

AFFORDABLE HOUSING SET-ASIDE PROGRAM ORDINANCE

(Reprinted from Emeryville Municipal Code, Title 9 (Zoning Code), Chapter 4, Article 62)

Article 62. Affordable Housing Set-Aside Program

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9-4.62.1. Created.

To lessen the shortage of housing affordable to moderate, low, and very low income households in the City of Emeryville as partial compliance with California Government Code Section 65583(c), there is hereby created an Affordable Housing Set-Aside Program.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)

9-4.62.2. Definitions.

As used in this article:

(a) “Affordable,” for moderate-income households, shall mean that the relevant housing is available on terms such that the housing costs are less than thirty percent (30%) of the gross income of a moderate-income household (adjusted for household size, depending on the number of bedrooms in the dwelling unit). Where units are targeted as being affordable to income levels below moderate income, housing costs must be equal to or less than thirty percent (30%) of the relevant income level. The City shall publish the annual home-sale price and rents allowable under this program on an annual basis.

(b) “Applicant” shall mean any person, firm partnership, association, joint venture, corporation, or any entity or combination of entities which seeks City permits and approvals.

(c) “At one (1) location” shall mean all adjacent land owned or controlled by the applicant, the property lines of which are contiguous at any point, or the property lines of which

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are separated only by a public or private street, road or other public or private right-of-way, or separated only by other land of the applicant.

(d) “Bedroom(s)” shall mean the number of rooms available predominantly as sleeping quarters. The City has a history of providing live/work space and other unusually structured living arrangements. For that reason, the City retains discretion in determining how many bedrooms a particular dwelling unit will contain so as to determine what price or rent will be required for eligibility as a set-aside unit.

(e) “Density bonus” shall mean an increase in the number of dwelling units per acre otherwise allowed for any particular parcel.

(f) “Dwelling unit” shall mean a dwelling designed for occupancy by one (1) household.

(g) “Housing costs” shall mean the monthly mortgage principal and interest, property taxes, homeowners insurance, and condominium fees, where applicable, for ownership dwelling units; and the monthly rent and utility allowance for rental dwelling units.

(h) “Income eligibility” shall mean the gross annual household income, considering the household size and number of dependents, income of all wage earners, elderly or disabled family members and all other sources of household income.

(i) “Market-rate unit” shall mean an ownership or rental housing dwelling unit which is not subsidized by any Federal or State funds and which is not used to qualify for the set-aside requirements of this article.

(j) “Moderate, low and very low income households” means those households whose income matches levels determined periodically by the U.S. Department of Housing and Urban Development, based on the San Francisco–Oakland Standard Metropolitan Statistical Area (SMSA) median income levels by family size, under which “moderate income” is defined as greater than eighty percent (80%) to one hundred twenty percent (120%) of median income, “low income” is defined as fifty percent (50%) to eighty percent (80%) of median income and “very low income” is defined as less than fifty percent (50%) of median income.

(k) “Operating agent of the City” shall mean a nonprofit organization, for-profit corporation, County or City agency chosen by the City to carry out some or all of the administrative provisions of this article.

(l) “Project” shall mean a housing development at one (1) location including all dwelling units for which permits have been applied for or approved within a twelve (12) month period.

(m) “Resale controls” shall mean legal restrictions by which the price of set-aside units will be controlled to insure that the dwelling unit is affordable to moderate, low or very low income households over time.

(n) “Set-aside unit” shall mean an ownership or rental housing unit, as required by this article, which is affordable to a household with moderate, low or very low income.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)

9-4.62.3. General Requirements for New Residential Developments of Thirty (30) or More Dwelling Units.

