

**Foster City Municipal Code  
Chapter 17.90  
BELOW MARKET RATE INCLUSIONARY HOUSING PROGRAM**

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**17.90.010 Purpose:**

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The purpose of this chapter, to be known as the Below Market Rate Inclusionary Housing Program, is to:

- A. Enhance the public welfare by establishing policies and encouraging the development and availability of housing opportunities to a broad range of households with varying income levels within the city as mandated by state law, California Government Code Section [65580](#) and following; and
- B. Promote the city's goals as stated in the housing element of the general plan to increase the supply of below market rate housing to meet the city's regional share of extremely low, very low, low, and moderate income housing needs and the needs of special groups, including the elderly, disabled, small and large families, and local workers by imposing an inclusionary requirement for residential development projects; and
- C. Reduce vehicle miles traveled (VMT) and greenhouse gas (GHG) emissions by providing people at all income levels more opportunities to live near where they work; and

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D. Support the local economy by making it easier for employers to attract and retain workers by providing people at all income levels more opportunities to live near where they work; and

E. Affirmatively further the policies and purposes of the Fair Housing Act, also known as “Affirmatively ~~Further~~Furthering Fair Housing” by reducing segregation and concentration of poverty; and

F. Implement the city's adopted inclusionary policy contained in the housing element of the general plan by creating standards and a mechanism to provide below market rate dwelling units as part of ~~new proposed~~ residential development projects; including by providing program management, maintenance, and compliance standards and guidelines for eligibility and occupancy of below market rate units for existing and proposed residential projects; and

G. Provide for the establishment and imposition of a below market rate housing in-lieu fee on residential development projects as an alternative means of mitigating the impact of residential development projects on the need for below market rate dwelling units in the city, as opposed to the development and construction of below market rate dwelling units as part of residential development projects, in certain circumstances. (Ord. 644 § 3, 2022) (Ord. XX, 2023).

**17.90.020 Definitions.**

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**A. —**

A. “Administration and compliance monitoring cost” means the ongoing cost of city services for administration, compliance, and monitoring of new and existing below market rate dwelling units. The city council, by resolution or deed restriction, may establish recurring annual fees for below market rate property owners on a per unit basis for the ongoing annual administration and compliance monitoring costs of the below market rate units. Fees may be updated from time to time.

B. “Below market rate housing fund” means a separate or segregated fund or account designated by the city to maintain and account for all monies received pursuant to this chapter.

**B**

C. “Below market rate ownership cost” means the sale price for a below market rate dwelling unit, available as a for-sale unit, resulting in a projected average monthly housing expense during the first calendar year of an

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eligible household's occupancy, including mortgage principal and interest, mortgage insurance, property taxes, homeowners' insurance, homeowners' association dues, if any, and a reasonable allowance for utilities, not exceeding the sales prices specified by Section [50052.5](#) of the California Health and Safety Code and California Code of Regulations Title 25, Sections 6910 through 6924.

**C**

**D.** "Below market rate rent" means the total monthly housing expenses for a below market rate dwelling unit, available as a rental unit, not exceeding the rents specified by Section [50053](#) of the California Health and Safety Code and California Code of Regulations Title 25, Sections 6910 through 6924, except that the city may permit alternative criteria, when necessary, to be consistent with pertinent state and federal statutes and regulations governing publicly assisted rental housing, or for workforce housing. As used in this chapter, "below market rate rent" shall include the total of monthly payments by the tenant for all of the following:

1. Use and occupancy of the below market rate dwelling unit and land and all facilities associated with the below market rate dwelling unit, including but not limited to parking (whether unbundled or not), bicycle storage, storage lockers, and use of all common areas;
2. Any additional separately charged fees or service charges assessed by the owner, other than security deposits;
3. An allowance for utilities paid by the tenant as established by the San Mateo County Housing Authority which may be updated from time to time, including garbage collection, sewer, water, electricity, gas, and other heating, cooking, and refrigeration fuel, but not telephone service, cable TV or WiFi/internet, and any other fees required to be paid by the tenant for services received;
4. Any other interest, taxes, fees or charges for use of the land or below market rate dwelling unit or associated facilities and assessed by a public or private entity other than the owner, and paid by the tenant.

**D**

**E.** "Below market rate dwelling unit" means a dwelling unit in a residential development project that is restricted for sale or rental to and occupancy by an eligible household at a below market rate ownership cost or below market rate rent, as applicable, and as required by this chapter.

**E**

**F.** "Below market rate housing administrative standards and guidelines" means standards and guidelines adopted by the community development director from time to time to provide a consistent framework for

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determining household income, below market rate ownership cost, below market rate rent, eligible households, monitoring, reporting, scope of below market rate housing plan, terms of below market rate housing agreement, marketing plan requirements, and any other relevant rules, regulations or provisions necessary for the administration of this chapter.

**F**

**G.** “Below market rate housing agreement” means an agreement that shall specify the number, type, location, size, and phasing of all below market rate dwelling units required in a residential development project, provisions for income certification and screening of potential purchasers or renters of below market rate dwelling units, and resale control mechanisms, including the financing of ongoing ~~administrative~~administration and compliance monitoring costs, consistent with the approved below market rate housing plan, as determined by the community development director.

**G**

**H.** “Below market rate housing in-lieu fee” means the fee imposed on each dwelling unit of a residential development project, established by resolution of the city council, and updated from time to time, not to exceed the cost of mitigating the impact of residential development projects on the need for below market rate dwelling units in the city. For purposes of this Chapter, such an in-lieu fee is only for residential development projects, or residential components of mixed-use projects.

**H**

**I.** “Below market rate housing plan” means a plan prepared by the developer of a residential development project that describes how the proposed dwelling units conform to the requirements of this chapter, and city and state density bonus law requirements, as applicable, and shall include, at a minimum, procedures and requirements for determining eligible households for rental of rental units or purchasers of for-sale units, occupancy requirements, initial and ongoing marketing policies, application process, waitlist management, income verification requirements, annual recertification, if applicable, rejection of ineligible housing applicants and eligibility termination, ongoing compliance monitoring costs, and such other provisions as the community development director may prescribe from time to time pursuant to below market rate housing administrative guidelines.

