

NO FEE FOR RECORDING PURSUANT
TO GOVERNMENT CODE 27383

RECORDING REQUESTED BY:
Manager, Health, Housing & Community Services
City of Berkeley
2180 Milvia Street, 2nd Floor
Berkeley, CA 94704

WHEN RECORDED MAIL TO:
Manager, Health, Housing & Community Services
City of Berkeley
2180 Milvia Street, 2nd Floor
Berkeley, CA 94704

**REGULATORY AGREEMENT AND DECLARATION OF RESTRICTIVE
COVENANTS: AFFORDABLE RENTAL UNITS AT [Property Address], Berkeley,
California ("Property")**

This Regulatory Agreement (this "Agreement") is entered into as of [redacted], by and between the City of Berkeley, a California charter city ("City") and [redacted], [owner Name(s)], [legal entity description] ("Owner") (each a "Party" and collectively the "Parties").

WHEREAS, the City of Berkeley approved Use Permit No. 00-00000000 ("Use Permit") [date of approval] for the construction of [Number of Units] (#) residential rental units at [property address] ("Project") which is attached hereto and incorporated herein as Exhibit A of this Agreement on that Property more particularly described in Exhibit B attached hereto and incorporated herein ("Property"); and

WHEREAS, in accordance with the requirements of Berkeley Municipal Code Section 22.328.030, Owner is required to provide affordable housing units in the Project as a condition of developing the Project; and

WHEREAS, the Owner agreed to include affordable housing units in the Project (the "Qualifying Units") and requested additional residential units and concessions pursuant to California Government Code Section 65915 ("Density Bonus Law"); and [Density Bonus Projects only]

WHEREAS, Owner elected to pay an In-Lieu Fee for the required affordable housing units that are not being provided as part of this Agreement; and

WHEREAS, it is the intention of the Owner and the City to set forth in greater detail and specificity within this Agreement the terms and conditions applied to the Project as a condition of City's approval; and

WHEREAS, Owner received a Use Permit pursuant to Berkeley Municipal Code Section 23.326.030 that granted Owner the right to demolish existing dwelling units on the Property in order to build the Project, and Owner has elected to designate units in the Project as affordable to Extremely Low Income, Very Low Income and Low Income Households as set forth herein, which Owner is obligated to provide to tenants displaced as a result of the Project ("Displaced Tenants") with a right of first refusal; and [Demolition Ordinance Projects Only]

WHEREAS, in compliance with Berkeley Municipal Code Section 22.328.030 and in compliance with the Density Bonus Law [Density Bonus Projects only], Owner has agreed to rent [Number of Units] (#) units in the Project to Very Low Income Households at affordable rents ("City Affordable Units"); and

WHEREAS, Owner recorded or will record, prior to receipt of a Certificate of Occupancy, a condominium map for the Project and indicated to the City that the Project will be initially operated as rental housing; and [Condominium Map Projects Only]

WHEREAS, as long as Owner chooses to rent the Affordable Units, occupancy and affordable rents shall be determined as set forth in of Article 2 below, but if during the the term of this Agreement, Owner chooses to sell the Affordable Units, the Project will be subject to the requirements of Article 3, including the calculation of sale prices; and [Condominium Map Projects Only]

WHEREAS, the Density Bonus Law requires the City to ensure, and the Owner to agree to, continued affordability of the Affordable Units for the Density Bonus Period, as defined below; and [Density Bonus Projects Only]

WHEREAS, to ensure their continued affordability for the Density Bonus Period, this Agreement shall be executed and recorded against the Property; and [Density Bonus Projects Only]

WHEREAS, the Owner agrees to execute and comply with this Agreement and Exhibit A and agrees to comply with the City of Berkeley Below Market Rate Rental Program Guidelines and Operational Manual ("City Guidelines") in consideration for the City's approval of the Project; and

WHEREAS, this Agreement and Exhibit A provide that Owner shall comply with all provisions of the Berkeley Municipal Code, the Density Bonus Law [Density Bonus Projects Only] all conditions of the Use Permit; and

WHEREAS, Owner acknowledges and agrees that the Project Approvals provided adequate and proper notice pursuant to Government Code Section 66020 of Owner's right to protest any requirements for fees, dedications, reservations, and other exactions as may be included in this Agreement, that no protest in compliance with Section 66020 was made within ninety (90) days of the date that notice was given, and that the period has expired in which Owner may protest any and all fees, dedications, reservations, and other exactions as may be included in this Agreement; and

WHEREAS, it is the further intention of Owner and the City that this Agreement will run with the land and will be binding on all parties that have or will acquire any right, title, or interest in the Project.

