Sale Inclusionary Units to ensure the continued affordability of the For-Sale Inclusionary Units in compliance with this chapter.
- (F) Building permits: The Town shall not issue a building permit for a residential development project subject to the requirements of this chapter without an Affordable Housing Agreement executed by the owner, the applicant (if not the owner) and the Town Manager, and approved as to form by the Town Attorney, and recorded against the property, or payment of In-lieu Fees in accordance with this chapter.

17.140.090. Requirements for For-Sale Inclusionary Units:

- (A) Initial sales price and resale. The initial sales price and resale price of the For-sale Inclusionary Unit will be at an Affordable Sales Price that will ensure that the purchaser of the Inclusionary Unit will pay an Affordable Housing Cost for the unit. The Town shall, from time to time, set a benchmark mortgage interest rate and an assumed home buyer down payment amount to be used to calculate the Affordable Sales Price. The Town Manager may establish and adjust such benchmark mortgage interest rates, establish an assumed home buyer down payment amount, along with a range of allowable home buyer down payments pursuant to the delegated authority set forth in section 17.140.160. Such standards shall be in writing and available to the public upon request.
- (B) Transfer. A resale restriction agreement will be entered into on each change of ownership of For-sale Inclusionary Units, to maintain the household income restriction on the Inclusionary Unit prior to the expiration of the affordability period established pursuant to section 17.140.050.
- (C) Owner occupancy required: All for-sale Inclusionary Units are subject to the following regulations:
 - (1) Principal residence. The purchaser of the Inclusionary Unit shall use and occupy the Inclusionary Unit as purchaser's principal place of residence.
 - (2) No rental. Owner is expressly prohibited from leasing or renting the Inclusionary Unit unless the Town has given its prior written consent to such lease or rental on the basis of a demonstrated hardship by the owner.

- (3) Annual report. The Town from time to time may require certification of continuing occupancy of the Inclusionary Unit by owner, which shall be verified by owner to the reasonable satisfaction of the Town by means of a written report by owner to the Town setting forth the income and family size of the occupants of the Inclusionary Unit. Such report shall be submitted to the Town annually. Owner shall not be deemed to be in default of the affordable agreement and this program for any failure to deliver such annual report until 30 days after receipt by owner of written notice from the Town requesting such report. The Town shall have the option of establishing the type of form to be used for the report.

17.140.100 Occupancy of Rental Units.

- (A) Occupancy of Rental Units: Unless determined otherwise by the Town Council, all rental Inclusionary Units required by this chapter shall be only rented to households in the appropriate income category for the Inclusionary Units.
- (B) Use and occupancy of rental Inclusionary Units: The applicant shall designate and offer rental Inclusionary Units for rent to households in the appropriate income category, based on the approved Inclusionary Housing Plan.
- (C) Establishment of rental rates: The maximum allowable rent of Inclusionary Units will be the Affordable Rent as defined herein, based on the applicable income levels for the Inclusionary Units, and shall be confirmed by the Town on an annual basis.
- (D) Annual report: The owner shall submit an annual report summarizing the occupancy of each Rental Inclusionary Unit for the year. The Town may require additional information if deemed necessary. The owner shall obtain and review documents that demonstrate the prospective renter's total income, such as income tax returns or W-2s for the previous calendar year, and submit such information on a form approved by the Town.

17.140.110 Affordable Housing In-Lieu Fees

- (A) Affordable Housing In-Lieu Fees are hereby established for residential development projects and mixed use projects with a residential component. The amount of said fees shall be established by Town Council Resolution, as may be amended from time to time. The amount of fees shall not exceed the cost of mitigating the impact residential development projects on the need for affordable housing in the Town of Fairfax.
- (B) All such fees shall be deposited in the Affordable Housing Fund described in section 17.140.130 herein.
- (C) Payment of fees shall be due prior to the issuance of the first building permit for the project. Fees shall be calculated based on the fee schedule in effect at the time the building permit is issued, unless State law specifies that the Town shall use a fee schedule in effect at an earlier date.

17.140.120 Commercial/Nonresidential Linkage Fees.

- (A) Affordable Housing commercial/nonresidential linkage fees (fees) are hereby established for commercial/nonresidential development projects. The amount of said fees shall be established by Town Council Resolution, as may be amended from time to time. The amount of fees shall not exceed the cost of mitigating the impact of commercial/nonresidential development projects on the need for affordable housing in the Town of Fairfax.
- (B) All such fees shall be deposited in the Affordable Housing Fund described in section 17.140.110 herein.
- (C) Payment of fees shall be due prior to the issuance of the first building permit for the project. Fees shall be calculated based on the fee schedule in effect at the time the building permit is issued, unless State law specifies that the Town shall use a fee schedule in effect at an earlier date.
- (D) Exemptions. The following commercial development projects are exempt from the provisions of this section:
 - (1) Projects adding less than five thousand square feet of net new square footage.
 - (2) Town buildings and facilities and those public facilities entitled to an exemption under law.
 - (3) Projects that have established a vested right not to be subject to this section.
 - (4) The Town Council waives the commercial/nonresidential linkage fee pursuant to section 17.140.130.

17.140.130 Affordable Housing Fund. An Affordable Housing Fund is hereby established to receive all housing impact and other applicable fees and funds.