**I**

**J.** “Building permit” includes full structural building permits as well as partial permits such as foundation-only permits and demolition permits.

**J**

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**K.** “Density bonus” means entitlement to build additional residential units above the maximum number of units permitted pursuant to the existing general plan, applicable specific plan and/or zoning designation, and as further specified in Chapter 17.86 and California Government Code Section [65915](#) (“State Density Bonus Law”).

**K**

**L.** “Developer” means the person(s) or legal entity(ies), including the property owner, or successor, seeking a planning permit or building permit for a residential development project.

**L**

**M.** “Development applicant” means the developer seeking a planning permit or building permit for a residential development project.

**N.** “Director” means the director of the city’s community development department, or designee.

**O.** “Dwelling unit” means a dwelling designed for occupancy by one household; the foregoing notwithstanding, dwelling unit shall not include an accessory dwelling unit as defined in Section [17.78.040](#).

**M**

**P.** “Eligible household” means those households whose maximum income does not exceed levels published annually for extremely low income households, very low income households, low (or lower) income households, and moderate income households, adjusted for household size and appropriate for the below market rate dwelling unit.

**N-**

**Q.** “Extremely low income households” means households with incomes no greater than the maximum income for extremely low income households, as published annually by the California Department of Housing and Community Development (HCD) as the Official State Income Limits pursuant to Health and Safety Code Section [50093](#) ~~for San Mateo County, adjusted for household size, except that the city may permit alternative criteria, when necessary, to be consistent with pertinent state and federal statutes and regulations governing publicly assisted housing.~~

~~**Q50093.** “For sale unit” means a dwelling unit that may be sold individually in conformance with the Subdivision Map Act. For sale units also include dwelling units that are converted from rental units to for sale units.~~

~~**P.** “Low income households” means households with incomes no greater than the maximum income for low income households, as published annually by the California Department of Housing and Community~~

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~~Development (HCD) as the Official State Income Limits pursuant to Health and Safety Code Section 50093~~ for San Mateo County, adjusted for household size, except that the city may permit alternative criteria, when necessary, to be consistent with pertinent state and federal statutes and regulations governing publicly assisted housing.

R. "For-sale unit" means a dwelling unit that may be sold individually in conformance with the Subdivision Map Act. For-sale units also include dwelling units that are converted from rental units to for-sale units.

~~Q.~~

S. "Household" means one (1) person living alone or two (2) or more persons sharing residency whose income is considered for housing payments, and all minor children.

T. "Housing applicant" means an individual or household who has submitted or will submit an application to rent a below market rate dwelling unit.

U. "Low income households" means households with incomes no greater than the maximum income for low or lower income households, as published annually by the California Department of Housing and Community Development (HCD) as the Official State Income Limits pursuant to Health and Safety Code Section 50093 for San Mateo County, adjusted for household size, except that the city may permit alternative criteria, when necessary, to be consistent with pertinent state and federal statutes and regulations governing publicly assisted housing. "Market rate unit" means a dwelling unit in a residential development project that is not a below market rate dwelling unit.

~~R.~~

V. "Moderate income households" means households with incomes no greater than the maximum income for moderate income households, as published annually by the California Department of Housing and Community Development (HCD) as the Official State Income Limits pursuant to Health and Safety Code Section ~~50093~~50093 for San Mateo County, adjusted for household size, except that the city may permit alternative criteria, when necessary, to be consistent with pertinent state and federal statutes and regulations governing publicly assisted housing.

~~S.~~

W. "One location" includes all adjacent parcels of land under common ownership or control, the property lines of which are contiguous at any point, or the property lines of which are separated only by a public or private

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street, road, or other public or private right-of-way, or separated only by the lands owned or controlled by the developer.

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X. “Planning permit” means any discretionary approval of a residential development project, including, without limitation, a general or specific plan adoption or amendment, rezoning, tentative map, parcel map, conditional use permit, variances, or architectural review.

⤵

Y. “Property owner” means the developer or successor owner or authorized agent of below market rate development.

Z. “Rental unit” means a dwelling unit that is intended to be offered for rent or lease and that cannot be sold individually in conformance with the Subdivision Map Act.

∇

AA. “Residential development project” means an application for a planning permit or building permit at one location to create one or more dwelling units, redevelop an existing residential development project to remove and replace dwelling units and/or create one or more additional dwelling units, convert nonresidential uses to dwelling units, subdivide a parcel to create one or more separately transferable parcels intended for development of dwelling units, or implement a condominium conversion, including development of dwelling units constructed at one location and in phases.

⚡

BB. “Review authority” means the city staff person or body authorized to approve or deny an application for a planning permit or building permit for a residential development project.

✖

CC. “Very low income households” means households with incomes no greater than the maximum income for very low income households, as published annually by the California Department of Housing and Community Development (HCD) as the Official State Income Limits pursuant to Health and Safety Code Section 5009350093 for San Mateo County, adjusted for household size, except that the city may permit alternative criteria, when necessary, to be consistent with pertinent state and federal statutes and regulations governing publicly assisted housing. (~~Ord. 644 § 3, 2022~~)

DD. “Workforce housing” means dwelling units rented at below market rental rates for certain categories of workers pursuant to Section 17.90.100(D). (~~Ord. 644 § 3, 2022~~) (Ord. XX, 2023).. \

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**17.90.030 Applicability.**

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The requirements of this chapter shall apply to any residential development project as set forth below.