NOW, THEREFORE, Owner and City agree as follows:

ARTICLE 1 DEFINITIONS

- 1.0 Affordable Housing Portal – a web-based portal for managing affordable housing applications and lotteries as identified by the City.
- 1.1. Affordable Units – The Qualifying Units [Density Bonus Projects Only] the City Affordable Units, the Replacement Units [Demolition Ordinance Projects Only], and the Reserved Units (as defined below) are together known as the Affordable Units.
- 1.2. Area Median Income (AMI)
 - A. All area median income (“AMI”) standards, including but not limited to the standards for “Very Low” Income Households, shall be based on the income standards for the Oakland Fremont Metropolitan Area, reported by the United States Department of Housing and Urban Development (“HUD”) adjusted for family size.
 - B. In the event HUD discontinues establishing such income standards, the standard for median household income is the area median income in the metropolitan area as determined by the California State Department of Housing and Community Development (“HCD”). If such income standards are no longer in existence, the City will designate another appropriate source or method for determining the median household income.

- 1.3. Base Project – Pursuant to the approved Use Permit, the base project for this Project is [Number of Units] (#) units. [Density Bonus Projects Only]
- 1.4. Below Market Rate (BMR) Program – the City’s program that administers and monitors all Affordable Units created through this Agreement.
- 1.5. Below Market Rate (BMR) Compliance Monitor – the City’s designated monitor for administration and compliance of the BMR program and all Affordable Units created through this Agreement.
- 1.6. City Affordable Units – City Affordable Units are the [Number of Units] (#) residential units that the Owner has agreed to rent in the Project to Very Low Income Households and [Number of Units] (#) residential units that the Owner has agreed to rent in the Project to Low Income Households for the life of the Project in compliance with Berkeley Municipal Code (BMC) Section 22.328.030 . These [Number of Units] (#) residential units include [Number of Units] (#) Qualifying Units [Density Bonus Projects Only] and [Number of Units] (#) Reserved Units described below. The [Number of Units] (#) Extremely Low Income Households required as Replacement Units [Demolition Ordinance Projects Only] will count as Very Low Income units to avoid the In-Lieu Fee pursuant to Berkeley Municipal Code (BMC) Section 23.328.
- 1.7. Extremely Low Income – a Household whose combined annual gross income from all sources is no more than 30% of AMI.
- 1.8. Household – a “Household” is as defined in Berkeley Municipal Code Section 23.502.020(H)(10): One or more persons, whether or not related by blood, marriage, or adoption, with common access to and use of all living, kitchen, and eating areas within a single dwelling unit.
- 1.9. Housing Authority – the Berkeley Housing Authority or its successor agency.
- 1.10. Low Income Household – a Household whose combined annual gross income from all sources is no more than 80% of AMI.
- 1.11. Preferences – Preferences are categories designated by the City to establish priorities for lease applications for Affordable Units except those eligible for Shelter Plus Care vouchers.
- 1.12. Qualifying Units – Qualifying Units are those affordable residential units that are required to be provided on site under the Density Bonus Law in order to obtain a density bonus. For a period of fifty-five years from the date the City first issues a Certificate of Occupancy (“Density Bonus Period”), [Number of Units] (#) of the residential units shall be rented to and occupied by, or if vacant, available for occupancy by Very Low Income Households at rents set in accordance with Section 2.5 below and [Number of Units] (#) of the residential units shall be

rented to and occupied by, or if vacant, available for occupancy by Low Income Households at rents calculated in accordance with **Section 2.5** below **[Density Bonus Projects only]**. The **[Number of Units] (#)** Extremely Low Income Households **[Demolition Ordinance Projects Only]** required as Replacement Units will count as Very Low Income units for the purposes of satisfying the Density Bonus requirements.

- 1.13. Replacement Units – Replacement Units are those affordable residential units that are required to be provided by the Owner as a condition of obtaining a Use Permit pursuant to Berkeley Municipal Code Section 23.326.030. In perpetuity from the date the City first issues a Certificate of Occupancy, **[Number of Units] (#)** of the residential units shall be rented to and occupied by, or if vacant, available for occupancy by Extremely Low Income Households, **[Number of Units] (#)** of the residential units shall be rented to and occupied by, or if vacant, available for occupancy by Very Low Income Households and **[Number of Units] (#)** of the residential units shall be rented to and occupied by, or if vacant, available for occupancy by Low Income Households. After the 55 year period, the **[Number of Units] (#)** Extremely Low Income units will become Very Low Income units for a total of **[Number of Units] (#)** Very Low Income Units as a condition of obtaining a Use Permit pursuant to Berkeley Municipal Code Section 23C.08.020. **[Demolition Ordinance Projects Only]**
- 1.14. Reserved Units – Reserved Units are those affordable residential units that are required to be provided on-site under BMC Section 22.328.030(A)(5)(d) for households with Section 8 vouchers and Shelter + Care certificates.
- 1.15. Very Low Income Household – a Household whose combined annual gross income from all sources is no more than 50% of AMI.