(a) Developers of new residential projects (both new construction and conversion of nonresidential space to a residential use) of thirty (30) or more dwelling units or lots, including but not limited to, single-family dwellings, apartments, multiple dwelling structures, or group of dwellings, condominium developments, cooperatives, or townhouse developments, shall be conditioned to provide twenty percent (20%) of the dwelling units in the project as set-aside units affordable by moderate, low, or very low income households for a minimum period of twenty-five (25) years from date of availability as more fully described below, unless the developer, in agreement with City staff, elects to commit to a fixed percentage of the set-aside units as being affordable to low and very low income households in return for a reduction of the set-aside percentage at affordable rates.

In applying these percentages, any decimal fraction less than or equal to 0.50 may be disregarded and any decimal fraction greater than 0.50 shall be construed as requiring one (1) dwelling unit. The set-aside requirement shall be imposed only once on a given development, regardless of changes in the character or ownership of the development, except as provided in Section 9-4.62.7 below.

In the event that the developer provides some or all of the ownership project units not included in the set-aside which are of comparable size and at prices which are affordable to households with income less than one hundred thirty-five percent (135%) of median income, then one (1) or more of the following options shall be employed for those affected set-aside units:

- (1) The developer may be required to provide those set-aside units at a price which is affordable to households at one hundred percent (100%) of the median income with financial assistance from the City to facilitate the lowering of the purchase price; and/or
- (2) The City may waive the set-aside requirement for some or all of those set-aside units.

(b) Any development permit for new residential projects (both new construction and conversion) of thirty (30) or more dwelling units or parcels shall have conditions attached which will assure compliance with the provisions of this chapter. Such conditions shall specify the timing of the construction of the set-aside units, the number of set-aside units at appropriate price levels, provision for income certification and screening of potential purchasers and/or renters of set-aside units, a resale control mechanism, and, if applicable, density bonuses.

In addition, the conditions shall require a written agreement to indicate the number, type, location, approximate size, and construction scheduling of all dwelling units and such reasonable information as shall be required by the City for the purpose of determining the applicant's compliance with this chapter.

All set-aside units in a project and phases of a project should be constructed concurrently with or prior to the construction of non-set-aside units, unless the City determines that extenuating circumstances exist.

(c) All set-aside units shall be sold or rented to moderate, low, or very low income households as certified by the City or its operating agent.

(d) Unless the City finds compelling reasons to the contrary, the set-aside units shall be reasonably dispersed throughout the development where feasible, the mix and type of set-aside units shall be reasonably proportionate to those of the project as a whole, and shall be comparable with the design of the market rate units in terms of appearance, materials, and finished quality. The written agreement referred to in subsection (b) above shall include a breakdown of the types

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of units for the set-aside, which shall be directly proportionate to the types of units in the project as a whole.

(e) The applicant shall have the option, with the approval of the City, to transfer credit for set-aside units constructed at one (1) location within the City to satisfy the requirement of this article. The set-aside requirement may be satisfied with construction of dwelling units up to twelve (12) months prior to the approval of the project.

(f) The applicant shall, upon a finding by the applicant with staff concurrence that the construction of the required set-aside units is not feasible or appropriate as part of a larger development project, have the option to construct the set-aside units on a site or sites not contiguous with the development.

(g) The applicant shall have the option, with the concurrence of the City, in a home ownership project, of constructing rental units in a number sufficient to meet the set-aside requirements of this article. These rental units shall be subject to Section 9-4.62.4.

(h) Where units at a separate location are used to meet the set-aside requirements under subsections (e), (f) and (g) of this article, the set-aside percentage shall be applied to the number of units at the two (2) or more locations combined.

(i) Where the applicant is willing to commit to making a portion of the set-aside units affordable to low or very low income households or to extend the duration of the set-aside for more than twenty-five (25) years:

(1) The applicant can seek approval by the City under Section 9-4.62.3(a) above to reduce the number of units required;

(2) With City approval, the applicant may reduce the interior amenity level of the set-aside units below that of the market-rate units, provided such dwelling units conform to the requirements of applicable building and housing codes;

(3) With City approval, the applicant may reduce the square footage of the set-aside units below that of the market-rate units, provided all dwelling units conform to the requirements of applicable building and housing codes; and/or

(4) The Emeryville Redevelopment Agency may subsidize the cost of traffic impact fees, if any, building permit fees, and other fees and exactions that may be required of some or all of the project units.