A. Residential Development Projects—Five to Nine Dwelling Units. Residential development projects containing five to nine dwelling units are hereby required, as a condition of issuance of a planning permit or building permit, to either:

1) ~~pay.~~ Pay a below market rate housing in-lieu fee for each dwelling unit upon issuance of a building permit, or {

2) ~~construct.~~ Construct below market rate units on the location of the residential development project per Section ~~17.90.040 (Requirements for inclusion of below market rate dwelling units), make said below market rate dwelling units available for sale or rental to and occupancy by eligible households at the applicable household income level and at below market rate ownership cost or below market rate rent, as applicable, and secure said obligation pursuant to a below market rate housing agreement as set forth in Section 17.90.070(E) (Below Market Rate Housing Agreements).~~

~~17.90.040 B. Residential Development Projects—Ten Dwelling Units or More. Residential development projects of ten dwelling units or more are hereby required, as a condition of issuance of a planning permit or building permit, to construct below market rate units on the location of the residential development project per Section 17.90.040 (Requirements for inclusion of below market rate dwelling units), make said below market rate dwelling units available for sale or rental to and occupancy by eligible households at the applicable household income level and at below market rate ownership cost or below market rate rent, as applicable, and secure said obligation pursuant to a below market rate housing agreement as set forth in Section 17.90.070~~ 17.90.080(E) (Below Market Rate Housing Agreements).

B. Residential Development Projects—Ten Dwelling Units or More. Residential development projects of ten dwelling units or more are hereby required, as a condition of issuance of a planning permit or building permit, to:

1. Construct below market rate units on the location of the residential development project per Section 17.90.040 (Requirements for inclusion of below market rate dwelling units);



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2. Make said below market rate dwelling units available for sale or rental to and occupancy by eligible households at the applicable household income level and at below market rate ownership cost or below market rate rent, as applicable; and,
3. Secure said obligation pursuant to a below market rate housing agreement as set forth in Section 17.90.080(E) (Below Market Rate Housing Agreements).

C. Exemptions. The provisions of this chapter shall not apply to developers of residential development projects which fall within one or more of the following categories:

1. Residential development projects containing four or fewer dwelling units;
2. Residential development projects located on property owned by the state of California, the United States of America, or any of its agencies and used exclusively for governmental or educational purposes;
3. Residential development projects involving the repair or replacement of a building that was damaged or destroyed by fire or other calamity, so long as:
  - (a) ~~the~~ The square footage and use of the building remains the same~~;~~;
  - (b) ~~construction~~ Construction of the replacement building is conducted in accordance with California Government Code Section ~~65852.25~~65852.25, which section requires a building permit to be secured within two years of the occurrence of any such event~~;~~ and~~;~~
  - (c) ~~in~~ In accordance with California Health and Safety Code Section ~~18938.6~~18938.6, construction begins within one year from the issuance of a building permit, subject to the issuance of one or more extensions, not to exceed one hundred eighty days, upon a showing of justifiable cause by the development applicant to the satisfaction of the building official~~;~~;
4. Accessory dwelling units (ADUs) or junior accessory dwelling units (JADUs) as defined in Chapter 17.78;
5. Residential development projects which are developed in accordance with the terms of a development agreement adopted by ordinance pursuant to the authority and provisions of

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California Government Code Section [65864](#) et seq., and that is executed prior to the effective date of the ordinance codified in this chapter; provided, that such residential development projects shall comply with any below market rate inclusionary housing requirements included in the development agreement or any predecessor ordinance in effect on the date the development agreement was executed;

6. Residential development projects exempted by California Government Code Section [66474.2](#) or [66498.1](#) or successor provision; provided, that such residential development projects shall comply with any predecessor ordinance, resolution, or policy governing below market rate inclusionary housing in effect on the date the application for the development was deemed complete;

7. Residential development projects exempted by California Government Code Section [65589.5](#)(o) or successor provision; provided, that such residential development projects shall comply with any predecessor ordinance, resolution, or policy governing below market rate inclusionary housing in effect on the date that a preliminary application for the development containing all of the information required by California Government Code Section [65941.1](#) was submitted to the city; or

8. Residential development projects for which all applications for city of Foster City discretionary development entitlements required to develop the project have been deemed complete prior to the effective date of the ordinance codified in this chapter; provided, that such residential development projects shall comply with any predecessor ordinance, resolution, or policy governing below market rate inclusionary housing in effect on the date the application for the development was deemed complete. (Ord. 644 § 3, 2022) ~~(Ord. XX, 2023)~~

**17.90.040 Requirements for inclusion of below market rate dwelling units- in**

~~**A. Number of Below Market Rate Dwelling Units and Level of Affordability. Residential**~~ development projects

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~~**A. of ten dwelling units or more shall construct, or cause to be constructed, the number of below market rate dwelling units as specified below.**~~ For the purposes of this section, "total dwelling units" does not include ~~(~~

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1) ~~dwelling.~~ Dwelling units awarded above the otherwise-allowable maximum density as part of a density bonus in Chapter ~~17.86~~17.86 (Density Bonuses), as provided by California Government Code Section ~~65915(b)(3), or (2) in~~65915(b)(3), or

2. In a residential development project that will require the demolition of dwelling units, the number of dwelling units demolished, provided the residential development project will create at least as many dwelling units as will be demolished and otherwise complies with the requirements of California Government Code Section ~~66300~~66300(d), as applicable to the demolished units.

B. Number of Below Market Rate Dwelling ("BMR") Units and Level of Affordability. Residential development projects of ten dwelling units or more, or residential projects of five to nine units that opt to construct units, shall construct, or cause to be constructed, the number of below market rate dwelling units as specified below.

1. Rental Projects:

(a) Five percent of the proposed total dwelling units in a rental residential development project shall be ~~below market rate dwelling~~BMR units occupied by or available for occupancy by moderate income households at or below market rate rents; ~~five~~

(b) Five percent of the proposed total dwelling units shall be below market rate dwelling units occupied by or available for occupancy by low income households at or below market rate rents; and ~~ten,~~

(c) Ten percent of the proposed total dwelling units shall be below market rate dwelling units occupied by or available for occupancy by very low income households at or below market rate rents. ~~Alternative percentages and levels of affordability may be considered as part of the below market rate housing plan and below market rate housing agreement (Section 17.90.070) and the reviewing authority may approve or conditionally approve such an alternative if it determines, based on substantial evidence, that such alternative percentages and levels of affordability will provide as many or more below market rate units at the same or lower income levels or will otherwise provide greater public benefit than the standard requirement.~~

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2. Ownership Projects.