ARTICLE 2

AFFORDABLE UNIT REQUIREMENTS

2.1. Designation of Affordable Units

- A. Affordable Units shall be (a) reasonably dispersed throughout the Housing Development Project; and (b) comparable to other Residential Units in the Housing Development Project in terms of appearance, materials, and finish quality. The Affordable Units shall have the same proportion of unit types (i.e., number of bedrooms) and average size as the market rate units (provided, however, that no Affordable Unit may have more than three bedrooms). The minimum bedroom size for any Affordable Unit shall be 70 square feet. Residents of Affordable Units shall have access to the same common areas and amenities that are available to residents of other Residential Units in the Housing Development Project. Any fee charged for use of the common areas,

mandatory housing services or for spaces reserved for individual Units shall be included in the rents allowed for the Affordable Units pursuant to Section 2.5 below.

- B. Assumed household sizes for purposes of determining rental rates for Affordable Units shall be as follows:

Unit Size	AMI Standard
Studio unit	AMI for a one-person household
One-bedroom unit	AMI for a two-person household
Two-bedroom unit	AMI for a three-person household
Three-bedroom unit	AMI for a four-person household

- C. The following table sets forth the designated Affordable Unit Numbers and the Unit's corresponding number of bedrooms.

Unit No.	No. of Bedrooms	Affordability Level

- D. If Owner wishes to designate units other than those in subsection C above as Affordable Units, Owner shall first notify the City in writing of the proposed change in designation at least 10 business days prior to the effective date of such change. The City may reject such change in its discretion, but in all cases shall respond to Owner within 10 business days of receipt of notice from Owner or such change shall be deemed approved. Owner shall send all notices required by this subsection in accordance with Section 6.15.

- E. All Affordable Units shall be included in the City's BMR program and operate under the auspices of the City's BMR Compliance Monitor.

2.2. Reservation for Section 8 Voucher and Shelter + Care Certificate Holders

- A. Owner shall reserve 50% of the Extremely Low Income and Very Low Income units provided or [Number of Units] (#) units for rental to households with Section 8 vouchers from the Housing Authority and 50% of the Extremely Low Income and Very Low Income units provided or [Number of Units] (#) units for rental to households with Shelter + Care certificates provided by the City (Reserved Units) as established by BMC Section 22.328.030(A)(5)(d) Resolution No. 70,698-N.S, and future resolutions as may amend these requirements from time to time.

B. Prior to marketing any units, Owner shall develop a marketing plan subject to the City's approval as further described in Section 2.3.C below, and follow the approved plan when marketing the Affordable Units. The marketing plan shall identify processes for:

- i. Notifying the Housing Authority and the City about the application process for the Reserved Units in a timely way at initial lease-up and for future vacancies;
- ii. Notifying community agencies which provide social services to Section 8 voucher and Shelter + Care certificate holders;
- iii. Providing information about the availability of Reserved Units in the marketing materials;
- iv. Listing the Affordable Units on the Affordable Housing Portal and Coordination of Preferences. Preferences are established by Resolution No. 70,698-N.S. and future resolutions as may amend these requirements from time to time. Applications with Preferences must follow the City's adopted Preference Guidelines.
- v. Notifying the Displaced Tenants who have a right of first refusal to rent units in the Project and to rent the Affordable Units in accordance with Berkeley Municipal Code Section 23.326.030. [Demolition Ordinance Projects Only].

C. If, despite Owner's best efforts to rent the Reserved Units to Section 8 voucher holders and Shelter + Care certificate holders, a Reserved Unit remains vacant 30 days after becoming vacant, then Owner shall provide written notice of this fact to the BMR Compliance Monitor. Such notice shall describe the efforts taken by Owner in compliance with subsection 2.2.B and include any related documentation.

- i. The BMR Compliance Monitor shall review such notice and meet and confer with Owner as necessary.
- ii. If, after such review, the Department of Health, Housing & Community Services determines Owner complied with subsections 2.2.A and B, then it shall provide written notice to the Owner that he/she may rent such Reserved Unit to a Very Low-Income Household whether or not such Household possesses a Section 8 voucher or Shelter + Care certificate.
- iii. If, after such review, the Department of Health, Housing & Community Services determines Owner has not complied with subsections 2.2.A and B, then it shall provide written notice to the Owner of the additional actions Owner shall take to rent the Reserved Unit to a Section 8 voucher or Shelter + Care certificate holder and the Owner shall

immediately take such additional actions as set forth in the notice upon receipt.