(j) Prior to City approval of a lesser set-aside in return for targeting to lower income under subsection (a) or approval of options set forth in subsection (i), the City must find that the request provides at least an equivalent contribution toward City goals.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)

9-4.62.4. Set-Aside Unit Requirements for Rental Residential Developments.

(a) In rental projects subject to Section 9-4.62.3(a), a twenty percent (20%) set-aside of the rental units affordable to moderate income households shall be required as provided above. The set-aside rental units shall be offered at rent levels not exceeding the maximum housing unit rental price affordable by moderate-income households at thirty percent (30%) of gross income for a minimum period of twenty-five (25) years from the recordation of the Certificate of Occupancy for the set-aside units.

(b) The City or its operating agent shall monitor the set-aside rental units. The developer or owner shall retain final discretion in the selection of the eligible households; provided, that the same rental terms and conditions (except rent levels and income) are applied to tenants of set-aside units as are applied to all other tenants, except as required to comply with government subsidy programs.

(c) The City shall enter into recorded agreements with developers, and take other appropriate steps necessary to assure that the required moderate, low and very low income rental dwelling units are provided and that they are rented to moderate, low, or very low income households for a period of at least twenty-five (25) years from the recordation of the Certificate of Occupancy for the units. When this has occurred, the City or its operating agent shall prepare a certification indicating that the developer has complied with the requirements of this section, and shall transmit this certification to the City.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)

9-4.62.5. Set-Aside Unit Requirements for Ownership Residential Developments.

(a) In ownership residential projects subject to Section 9-4.62.3(a) above, a twenty percent (20%) set-aside of the dwelling units affordable to moderate, low or very low income households shall be required as provided above. The housing unit sales prices corresponding to these income ranges shall be established by the City or its designee.

(b) The developer shall sell the set-aside units, with the assistance of the City, as required by this article for sale to eligible purchasers for a period of not less than sixty (60) days from the date of the City's issuance of the Certificate of Occupancy for each particular set-aside unit, with the sale being completed within ninety (90) days thereafter.

Should the developer be unable to sell some or all of said set-aside units, the City shall be offered the opportunity to sell said units, for a period of no less than sixty (60) days, with sale being completed within ninety (90) days thereafter.

Should the City not exercise its option to sell, or should it or its operating agent be unable to sell the units, the sale and resale restrictions shall be removed. However, in the event that the sale of set-aside units should lag behind the sale of market-rate units by a margin of twenty percent (20%) or more, the developer may be required to extend its sales efforts for additional sixty (60) day increments at the discretion of the City.

The City or its operating agent shall advise all prospective purchasers of the resale restrictions applicable to ownership set-aside units as specified in this article.

(c) The City or its operating agent shall review the assets and income of prospective purchasers of the ownership set-aside units on a project-by-project basis. The City or its operating agent shall advertise the initial availability of set-aside units to the Emeryville general public. Upon notification of the availability of ownership dwelling units by the developer, the City or its operating agent shall seek and screen qualified purchasers through a process involving applications and interviews. Where necessary, the City, or its operating agent, and/or the developer's marketing agent shall hold a lottery to select purchasers. The developer/owner shall retain final approval in the selection of the qualified purchasers selected by the City or its operating agent; provided, the same terms and conditions (except income) are applied to the

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purchasers of set-aside units as are applied to all other purchasers. Preference will be given first to residents of Emeryville and second to people employed in Emeryville.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)

9-4.62.6. Eligibility Requirements for Ownership Set-Aside Units.

(a) In establishing moderate, low or very low household income, the City or its designee shall consider, among other things, the median household income data provided periodically by HUD, household size and number of dependents, and all sources of family income and assets.