(a) Twenty percent of the proposed total dwelling units in a for-sale residential development project shall be ~~below market rate dwelling~~BMR units sold to and occupied by or available for sale to and occupancy by moderate income households at or below market rate ownership cost.

3. Fractional Units. ~~In calculating~~Calculation of units or fees when the number of ~~below market rate dwelling units required pursuant to subsections (A)(1) and (A)(2) of this section,~~any~~BMR units is not a whole number shall be as follows:~~

(a) ~~Any~~ fraction of less than 0.50 shall be satisfied by payment of an amount equal to the below market rate housing in-lieu fee, as adopted by the city council applicable to rental or ownership residential developments, times the applicable fraction, ~~and any or~~

(b) ~~Any~~ fraction of 0.50 or more shall be satisfied by developing one below market rate dwelling unit available for sale or rental to and occupancy by eligible households at the applicable household income level and at below market rate ownership cost or below market rate rent, as ~~applicable~~applicable. In either scenario, the development applicant has the option to provide an additional BMR unit instead of the fee.

**B**

4. Density Bonus. ~~Below market rate dwelling~~BMR units that satisfy the requirements of this chapter may be counted toward the number of ~~below market rate dwelling~~BMR units required for a density bonus under California Government Code Sections ~~65915~~65915 through ~~65918.~~  
~~To be eligible, the below market rate dwelling units shall meet all of the applicable requirements in California Government Code Section 65915. These requirements, including application submittal requirements and replacement housing obligations, are~~65918as set forth in Chapter ~~17.86~~17.86 (Density Bonuses). (Ord. 644 § 3, 2022) (Ord. XX, 2023).

**17.90.050 Payment of below market rate housing in-lieu fee.**

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A. Amount. The amount of the ~~below market rate~~BMR housing in-lieu fee applicable to rental residential development projects and ownership residential development projects shall be established ~~from time to time~~ by resolution of the city council. ~~and be calculated based on the type of residential development (rental or ownership).~~ The below market rate housing in-lieu fee established for rental residential development projects

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and ownership residential development projects shall not exceed the cost of mitigating the impact of rental or ownership residential development projects on the need for below market rate dwelling units in the city.

B. Timing of Payment. Payment of the ~~below market rate~~BMR housing in-lieu fee shall be due prior to the issuance of the first building permit ~~for the residential development project. The below market rate housing in-lieu fee shall be calculated based on the type of residential development project (i.e., either rental or ownership);~~ and the applicable fee schedule in effect at the time the building permit is issued for a rental residential development project or ownership residential development project. (Ord. 644 § 3, 2022) (Ord. XX, 2023).

**17.90.060 Standards for development of below market rate dwelling units.**

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A. ~~A.~~ Quality of Construction and Number of Bedrooms. All below market rate dwelling units required by this chapter shall be equal to the overall quality of construction to market rate units in the same residential development project as follows:

- ~~1.~~ 4. The exterior appearance of the ~~below market rate dwelling~~BMR units shall be the same as that of market rate units.
2. Interior finishes and amenities of the ~~below market rate dwelling~~BMR units shall not differ from those provided in the base model market rate units.
3. The number of bedrooms in the ~~below market rate dwelling~~BMR units shall be equal to the average number of bedrooms in the market rate units, including square footage by unit size, and the below market rate dwelling units shall be dispersed within the residential development project, with the location of below market rate dwelling units comparable to those of the market rate units, subject to review and approval by the ~~community development~~ director.
4. The ~~below market rate dwelling~~BMR units shall have access to the same amenities as the market rate units and shall be included within the below market rate ownership cost or below market rate rent for the below market rate dwelling unit. For example, residents of the below market rate dwelling units shall not be excluded from common open space, parking, storage, and other community facilities or amenities in the residential development project, nor shall

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households residing in below market rate dwelling units be charged more than a below market rate rent or a below market rate ownership cost as defined in Section [17.90.020](#) (Definitions) for the use of such facilities and amenities.

B. Availability for Occupancy. Below market rate dwelling units required by this chapter shall be made available for occupancy concurrently with the market rate units. For the purposes of this subsection, “concurrently” means that the city may not issue building permits for more than fifty percent of the market rate units until it has issued building permits for all of the below market rate dwelling units, and the city may not approve any final inspections or certificates of occupancy for more than fifty percent of the market rate units until it has issued final inspections or certificates of occupancy for all of the below market rate dwelling units.

C. Duration of Affordability.

1. Ownership. ~~Below market rate dwelling~~BMR units available as a for-sale unit ~~produced as required by this chapter shall, pursuant~~are subject to the following:

(a) Pursuant to the terms of a below market rate housing agreement, ~~be~~BMR units are legally restricted for sale to and occupancy by eligible households within the income levels for which the below market rate dwelling units were designated and at a below market rate ownership cost for a period of at least forty-five years from the date of recordation of each grant deed.

(b) Resale of the ~~below market rate dwelling~~BMR unit during the forty-five-year term shall be restricted to eligible households at a below market rate ownership cost as defined herein and set forth in the below market rate housing agreement recorded against the below market rate dwelling unit and the forty-five-year term shall start over with each resale.

(c) If a ~~below market rate dwelling~~BMR unit has not been sold or resold prior to the expiration of the forty-five-year term, then upon the expiration of the forty-five-year term, the restrictions set forth in the below market rate housing agreement shall terminate, expire and be of no further force or effect and the dwelling unit may then be sold at market rate.

(d) The below market rate housing agreement shall be recorded against the property of the applicable residential development project and below market rate dwelling unit(s) in

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accordance with the provisions of and consistent with the form specified in  
Section ~~17.9080.070~~(E).

2. Rental. ~~Below market rate dwelling~~BMR units available as a rental unit ~~produced as required by this chapter or pursuant to~~are subject to the following:

(a) Pursuant to the provisions of California Government Code Section ~~66300~~(d) BMR units shall, pursuant to the terms of a below market rate housing agreement, be legally restricted to occupancy by eligible households within the income levels for which the below market rate dwelling units were designated and at a below market rate rent for a period of at least ninety-nine years from the date a certificate of occupancy is issued by city for the entire residential development project.