- D. If Owner receives a notice from the City pursuant to subsection 2.2.C.ii, such notice shall not exempt Owner from complying with subsections 2.2.A and B upon the next vacancy of such Reserved Unit. Rather, Owner shall again be required to comply with Sections 2.2.A and B in order to rent such Reserved Unit to a Section 8 voucher or Shelter + Care certificate holder upon each vacancy.
- E. Owner may receive a contract rent from the Section 8 or Shelter + Care Program that exceeds the applicable rental limit for an Affordable Unit as determined pursuant to Section 2.5, provided that the tenant portion of the rent remains within the applicable rental limit. This limitation applies both to the Reserved Units and other Affordable Units rented to Section 8 voucher or Shelter + Care certificate holders by Owner.
- F. Nothing in this Section 2.2 shall prevent Owner from renting more than the Reserved Units to Section 8 voucher and Shelter + Care certificate holders. Owner is encouraged to rent as many Affordable Units or market rate units in the Project to Section 8 voucher and Shelter + Care certificate holders as possible.

2.3. Affirmative Marketing

- A. Owner shall affirmatively market the availability of Affordable Units to diverse Low, Very Low Income, and Extremely Low Income Households. Owner shall provide written notification to both the City's Health, Housing & Community Services Department and the Housing Authority 120 days prior to conducting any marketing of an Affordable Unit.
- B. Affirmative marketing consists of actions to provide information and otherwise attract eligible persons in the housing market area to the available housing without regard to race, color, national origin, sex, religion, familial status, or disability.
- C. At least 120 days prior to marketing the Affordable Units, Owner must submit a draft marketing plan in accordance with the requirements of the Guidelines to the City for review and approval. The City will approve or reject the marketing plan in writing within 10 business days of submission.
- D. Owner shall retain copies of any advertisements and announcements utilized and a list of any publications or organizations mailed such advertisements or announcements. The copies and list shall be furnished to the City on request. Owner shall keep such records as well as records documenting the results of

the affirmative marketing for three years after affirmatively marketing an Affordable Unit.

2.4. Certification of Eligibility for Occupancy

- A. Applicants claiming Preferences must be certified by the BMR Compliance Monitor for meeting criteria established by City Guidelines.
- B. For any Affordable Units, Owner shall determine that the candidate Household meets eligibility requirements of the City Guidelines, including any Preference criteria, before leasing an Affordable Unit to the Household, and recertify the Household's income eligibility annually before renewing the lease. However, Owner shall not be required to calculate the income for Households who possess Section 8 vouchers. Instead, Owner shall confirm that the Household income determined by the Housing Authority meets the eligibility requirements of the City Guidelines for that particular Affordable Unit. Notwithstanding the above, any Displaced Tenant shall not be required to meet the eligibility requirements in the City guidelines related to income but must certify their status as a Displaced Tenant. **[Demolition Ordinance Projects Only]**
- C. If required by the City Guidelines, the Owner shall submit the eligibility information to the —BMR Compliance Monitor for certification prior to renting the unit to that Household, and shall not rent the unit to the Household or renew a lease for an Affordable Unit until the City has certified eligibility of the candidate Household in writing.
- D. If required by the City Guidelines, the City shall review and either approve or reject the income certification and recertification documentation prepared by the Owner for any Household renting an Affordable Unit prior to any new or renewed lease. The BMR Compliance Monitor shall complete his/her review no later than 15 days from receipt of a complete documentation from the Owner.

2.5. Calculation of Rents

Beginning on the date the City first issues a Certificate of Occupancy and continuing for the life of the Project, the following provisions shall apply, notwithstanding anything to the contrary in this Agreement or the Use Permit.

- A. Affordable Units shall be rented to Low Income, Very Low Income, and Extremely Low Income Households at rents calculated in accordance with Berkeley Municipal Code 23.328.020. Rents will be adjusted for the assumed household sizes set forth in Section 2.1.B above.

- B. Rents for Displaced Tenants shall be the rent that would have applied if their unit had not been demolished pursuant to Berkeley Municipal Code Chapter 23.326. [Demolition Ordinance Projects Only]
- C. Rent shall include a reasonable allowance for tenant-paid utilities, including garbage collection, sewer, water, electricity, gas, and other heating, cooking and refrigeration fuels, as provided in the City Guidelines. The City shall publish a utility allowance schedule. Such allowance shall take into account the cost of an adequate level of service. Utilities do not include telephone service, cable television or internet. Rent also includes any separately charged fees or service charges assessed by Owner that are required of all tenants, other than security deposits.
- D. The total rent for Affordable Units rented to Extremely Low Income and Very Low Income Households receiving rental subsidies through the Section 8 Program, Shelter + Care, or successor programs, shall be calculated according to the regulations of the applicable program, as determined by the Housing Authority or its successor. The tenant portion of the rent must be consistent with Section 2.5.A above.
- E. Rent increases for all Affordable Units occupied by tenants without assistance from the Section 8, Shelter + Care or their successor programs shall be authorized by the City annually upon Owner's renewal of leases with such tenants to the extent that there are increases in median household income reported by the U.S. Department of Housing and Urban Development for the Oakland Fremont Metropolitan Area, as updated, and such rents do not exceed the amounts determined pursuant to Section 2.5.A above. The increases in median household income shall be set forth in the allowable rent ceilings published in updates of the City Manager's regulations promulgated pursuant to BMC Section 23.328.050(D). If the median income declines, Owner will not be required to reduce the rent, however further increases may not be made until the median income increases over its previous high point. Owners must provide a minimum 30-day notice to tenants for any rent increases. All notices must be provided in writing and delivered to the tenant via U.S. mail.