(b) Every purchaser of a set-aside unit shall certify by a form acceptable to the City that the dwelling unit is being purchased for the purchaser's primary place of residence. The City or its operating agent shall verify this certification. Failure, by the purchaser, to maintain eligibility for homeowners' property tax exemption shall be construed to mean that the set-aside unit is not the primary place of residence of the purchaser. Should the purchaser fail to make the unit his/her principal place of residence within six (6) months following notice by the City of the failure to comply with this provision, such failure shall authorize the City to send a subsequent notice that it treats the failure as a sale which triggers a preemptive option and right of first refusal for the City to purchase such unit consistent with the procedures set out in Section 9-4.62.7(b) below; provided that no sale is deemed to occur, no option periods are triggered, and no rights of the City are extinguished if it does not send the second written notice deeming the failure of the owner to comply as a sale.

(c) The policies governing the selection of home buyers for certification by the City or its operating agent under the provisions of this article shall be established by the City. These shall include, but not be limited to, maximum income and asset limits, order of preference, and policy on first-time home buyers. The most recently established criteria shall be used by the City or its operating agent in selecting home buyers and in structuring any lottery. The City shall notify the City or its operating agent in writing of any addition or modification to its selection policies.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)

9-4.62.7. Control of Resale of Ownership Set-Aside Units.

(a) In order to maintain the availability of the housing units as may be constructed pursuant to the requirements of this article, the City shall impose the following resale conditions for a minimum period of twenty-five (25) years from the recordation of each grant deed, which twenty-five (25) year period shall start over with each resale. The price received by the seller of a set-aside unit shall be limited to the purchase price plus an increase based on the Bay Area Consumer Price Index or the fair market value, whichever is less.

(b) Home ownership set-aside units constructed, offered for sale or sold under the requirements of this article shall be offered to the City or its operating agent or its assignee for a period of at least sixty (60) days for the exercise of the option to purchase, with an additional ninety (90) days for the completion of sale, by the first purchaser or subsequent purchaser(s) from the date of the original sale for a price affordable to moderate, low or very low income families as stipulated in subsection (a) of this section. Home ownership set-aside units shall be sold and

resold from the date of the original sale only to moderate, low or very low income households as determined to be eligible for set-aside units by the City or its operating agent according to the requirements of this article. The seller shall not levy or charge any additional fees nor shall any finder's fee or other monetary consideration be allowed other than customary real estate commissions and closing costs.

(c) The owners of any set-aside unit shall attach and legally reference in the grant deed conveying title of any such set-aside ownership unit a declaration of restriction provided by the City or its operating agent stating the restrictions imposed pursuant to this article. The grant deed shall afford the grantor and the City the right to enforce the attached declaration of restrictions. The declaration of restrictions shall include all applicable resale controls, occupancy restrictions, and prohibitions as required by this chapter. Should the City provide subsidies or financing for any set-aside unit, including down payment assistance loans, it will require the filing of a deferred payment second deed of trust in favor of the City, having such terms as the City shall from time to time require, and that second deed of trust shall incorporate and make further enforceable the declaration of restrictions referred to in this subsection.

(d) The City or its operating agent shall be given the responsibility of monitoring the resale of ownership set-aside units. The City or its operating agent or its assignees shall have a sixty (60) day option to commence purchase of ownership set-aside units after the owner gives notification of intent to sell. Any abuse in the resale provisions shall be referred to the City for appropriate action.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)

9-4.62.8. Availability of Government Subsidies.

It is the intent of this chapter that the requirements for set-aside units affordable by moderate-income families shall not be determined by the availability of government subsidies. This is not to preclude the use of such programs or subsidies. This article is also not intended to be an undue burden on the developers of residential projects. Therefore, as detailed in succeeding sections of this article, incentives are given to provide set-aside units.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)

9-4.62.9. Density Bonus.