(b) The ~~foregoing notwithstanding, the community development~~ director, or his or her designee, may, ~~in the exercise of her or his discretion~~, accept a shorter period of affordability of no less than fifty-five years, if the applicable residential development project provides substantial evidence that a shorter-term restriction is necessary and required in order to obtain financing for the applicable residential development project.

(c) The below market rate housing agreement shall be recorded against the property of the applicable residential development project in accordance with the provisions of and consistent with the form specified in Section ~~17.90.070080~~(E). ~~(Ord. 644 § 3, 2022) (Ord. XX, 2023).~~

~~D.—Eligibility. No eligible household may occupy a below market rate dwelling unit available as a rental unit or acquire a below market rate dwelling unit available as a for-sale unit until the community development director, or his or her designee, has approved a below market rate housing plan prepared by the developer, which plan shall include eligibility requirements specific to the residential development project, and a below market rate housing agreement has been recorded against the residential development project in accordance with Section 17.90.070(E).~~

~~E.—Principal Residence. Any eligible household that occupies a below market rate dwelling unit must occupy that dwelling unit as its principal residence, unless otherwise approved in writing for rental to a third party for a limited period of time due to household hardship, as determined and approved by the city in advance and in accordance with below market rate housing administrative guidelines.~~

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~~F. Below Market Rate Housing Administrative Guidelines. The community development director, or his or her designee, may, from time to time, adopt and revise rules, regulations and guidelines for determining household income, below market rate housing cost, below market rate rent, determining eligible households of for sale units and rental units, establishing monitoring and reporting requirements for residential development projects, and such other provisions and requirements as are relevant to the administration of this chapter.~~

~~G. Housing Preferences. Subject to applicable state and federal fair housing laws, the city council may, from time to time, adopt preferences for the sale or rental to and occupancy of below market rate dwelling units at the applicable below market rate ownership cost or below market rate rent, as applicable, to eligible households that live and/or work in the city or any other characteristics the city council deems appropriate to further the purposes of this chapter. The city council may also, from time to time, adopt preferences applicable to specific residential development projects. (Ord. 644 § 3, 2022)~~

~~**17.90.070 Below market rate housing plan and below market rate housing agreement.**~~

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~~A. Required. A below market rate housing plan is required for any residential development project that provides below market rate dwelling units, either on site or off site. The below market rate housing plan shall describe how the proposed dwelling units conform to the requirements of this chapter and city and state density bonus law requirements, as applicable. Further, the below market rate housing plan shall include, at a minimum, procedures and requirements for determining eligible households for rental of rental units or purchasers of for sale units, occupancy requirements, initial and ongoing marketing policies, application process, waitlist management, income verification requirements, annual recertification, if applicable, rejection of ineligible applicants and eligibility termination, funding by developer of ongoing administration and monitoring costs to be incurred by city following occupancy of below market rate dwelling units, and such other provisions as the community development director, or his or her designee, may prescribe from time to time pursuant to below market rate housing administrative guidelines. Below market rate housing plans are not required for residential development projects that are not required to provide for the construction, sale and/or rental of on-site or off-site below market rate dwelling units, in compliance with the provisions of this chapter.~~

~~B. Submittal and Review. The below market rate housing plan must be submitted prior to the first planning permit application being deemed complete. The below market rate housing plan shall be processed concurrently with all other planning permits required for the residential development project.~~



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~~C. Approval of On-Site Below Market Rate Dwelling Units. The review authority may approve or conditionally approve a below market rate housing plan that proposes on-site below market rate dwelling units if it makes findings, based on substantial evidence, that:~~

~~1. The on-site below market rate dwelling units comply with the applicable standards in this chapter, including, without limitation, the requirement that the below market rate dwelling units be made available for occupancy concurrently with the market rate units.~~

~~2. The on-site below market rate dwelling units will mitigate the impact of the market rate units in the residential development project on the need for below market rate dwelling units in the city.~~

~~D. Amendments. The approved below market rate housing plan may be amended prior to issuance of any building permit for the residential development project. A request for a minor modification of an approved below market rate housing plan may be granted by the community development director if the modification is substantially in compliance with the original below market rate housing plan and conditions of approval. Other significant or substantial modifications to the below market rate housing plan, as determined by the community development director, shall be processed in the same manner as the original below market rate housing plan.~~

~~E. Below Market Rate Housing Agreements. As a condition of approval of a residential development project, a below market rate housing agreement acceptable to the community development director, approved by the city attorney and executed by the city manager, shall be recorded against the residential development project prior to approval of any final or parcel map, or issuance of any building permit, whichever occurs first. The below market rate housing agreement shall specify the number, type, location, size, and phasing of all below market rate dwelling units, provisions for income certification and screening of potential purchasers or renters of below market rate dwelling units, and resale control mechanisms, including funding by developer of ongoing administrative and monitoring costs incurred by city, consistent with the approved below market rate housing plan. The below market rate housing agreement shall provide for the indemnification and defense of the city, as approved by the city attorney, against any and all claims brought by any and all persons, including eligible households, in connection with the administration and implementation by city of the below market rate housing plan and below market rate housing agreement. A below market rate housing agreement applicable to below market rate dwelling units, available as for-sale units, shall require as a condition of the sale of a below market rate dwelling unit from developer to an eligible~~

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~~household, that the restrictions set forth in the below market rate housing agreement and this chapter be recorded against the below market rate dwelling unit in the form of a resale restriction agreement, performance deed of trust, and/or regulatory agreement, as approved by the city attorney and executed by the city manager, to ensure the continued affordability of the below market rate dwelling units. (Ord. 644 § 3, 2022)~~

17.90.070

**17.90.080 Alternatives.**

~~To the extent permitted by law, the city's objective is to obtain the actual development and construction of below market rate dwelling units within each residential development project, as opposed to the receipt of payment of below market rate housing in-lieu fees, construction of off-site below market rate dwelling units, or other such alternatives as set forth herein. Nevertheless, a~~ developer may propose an alternative means of compliance with this chapter subject to the following provisions:

A.—~~Construction of Off-Site Below Market Rate Dwelling Units.~~ If a developer of a residential development project of ten or more dwelling units proposes the construction of off-site below market rate dwelling units in the below market rate housing plan required under Section 17.90.070080, the city council may, in its discretion, approve such a proposal if it finds the proposal meets all of the following ~~conditions:condition~~

~~1.—~~

1. The proposed off-site location is within the city of Foster City, is currently owned by the developer or is under contract for purchase by the developer, is not located in a flood hazard zone and does not contain environmentally sensitive habitat, is not contaminated with or otherwise impaired by the presence of hazardous materials or hazardous substances in the soil, soil vapor or groundwater in, on, or under the off-site location or emanating from lands in proximity thereto, as reflected in a Phase I Environmental Site Assessment, and if necessary, a Phase II Environmental Site Assessment, and development and construction of a residential development project on the proposed off-site location is consistent with the city's adopted general plan, housing element, and zoning; and

~~2.—~~

2. The proposed off-site location is suitable for and development of a residential development project thereon is economically and financially feasible as determined by the city, in its sole discretion, pursuant to a feasibility analysis of a proposed residential

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development project on the proposed off-site location prepared by the city, at the expense of the developer, and approved by the city council; and

~~3.~~

3. The proposed off-site location is adequately served by all required utilities and transportation infrastructure, all of which are appropriately sized to accommodate the proposed off-site below market rate units, the off-site residential development project, and all reasonable foreseeable probable future development within the area served by said utilities and transportation infrastructure; and

~~4.~~

4. The proposed off-site below market rate units are in addition to any below market rate dwelling units otherwise required for the off-site residential development project; and

~~5.~~

5. The construction of the proposed off-site below market rate dwelling units within the off-site residential development project has not commenced before the approval of the on-site residential development project, the off-site below market rate dwelling units will be available for occupancy prior to or concurrently with the market rate units within the on-site residential development project, and the inclusion of the below market rate dwelling units within the off-site residential development project will not, when combined with the below market rate inclusionary requirement of the off-site residential development project, significantly contribute to residential segregation by income level within the city; and

~~6.~~

6. The proposed off-site below market rate dwelling units would be provided in at least the same quantity and affordability levels as would be required for on-site units. The foregoing notwithstanding, any proposal to provide rental off-site below market rate dwelling units to satisfy an inclusionary requirement for an ownership project shall comply with Sections [17.90.040\(A\)\(1\)](#) and [17.90.060\(C\)\(2\)](#); and

~~7.~~

7. The proposed off-site below market rate dwelling units comply with all other requirements of this chapter; and

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8. All necessary agreements required to secure the construction of the off-site below market rate dwelling units will be made a part of the affordable housing agreement required for the on-site residential development project; and

9. Financing or a viable financing plan, which may include public funding sources, is in place for the acquisition of land, development and construction of the proposed off-site below market rate dwelling units; and

10. The purposes of this chapter would be better served by implementation of the proposed alternative and that the proposed alternative meets the greatest community needs at that time.

**B. ~~B.~~ Conversion of Off-Site Dwelling Units or Nonresidential Buildings to Off-Site Below Market Rate Dwelling Units.** If a developer of a residential development project of ten or more dwelling units proposes the conversion of off-site dwelling units or nonresidential buildings to off-site below market rate dwelling units in the below market rate housing plan required under Section 17.90.070080, the city council may, in its discretion, approve such a proposal if it finds the proposal meets all of the following conditions:

1. All of the conditions as set forth in subsection A of this section; and
2. The construction of the proposed off-site below market rate dwelling units shall be in addition to any replacement units otherwise required by state law, including but not limited to Government Code Sections 66300(d) and 65915(c)(3).

**C. On-Site Clustering of Below Market Rate Dwelling Units.** If a developer of a residential development project of ten or more dwelling units proposes the clustering of on-site below market rate dwelling units in the below market rate housing plan required under Section 17.90.070080 as an alternative to the provisions of Section 17.90.060(A)(3) requiring the reasonable dispersal of such units within the residential development project, the city council may, in its discretion, approve such a proposal if it finds the proposal meets all of the following conditions:

1. The clustering of on-site below market rate dwelling units is necessary to access and secure sources of financing needed for the residential development project; and

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~~2.~~

~~2.~~ Construction of the clustered below market rate dwelling units will occur prior to or concurrently with the construction of the market units in the residential development project; and

3. The clustering of on-site below market rate dwelling units will not, when considered singularly or in connection with other residential development projects in the vicinity of the project, significantly contribute to residential segregation by income level within the city; and

4. The purposes of this chapter would be better served by implementation of the proposed alternative and that the proposed alternative meets the greatest community needs at that time.

D. Alternative to On-Site Construction of Below Market Rate Dwelling Units—Donation of Land. If a developer of a residential development project of ten or more dwelling units proposes the donation of land to the city for the construction of below market rate dwelling units in the below market rate housing plan required under Section ~~17.90.079080~~, the city council may, in its discretion, approve such a proposal if it finds the proposal meets all of the following conditions:

1. The land proposed to be donated to the city is located within the city of Foster City, is currently owned by the developer or is under contract for purchase by the developer, is not located in a flood hazard zone and does not contain environmentally sensitive habitat, and development and construction of a residential development project on the site is consistent with the city's adopted general plan, housing element, and zoning; and

2. The land proposed to be donated is suitable for and development of a residential development project thereon is economically and financially feasible as determined by the city, in its sole discretion, pursuant to a feasibility analysis of a proposed residential development project on the land proposed to be donated prepared by the city, at the expense of the developer, and approved by the city council; and

3. The land proposed to be donated to the city is adequately served by all required utilities and transportation infrastructure, all of which are appropriately sized to accommodate a

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residential development project on the site and all reasonable foreseeable probable future development within the area served by said utilities and transportation infrastructure; and

4. The fair market value of the land proposed to be donated equals or exceeds the value of the on-site below market rate dwelling units otherwise required to be provided as part of the residential development project, as shown in an appraisal of the land to be donated and a financial analysis of the proposed residential development project prepared by the city, at the expense of the developer, and approved by the city council; and