2.6. Ongoing Certification and Other Requirements

Households renting an Affordable Unit must remain income eligible for the duration of their tenancies except for Displaced Tenants [Demolition Ordinance Projects Only] Owner agrees to comply with recertification requirements and reporting as stated in the Administrative Guidelines.

2.7. Annual Monitoring Fee

Owner shall pay an Annual Monitoring Fee to the City for the Below Market Rate Units (i.e., Affordable Units), as authorized by BMC Section 23.328.050(E). The current fee was set by Resolution No. 70,698-N.S. in the amount of \$450 for each Below Market Rate unit, and future resolutions may amend this amount from time to time.

2.8 Rent Board Registration

All rental properties in the City of Berkeley must register with the Berkeley Rent Board annually and pay an annual registration fee of \$37 as established by Rent Board Resolution 23-08. Future resolutions may amend this amount from time to time.

2.9. Management Responsibilities.

Owner is responsible for all management functions with respect to the Affordable Units and the Project, including without limitation the selection of residents, certification and recertification of household size and income, evictions, collection of rents and deposits, maintenance, landscaping, routine and extraordinary repairs, replacement of capital items, and security. Owner shall provide to the City the name of the management agent and the on-site resident manager as well as contact information. Any time that Owner changes Management Agents or resident managers, Owner shall provide the City with the updated information within ten (10) days of such change of Management Agent or resident manager in accordance with the notice provisions in Section 6.15.

ARTICLE 3 SALE OF AFFORDABLE UNITS AS CONDOMINIUM UNITS

**[THIS SECTION ONLY APPLIES TO PROJECTS RECORDING A CONDOMINIUM
MAP PRIOR TO COMPLETION]**

3.1 Prohibition on Sale of Qualifying Units.

Pursuant to Government Code section 65915(c)(1)(A), all Qualifying Units shall be maintained as very low and low-income rental units for the Density Bonus Period and shall not be sold separately to owner-occupants.

3.2. Decision of Owner to Sell Units in the Project.

In the event that Owner determines to offer the Units in the Project for sale, the following shall apply.

A. Notification to City. At least one hundred twenty (120) days before offering an Affordable Unit for sale, Owner shall provide the City with written notice of the proposed sale of the Affordable Unit including the Unit size

(square footage and number of bedrooms), lot/building/unit number, street address, Owner name and Tract number, and required income level of the Unit. City shall notify Owner within thirty (30) days of the receipt of Owner's notification of the Affordable Sales Prices currently applicable to each Affordable Unit. For purposes of this section, Affordable Sales Price shall mean the maximum allowable sales price for an Affordable Unit in effect at the time of its sale by Owner to a Very Low Income or Low Income household as applicable.

B. Notification to Tenants. Owner shall provide all notices to tenants of the Affordable Units required by state law.

3.3. Sale by Owner to Eligible Households.

A. Owner shall comply with the City's BMR Ownership Administrative Guidelines. Items identified below shall conform with the most recent published Guidelines if there is a conflict.

B. Owner shall sell the Affordable Units to Very Low Income Households or Low Income Households, as applicable, at prices not in excess of the then-current Affordable Sales Prices provided by the City. The Affordable Sales Price shall be the absolute maximum price that Owner or any other seller may receive as compensation for the sale of an Affordable Unit. Owner or other seller may not charge or receive any additional amount for an Affordable Unit regardless of whether the additional amount is (a) for options, upgrades or additional improvements to the Affordable Unit, (b) paid through escrow or outside of escrow, (c) paid prior to, after or as part of the purchase escrow or (d) paid in cash or in kind, unless a reasonable accommodation is approved by the City for buyers requiring options or accommodations related to a disability, in which any additional cost shall be paid through escrow with prior written approval by City.

B. Owner shall actively market the Affordable Units, openly and in the same general manner as the market-rate Units, allow prospective buyers to view the Affordable Units, model units or floor plans, disclosure documents, and any other relevant sales materials, as may be available. Owner's sales agents shall provide the same general quality of customer service to the Affordable Unit buyers as provided to market-rate buyers, shall display information about the availability of the Affordable Units in a readily noticeable manner in the sales office and/or Project sales website, and shall disclose the Affordable Unit restrictions to any prospective buyers in a timely manner. Selected applicants shall be responsible for obtaining their own financing for the Affordable Units. Owner shall comply with applicable fair housing laws in the marketing and sale of the Affordable Units. Purchase contracts between Owner and eligible Very Low Income or Low Income households shall include requirements that buyers execute documents for the benefit of the City as described in Section 3.4 below.