- (A) All applicable affordable Housing In-Lieu Fees and nonresidential/commercial linkage fees collected shall be deposited into the Affordable Housing Fund. The monies deposited in the Affordable Housing Fund, with any interest earned, shall be used solely to increase and improve the supply of housing affordable to moderate, low, and very low-income households, consistent with the goals and policies contained in the Town's Housing Element and affordable housing requirements and policies.
- (B) The Affordable Housing Fund shall be administered by the Planning Director who may develop procedures to implement said fund consistent with the requirements of this chapter and subject to any adopted budget of the Town and generally acceptable accounting and procurement processes.

17.140.140 Waiver of affordable housing requirements or Commercial/Non-residential Linkage Fees

- (A) Request for waivers of affordable housing requirements or Commercial/Nonresidential Linkage Fees shall be made concurrent with

application submittal. As part of an application for the first approval of a residential or commercial development, a builder may request that the requirements of this chapter be reduced, adjusted, or waived based upon a showing that applying the requirements of this chapter would result in an unconstitutional taking of property or would result in any other unconstitutional result. The applicant shall set forth in detail the factual and legal basis for the claim, including all supporting technical documentation, and shall bear the burden of presenting the requisite evidence to demonstrate the alleged unconstitutional result.

- (B) The Town Council, based upon legal advice provided by or at the behest of the Town Attorney, may approve a reduction, adjustment, or waiver of the affordable housing requirement or Commercial/Nonresidential Linkage Fee if the Town Council determines that applying the requirements of this chapter would effectuate an unconstitutional taking of property or otherwise have an unconstitutional application to the property. The reduction, adjustment, or waiver may be approved only to the extent necessary to avoid an unconstitutional result after adoption of written findings, based on legal analysis and the evidence. If a reduction, adjustment, or waiver is granted, any change in the residential development or commercial and/or nonresidential project shall invalidate the reduction, adjustment, or waiver, and a new application shall be required for a reduction, adjustment, or waiver.

17.140.150 Enforcement.

- (A) The Town Attorney is authorized to enforce the provisions of this chapter and all affordable housing agreements, resale restrictions, deed of trust, and other requirements placed on Inclusionary Units by civil action and any other proceeding or method permitted by law. The Town Attorney may, at its discretion, take such enforcement action as is authorized under this code, as well as any other action authorized by law or by any regulatory document, restriction, or agreement executed under this chapter.
- (B) It shall be unlawful, a public nuisance, and a misdemeanor for any person/entity to sell or rent an affordable unit at a price or rent exceeding the maximum allowed under this chapter and implementing regulations, or to a household not qualified hereunder. Such person/entity shall be subject to a fine of five hundred dollars (\$500) per month plus restitution of the amount charged that exceeded the maximum allowed under this chapter from the date of original noncompliance until the affordable unit is in compliance with this chapter and implementing regulations. Fine monies collected that exceed the cost of enforcement shall be deposited into the Affordable Housing Fund.
- (C) The remedies provided herein are nonexclusive and cumulative and shall not preclude the Town from any other remedy or relief to which it is entitled under law or equity.

17.140.160 Administration.

- (A) The Town Manager is hereby given authority to initiate any administrative procedures or implementation guidelines as may be necessary to implement and carry out the purpose and intent of this chapter. Further, the Town Manager may, in the implementation of this program, develop application forms and submittal requirements reasonably related to the implementation of this chapter.
- (B) Forms or materials needed for implementation of this chapter may be introduced and utilized by the Town as the Town Manager deems may be necessary or desirable. All form changes or administrative procedures initiated by the Town Manager, and all administrative determinations or exercises of delegated authority by the Town Manager, shall be carried out in a manner consistent with, and reasonably related to, the purposes and intent of this chapter, the housing element and all other elements of the Town's General Plan, and the furtherance of state and local housing policies and goals, while respecting at all times the rights of property owners and applicants.
- (C) The Town Council may adopt and may amend from time to time by Resolution, implementing Affordable Housing Requirements and Program Regulations consistent with the provisions of this chapter and the Housing Element for the purpose of carrying out the administration of this chapter. A copy of the Affordable Housing Requirements and Program Regulations adopted by the Town Council shall be on file with the Town Clerk's Office and made available for public examination and posted on the Town's website. The Affordable Housing Requirements and Program Regulations shall set forth affordable housing requirements, affordable Housing In-Lieu Fee requirements, and Commercial/Nonresidential Linkage Fee requirements. The Planning Director or designee is responsible for administering this chapter. As part of this administration, the Director may perform the following tasks including, but not limited to: interpret the provisions of this chapter and the Affordable Housing Requirements and Program Regulation and establish operational and procedural requirements such as tenant eligibility, application processes, waitlist management, and income verification requirements.

SECTION 4: Severability. The Town Council hereby declares every section, paragraph, sentence, clause, and phrase is severable. If any section, paragraph, sentence, clause or phrase of these ordinance amendments are for any reason found to be invalid or unconstitutional, such invalidity, or unconstitutionality shall not affect the validity or constitutionality of the remaining sections, paragraphs, sentences, clauses or phrases.

SECTION 5: Effective Date. This Ordinance Amendment shall go into effect thirty (30) days from its adoption. Prior to the expiration of fifteen (15) days of adoption, this Ordinance pursuant to Government Code section 36933 shall be posted in three public places in the Town of Fairfax, to wit: 1. Bulletin Board, Town Hall Offices; 2. Bulletin

Board, Fairfax Post Office; and 3. Bulletin Board, Fairfax Women’s Club Building, located at 46 Park Road.

The foregoing Ordinance was introduced at a regular meeting of the Town Council on the 4th day of October, 2023, and duly adopted at the next regular meeting of the Town Council on the 1st day of November, 2023, by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

Chance Cutrano, Mayor

Attest: _____
Michele Gardner, Town Clerk