5. The land proposed to be donated to the city shall not be contaminated with or otherwise impaired by the presence of hazardous materials or hazardous substances in the soil, soil vapor or groundwater in, on, or under the land to be donated or emanating from lands in proximity thereto, as determined by and to satisfaction of the city, in its sole discretion, pursuant to a Phase I Environmental Site Assessment, and if necessary, a Phase II Environmental Site Assessment, conducted under the direction of the city and at the expense of developer; and

6. The purposes of this chapter would be better served by implementation of the proposed alternative and that the proposed alternative meets the greatest community needs at that time. (Ord. 644 § 3, 2022) (Ord. XX, 2023)

**17.90.080 Below market rate housing plan and below market rate housing agreement.**

A. Required. A below market rate housing plan is required for any residential development project that provides below market rate dwelling units, either on site or off site. **17.90.090 Waiver of requirements.**

~~A. Timing of Request. A developer of a residential development project may apply for a reduction, adjustment, or waiver of~~ The below market rate housing plan shall:

1. Describe how the proposed dwelling units conform to the requirements of this chapter ~~as part of an application for the approval of a planning permit or building permit, whichever permit is required first.~~

~~B. Application Requirements. The developer must show that applying the requirements of this chapter, without the requested reduction, adjustment or waiver, would result in an unconstitutional taking of property or would result in any other unconstitutional result. The developer shall set forth in detail the factual and legal~~

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~~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.~~

~~C. City Assumptions. The city may assume each of the following when applicable:~~

~~1. The developer will benefit from the incentives set forth in and state density bonus law and the zoning ordinance; and requirements, as applicable.~~

~~2. The developer is able to provide the most economical below market rate dwelling units feasible in terms of financing, construction, design, location and tenure.~~

~~2. Include provisions that demonstrate compliance with California Government Code Sections 65915(c)(3) and 66300(d), requiring replacement units to be restricted to lower-income households to match the percentage of lower-income tenants, as provided in Chapter 17.55, Replacement Units.~~

~~3. Include, at a minimum, procedures and requirements for:~~

~~(a) determining rental rates~~

~~(b) eligibility of households for rental of rental units or purchasers of for-sale unit,~~

~~(c) income requirements~~

~~(d) occupancy standards~~

~~(e) Initial and ongoing marketing policies~~

~~(f) application process~~

~~(g) waitlist management~~

~~(h) income verification requirements~~

~~(i) annual income recertification requirements~~

~~(j) \_\_\_\_\_~~

~~D. Decision. The review authority, based upon legal advice provided by or at the behest of the city attorney, may approve a reduction, adjustment, or waiver of the requirements of this chapter if the review authority 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.~~

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~~E. Changes to the Project. If a reduction, adjustment, or waiver is granted, any subsequent change in the applicable, rejection of ineligible housing applicants, eligibility termination~~

~~(k) funding by developer for ongoing administration and compliance monitoring costs following occupancy of below market rate dwelling units~~

~~(l) and such other provisions as the director may prescribe from time to time pursuant to below market rate housing administrative standards and guidelines.~~

~~4. Below market rate housing plans are not required for residential development projects that are not required to provide for the construction, sale and/or rental of on-site or off-site below market rate dwelling units, in compliance with the provisions of this chapter Submittal and Review. The below market rate housing plan must be submitted prior to the first planning permit application being deemed complete. The below market rate housing plan shall be processed concurrently with all other planning permits required for the residential development project.~~

C. Approval of On-Site Below Market Rate Dwelling Units. The review authority may approve or conditionally approve a below market rate housing plan that proposes on-site below market rate dwelling units if it makes findings, based on substantial evidence, that:

1. The on-site below market rate dwelling units comply with the applicable standards in this chapter, including, without limitation, the requirement that the below market rate dwelling units be made available for occupancy concurrently with the market rate units.

2. The on-site below market rate dwelling units will mitigate the impact of the market rate units in the residential development project on the need for below market rate dwelling units in the city.

D. Amendments. The approved below market rate housing plan may be amended prior to issuance of any building permit for the residential development project. ~~project~~A request for a minor modification of an approved below market rate housing plan may be granted by the director if the modification is substantially in compliance with the original below market rate housing plan and conditions of approval. Other significant or substantial



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modifications to the below market rate housing plan, as determined by the director, shall be processed in the same manner as the original below market rate housing plan.

E. Below Market Rate Housing Agreements. invalidate the reduction, adjustment, or waiver, and As a condition of approval of a residential development project, a new application below market rate housing agreement acceptable to the director, approved by the city attorney and executed by the city manager, shall be required for:

1. Be recorded against the residential development project prior to approval of any final or parcel map, or issuance of any building permit, whichever occurs first.
2. Specify the number, type, location, size, and phasing of all below market rate dwelling units, provisions for income certification and screening of potential purchasers or renters of below market rate dwelling units, and resale control mechanisms, and provisions for funding by developer for administration and compliance monitoring costs following occupancy of below market rate dwelling units consistent with the approved below market rate housing plan.
3. Provide for the indemnification and defense of the city, as approved by the city attorney, against any and all claims brought by any and all persons, including eligible households, in connection with the administration and implementation by city of the below market rate housing plan and below market rate housing agreement.
4. A below market rate housing agreement applicable to below market rate dwelling units, available as for-sale units, shall require as a reduction, adjustment, or waiver per this section, condition of the sale of a below market rate dwelling unit from developer to an eligible household, that the restrictions set forth in the below market rate housing agreement and this chapter be recorded against the below market rate dwelling unit in the form of a resale restriction agreement, performance deed of trust, and/or regulatory agreement, as approved by the city attorney and executed by the city manager, to ensure the continued affordability of the below market rate dwelling units. (Ord. 644 § 3, 2022) (Ord. XX, 2023)

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A. Establishment of the Affordable Housing Fund. The city of Foster City has established an affordable housing fund as set forth in Section [17.88.060](#). The city reaffirms that the affordable housing fund is created for the purpose of receiving and dispersing certain monies to address the housing needs of extremely low, very low, low and moderate income households. Separate accounts within the affordable housing fund may be created from time to time to avoid commingling of monies, if required by law or as deemed appropriate for the administration of the affordable housing fund:\_\_\_

B. \_\_\_ Deposits. All below market rate housing in-lieu fees or other funds collected under this chapter shall be deposited into the affordable housing fund.\_\_\_

C. \_\_\_ Use of Funds. In addition to the purposes set forth in Section [17.88.060](#), the monies in the affordable housing fund, including all interest and earnings from investment of the monies therein, shall be expended exclusively to provide, or assure the continued provision of, below market rate dwelling units to extremely low income, very low income, lower income, and moderate income households in the city, through property acquisition, construction, development assistance, rehabilitation, conversion, financing, rental assistance or other subsidies or methods, consistent with the goals and policies contained in the city's housing element and the purposes for which the fees were collected, and for administration and compliance monitoring of the below market rate dwelling units established pursuant to this chapter.