C. The City or its designee shall verify a potential buyer's eligibility pursuant to this Agreement before Owner may accept an offer to purchase an Affordable Unit. Owner agrees to pay a transaction fee for the reasonable cost of administering this Agreement as may be adopted by resolution of the City Council.

D. Eligible households shall submit purchase offers directly to Owner, and Owner shall accept offers to purchase in the order received, provided that such offers include a letter from the City certifying buyer's eligibility, a valid check for the required good faith deposit, and a preliminary first mortgage loan approval. Owner shall conduct any additional screening of applicants deemed necessary and not in violation of fair housing laws.

E. Owner shall be independently responsible to make good faith efforts to market and sell the Affordable Units in compliance with this Agreement, and shall cooperate with City in good faith in the effort to sell the Affordable Units to eligible households in a timely manner.

3.4. Affordable Sales Prices.

The Affordable Units shall be sold to eligible households at sales prices that do not exceed Affordable Sales Prices established by the City. Prior to commencing sales of the Affordable Units, the City shall provide to Owner a schedule of Affordable Sales Prices. Owner acknowledges and agrees that Affordable Sales Prices are determined based on current income levels in Oakland Fremont Metropolitan Area as reported by HUD or as determined by the City's BMR Ownership Administrative Guidelines.

3.5. Homebuyer Documents and Security Instruments.

Prior to the sale of each Affordable Unit, Owner shall ensure that:

A. The households purchasing the Affordable Unit and the City execute the Resale Restriction, which shall be recorded against the Affordable Unit at close of escrow on the sale. The Resale Restriction shall be recorded immediately following the grant deed to the eligible household, unless otherwise approved in writing by the City.

B. The eligible household signs a promissory note in favor of the City in the form to be provided by the City that obligates the eligible household to pay the City any excess sales proceeds or excess rents received by the eligible household if the eligible household fails to comply with the Resale Restriction on rental or resale of the Affordable Unit.

C. The eligible household signs a deed of trust and security agreement securing performance of the Resale Restriction and payment of the amounts due under the promissory note in favor of the City if the eligible household fails to comply with the terms of the Resale Restriction. The

Deed of Trust shall be recorded against the Affordable Unit, subordinate only to the Resale Restriction and the lien for the first mortgage loan obtained by the purchaser to finance the purchase of the Affordable Unit unless otherwise approved in writing by the City.

3.6. Compliance Reports, Inspections, Monitoring.

Within five (5) days following the sale of any Affordable Unit by Owner to an eligible household, Owner shall forward, or shall cause escrow officer to forward to the City, copies of the buyer's and seller's settlement statement and all closing documents, including Resale Restriction, City promissory note, and City deed of trust executed in connection with the sale.

3.7. In-Lieu Fee Option

If Owner elects to sell the Units in the Project, rather than offering the Affordable Units for sale in accordance with Sections 3.2, 3.3 and 3.4 above, Owner may elect to pay an In-Lieu Fee pursuant to BMC Section 23.328.030(B) in which event Owner shall not be required to comply with Sections 3.2, 3.3 and 3.4 provided the applicable In-Lieu Fee is paid. Owner may also elect to dedicate land as an alternative of the In-Lieu Fee at the discretion of the City consistent with the criteria identified in BMC Section 23.328.030 (C).

**ARTICLE 4
CITY RIGHT OF ENTRY**

4.1. Right of Entry by City

Owner hereby grants to the City and its duly authorized representatives the right to enter the Affordable Units at reasonable times, with reasonable notice to Owner and all tenants, which shall be no less than 48 hours by telephone or receipt of mailed notice, and in a reasonable manner for purposes of inspecting the Affordable Units to determine compliance with this Agreement. City shall also have the right to inspect Owner's records including income certifications and tenant leases at all reasonable times after providing Owner with notice of such inspection.

**ARTICLE 5
DEFAULT**

5.1. Events of Default

Any of the following shall constitute an event of default (each an "Event of Default") under this Agreement:

- A. Any increase in rent of Affordable Units above that permitted by **Section 2.5**; or
- B. Any material failure by Owner to comply with any other term, provision, or covenant set forth in this Agreement in the event that such failure continues for more than thirty (30) days after the City gives written notice thereof to Owner, or if the Event of Default cannot be cured within such thirty (30) day period and Owner fails within such period to commence with due diligence and dispatch the curing of such Default or, having so commenced, thereafter fails to prosecute or complete with due diligence and dispatch the curing of such Default.