To avoid any undue economic burden or cost to the applicant providing set-aside units required by the provisions of this article, the City is authorized to consider the applicability of an increase in density up to twenty-five percent (25%) in the proposed residential project; provided, that a density bonus granted does not conflict with the goals of the City General Plan. This density bonus is exclusive of and not a substitute for any other density bonuses, including increased density obtained with a Conditional Use Permit. Granting of a density bonus shall be based on a project-by-project analysis and determination that such an increase in density will not be detrimental to the public health, safety and/or welfare.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)

9-4.62.10. Reduction of Amenity and Square Footage.

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Upon a showing of economic hardship by the applicant and necessity in providing the set-aside units:

(1) With City approval, the applicant may reduce the interior amenity level of the set-aside units below that of the market-rate units, provided such dwelling units conform to the requirements of applicable building and housing codes; and

(2) With City approval, the applicant may reduce the square footage of the set-aside units below that of the market-rate units, provided all dwelling units conform to the requirement of applicable building and housing codes.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)

9-4.62.11. Fees.

In the attempt to avoid any undue burden on developers who are required to provide moderate-income set-aside units under the provisions of this article, the Emeryville Redevelopment Agency may subsidize the cost of traffic impact fees, if any, building fees and other City fees applicable to the set-aside units of a proposed housing development.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)

9-4.62.12. Technical Assistance.

In order to emphasize the importance of securing low and very low income housing as a part of this program, the City and/or designated consultants shall provide assistance on financial subsidy programs to applicants. The City may recommend that this be part of the environmental review process. During individual project review, consideration shall be given to an economic analysis which will indicate the most suitable methods for the terms of this article to be implemented. This is to be done for the purpose of increasing the feasibility and lowering the cost of dwelling units affordable to moderate, low and very low income households.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)

9-4.62.13. Enforcement.

(a) The provisions of this chapter shall apply to all agents, successors, and assignees of an applicant for development of the site. No building permit or occupancy permit shall be issued, nor any development approval granted, which does not meet the requirements of this article.

(b) In addition to, or in lieu of, the provisions of subsection (a) of this section, the City shall institute injunction, mandamus, or any other appropriate legal actions or proceedings for the enforcement of this article.

(c) Any person, firm, or corporation, whether as principal, agent, employee or otherwise, violating or causing the violation of any of the provisions of this article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable for each offense by a fine of not more than five hundred dollars (\$500.00), or by imprisonment in the County Jail for a term not exceeding six (6) months, or by both fine and imprisonment. Such person, firm, or corporation shall be deemed to be guilty of a separate offense for each and every day during any portion of which any violation of this chapter is commenced, continued, or permitted by such person, firm, or corporation, and shall be punishable as provided herein.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)

9-4.62.14. Appeals.

(a) Any person aggrieved by any action involving denial, suspension or revocation of a building or occupancy permit, or denial, suspension or revocation of any development approval may appeal such action or determination to the Planning Commission, with further appeal possible to the City Council.

(b) Any applicant or other person who contends that his (her) interests are adversely affected by a determination or requirement of the City or its operating agent in regard to this article may appeal to the City Council. The appeal shall set forth specifically wherein the action of the City or its operating agent fails to conform to the provisions of this article, thereby adversely affecting the applicant's interests. The City Council may reverse or modify any determination or requirement of the operating agent of the City if it finds that the action under appeal does not conform with the provisions of this article or to the contract between the operating agent and the City.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)

9-4.62.15. Annual Report.

The City shall prepare, or cause to be prepared, an annual report to the City Council on the status of the set-aside units constructed under the provisions of this article. The report shall include the number, size, type, tenure, and general location of the set-aside units as well as the number of resales and rental vacancy rate. This report shall provide a basis for an evaluation of the overall effectiveness of this article.

(Added by Sec. 2 (part), Ord. 90-11, eff. Oct. 4, 1990)