D. Guidelines. The city council may, from time to time, adopt guidelines for expenditure of monies in the affordable housing fund. (Ord. 644 § 3, 2022) [\(Ord. XX, 2023\)](#)

**17.90.100 Standards for occupancy, management, and compliance of below market rate dwelling units**

[A. Below Market Rate Housing Administrative Standards and Guidelines. The community development director may adopt and revise standards, rules, regulations and guidelines, best practices, and methodologies for determining household income, below market rate housing cost, below market rate rent, determining eligibility of households of for-sale units and rental units, establishing monitoring, reporting, requirements, for residential development projects, marketing plans, and such other provisions and requirements as are relevant to the administration of this chapter.](#)

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B. Eligibility. No eligible household may occupy a below market rate dwelling unit available as a rental unit or acquire a below market rate dwelling unit available as a for-sale unit until the director, or his or her designee, has approved a below market rate housing plan prepared by the developer, which plan shall include eligibility requirements specific to the residential development project, and a below market rate housing agreement has been recorded against the residential development project in accordance with Section 17.90.080.

C. Principal Residence. Any eligible household that occupies a below market rate dwelling unit must occupy that dwelling unit as its principal residence, unless otherwise approved in writing for rental to a third party for a limited period of time due to household hardship, as determined and approved by the city in advance and in accordance with below market rate housing administrative standards and guidelines.

D. Housing Preferences. Subject to applicable state and federal fair housing laws, the city may implement preferences for the sale or rental to and occupancy of below market rate dwelling units at the applicable below market rate ownership cost or below market rate rent, as applicable, to eligible households that live and/or work in the city or any other characteristics the city deems appropriate to further the purposes of this chapter. The city may also, from time to time, adopt preferences applicable to specific residential development projects, as permitted by law. (Ord. 644 § 3, 2022) (Ord. XX, 2023)

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**17.90.110 Enforcement.**

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A. Nuisance. Any violation of the provisions of this chapter, or the terms or conditions of a planning permit or building permit issued for a residential development project, or the terms of a below market rate housing plan or below market rate housing agreement approved in accordance with this chapter, or the below market rate standards and guidelines shall constitute a public nuisance.

~~B.~~ Provision of Below Market Rate Dwelling Units—Payment Obligation. Provision of below market rate dwelling units and/or payment of the below market rate housing in-lieu fee in accordance with the requirements of this chapter is the obligation of the developer of a residential development project. The city may institute any appropriate legal actions or proceedings necessary to ensure compliance herewith, including, but not limited to, actions to revoke, deny, modify or suspend any planning permit or building permit approved by the city.

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B. ~~C.~~ City Attorney Enforcement. (i) General. The ~~city attorney~~director or designee shall ~~be enforce this chapter and all below market rate housing administrative standards and guidelines, agreements, resale restrictions, performance deeds of trust, regulatory agreements, all other covenants or restrictions placed on residential development projects or below market rate dwelling units; and its provisions shall be binding on all agents, successors, and assigns of a development applicant or property owner.~~

1. If it is determined that a violation of the provisions of this chapter has occurred, the director or designee will do the following:

First letter: A courtesy first letter to the development applicant, for proposed development, or property owner, for approved or built developments, describing the nature of the non-compliance and providing a reasonable opportunity to resolve the issue. If the development applicant or the property owner does not resolve the issue within the timeline specified, the city will issue a second letter.

Second Letter: The second violation letter will request the violation to be resolved and brought into compliance within the time specified by the Director or designee.

Third Letter: if the development applicant, for proposed development, or property owner, for approved or built developments, does not resolve the issue after the issuance of the second letter, a third and final letter will be sent to the development applicant or owner requesting that the violation be resolved within the timeline specified by the Director or designee.

2. Administrative Appeals: The development applicant, for proposed development, or property owner, for approved or built developments, may appeal a Director's finding of a violation per the provisions of Section 17.06.150 Appeal procedures.

3. In the event the code compliance has not been achieved, the City Attorney is authorized to enforce the provisions of this chapter, including but not limited to, any and all below market rate housing agreements, resale restrictions, performance deeds of trust, regulatory agreements, and all other covenants or restrictions placed on residential development projects or below market rate dwelling units, as well as any administrative regulations, standards, or guidelines, by civil action and any other proceeding or method permitted by law. The city shall be entitled to recover its costs, expenses and fees, including reasonable attorneys' fees, incurred in connection with the enforcement of the provisions of this chapter and all below market rate housing administrative regulations, standards, or guidelines, agreements, resale restrictions, performance deeds of trust, regulatory agreements, and all other covenants or restrictions placed on residential development projects or below market rate dwelling units.

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**C.** <sup>D</sup> Developer Responsibility. Failure of any official or agency to enforce the requirements of this chapter shall not excuse any developer or owner from the requirements of this chapter. No planning permit, building permit, license, map, or other approval or entitlement for a residential development project or dwelling unit shall be issued, including without limitation a final inspection or certificate of occupancy, until all applicable requirements of this chapter have been satisfied.

**E**

**D.** Remedies. The remedies provided for in this section shall be cumulative and not exclusive and shall not preclude the city from any other remedy or relief to which it otherwise would be entitled under law or equity.

(Ord. 644 § 3, 2022) (Ord. XX, 2023)