5.2. Remedies

The occurrence of an Event of Default following the expiration of any applicable notice and cure periods shall give the City the right to proceed with any and all remedies set forth in this Agreement, including but not limited to the following:

- A. The City shall have the right to proceed with any suit, action, or proceeding available at law or in equity to require Owner to perform Owner's obligations under this Agreement. In any such action, the City may seek monetary relief in an amount sufficient to allow the City to provide rental housing equivalent to that wrongfully denied under this Agreement. The City shall be entitled to a daily penalty of no more than \$1,000 per day subject to the City's discretion for violations of this Agreement which can be placed on the Property via a lien. In addition to any other remedy provided by law or equity or granted elsewhere under this Agreement, the City may elect to seek in a court of appropriate jurisdiction such injunctive orders as are necessary to secure performance by Owner, its successors and assigns, of its commitments and obligations under this Agreement.
- B. If Owner has breached its obligation to provide the Affordable Units (or any of them) to Low or Very Low Income Households under the terms of this Agreement, then the Fee in the amount of \$ which was avoided by City in consideration for Owner's agreement to provide the Affordable Units to Low and Very Low Income Households as well as 10% interest on the Fee from the date that any Affordable Unit is rented to a household other than a Low or Very Low Income Household shall become immediately due and payable by Owner to the City.
- C. Any other means authorized under the Berkeley Municipal Code, Density Bonus Law, or any other federal or state statutes.

No right, power or remedy given to the City by the terms of this Agreement or the Density Bonus Law is intended to be exclusive of any other rights, power, or remedy; and each and every such right, power, or remedy shall be cumulative and in addition to

every other right, power, or remedy given to the City by the terms of this Agreement, the Density Bonus Law, or by any statute or ordinance or otherwise against Owner and any other person.

5.3. Third Party Beneficiaries

Certified income-eligible tenants of the Affordable Units are "Third Party Beneficiaries" of Section 2.5 of this Agreement and shall have the right to proceed with any suit, action, or proceeding at law or in equity to require Owner to perform its obligations under Section 2.5 of this Agreement.

5.4. Waiver

Any waiver by the City of any obligation or condition in this Agreement must be in writing from the City Manager or the City Manager's designee. No waiver will be implied from any delay or failure by the City to take action on any breach or default of Owner or to pursue any remedy allowed under this Agreement or applicable law. Any extension of time granted to Owner to perform any obligation under this Agreement shall not operate as a waiver or release from any of its obligations under this Agreement. Consent by the City to any act or omission by Owner shall not be construed to be a consent to any other or subsequent act or omission or to waive the requirement for the City's written consent to future waivers.

ARTICLE 6 GENERAL PROVISIONS

6.1. No Joint Venture Relationship

Nothing contained in this Agreement shall be construed as creating a joint venture or partnership between City and Owner. Owner is not the agent of the City for any purposes in connection with this Agreement.

6.2. Entire Agreement; Amendments

This Agreement constitutes the entire Agreement between the Parties. This Agreement may be amended only by written instrument executed by the City and Owner.

6.3. Transfers

For purposes of this Agreement, a Transfer shall mean any total or partial sale, assignment or conveyance or any transfer in any other mode or form of the Project or any part thereof or any interest therein. Owner shall provide the City with notice of any Transfer of the Project within thirty (30) days of such Transfer and any transferee shall take title to the Project subject to the terms and conditions of this Agreement. Any notice to the City of a Transfer shall include the full name of the transferee, the address

of the transferee and a designated contact person for the transferee and such notice shall be delivered in accordance with Section 6.15 of this Agreement. Failure to notify the City of any Transfer shall be considered a material default under this Agreement and entitle the City to exercise any and all remedies.

6.4. Term of Agreement

This Agreement shall be in effect for the life of the Project.

6.5. Binding on Successors

The City and Owner hereby declare their express intent that the covenants and restrictions set forth in this Agreement shall apply to and bind Owner and its heirs, executors, administrators, successors, transferees, and assignees having or acquiring any right, title or interest in or to any part of the Property and shall run with and burden such portions of the Property. Until all or portions of the Property are expressly released from the burdens of this Agreement, each and every contract, deed or other instrument hereafter executed covering or conveying the Property or any portion thereof shall be held conclusively to have been executed, delivered, and accepted subject to such covenants and restrictions, regardless of whether such covenants or restrictions are set forth in such contract, deed or other instrument. In the event of foreclosure or transfer by deed-in-lieu of all or any portion of the Property title to all or any portion of the Property shall be taken subject to this Agreement. Owner acknowledges that compliance with this Agreement is a requirement of Density Bonus Law and the Project Approvals, and that no event of foreclosure or trustee's sale may remove these requirements from the Property.

6.6. Superiority of Declaration

Owner warrants that (s)he has not executed, and agrees that (s)he will not execute, any other agreement with provisions contradictory to, or in opposition to, the provisions of this Agreement, and that, in any event, the requirements of this Agreement are paramount and controlling as to the rights and obligations between and among Owner, the City, and their respective successors.

6.7. Headings Not Part of Agreement

The headings used in this Agreement are not part of it and will not be considered in its interpretation.

6.8. Time Is of the Essence

The times for the performance of any obligations under this Agreement shall be strictly construed, time being of the essence.

6.9. Mutual Indemnification

Owner will indemnify and hold harmless (without limit as to amount) City and its elected officials, officers, employees and agents in their official capacity (hereinafter collectively referred to as "Indemnitees"), and any of them, from and against all loss, all risk of loss and all damage (including expense) sustained or incurred because of or by reason of any and all claims, demands, suits, actions, judgments and executions for damages of any and every kind and by whomever and whenever made or obtained, allegedly caused by, arising out of or relating in any manner to the Project, the Affordable Units, or Owner's performance or non-performance under this Agreement, and shall protect and defend Indemnitees, and any of them with respect thereto, except to the extent arising solely from the gross negligence or willful misconduct of the Indemnitees. The City will indemnify and hold harmless (without limit as to amount) Owner, and its members, officers, employees and agents in their official capacity (hereinafter collectively referred to as "Owner Indemnitees"), and any of them, from and against all loss, all risk of loss and all damage (including expense) sustained or incurred because of or by reason of any and all claims, demands, suits, actions, judgments and executions for damages of any and every kind and by whomever and whenever made or obtained, allegedly caused by, arising out of or relating in any manner to the City's performance or non-performance under this Agreement, and shall protect and defend Owner Indemnitees, and any of them with respect thereto, except to the extent arising solely from the gross negligence or willful misconduct of Owner Indemnitees. The provisions of this Section shall survive expiration or other termination of this Agreement or any release of part or all of the Property from the burdens of this Agreement, and the provisions of this Section shall remain in full force and effect.

6.10. Discrimination Prohibited

Owner shall not discriminate in the rental of any unit in the Project on the basis of race, color, creed, religion, sex, sexual orientation, age, handicap or disability (including Acquired Immune Deficiency Syndrome -- AIDS), marital status, ancestry, or national origin, presence of a child or children in the household, student/non-student status, source of income or disability.

6.11. Invalid Provisions

If, for any reason, one or more of the provisions contained in this Agreement are held invalid, illegal, or unenforceable in any respect by a court of competent jurisdiction, such provisions shall be deemed severed from the remaining provisions contained in this Agreement, and the remaining provisions shall be construed to continue in full effect.

6.12. Controlling Law and Venue

This Agreement shall be interpreted under the laws of the State of California. Venue for any legal action pertaining to this Agreement shall be Alameda County, California.

6.13. Interpretation of Agreement

This Agreement shall be interpreted to ensure that the rental of all Affordable Units or sale of Affordable Units remain affordable to Low and Very Low Income Households as described in this Agreement. The terms of Berkeley Municipal Code Chapter 23.32822.20.065, and the Density Bonus Law including documented legislative intent associated with its enactment shall apply to interpretation of this Agreement.

6.14. Recordation of Agreement

This Agreement shall be recorded against the Property in the Official Records of the County of Alameda.

6.15. Notices

All notices required herein, including, but not limited to, notice of change of ownership, notices of Transfers, notices of changes in the management agent, shall be sent by first class certified mail, return receipt requested or by express delivery service with a return receipt to the parties as follows:

To Owner:

Name of Contact

Name of Entity

Entity Address

To the City:

Housing & Community Services Manager

City of Berkeley Health, Housing & Community Services

2180 Milvia Street, 2nd Floor

Berkeley, CA 94704

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

Name of Designated Signatory
Title
Name of Entity

Date

City Manager
City of Berkeley

Date

Approved as to form:

Assistant City Attorney
City of Berkeley

Addendum A: Summary of City of Berkeley Inclusionary Rental Units Requirements

Attachments:

Exhibit A to Regulatory Agreement: Use Permit Conditions of Approval

Exhibit B to Regulatory Agreement: Legal Description of Property

A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF ALAMEDA)

On _____, before me, _____, a Notary
Public,

personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature

(Seal)

A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF ALAMEDA)

On _____, before me, _____, a Notary Public,

personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature

(Seal)

ADDENDUM A

Summary of City of Berkeley Inclusionary Rental Units Requirements

Boilerplate Template

EXHIBIT A
USE PERMIT CONDITIONS OF APPROVAL

Boilerplate Template

EXHIBIT B
LEGAL DESCRIPTION FOR PROPERTY

Boilerplate Template