

DRAFT

BELOW MARKET RATE ORDINANCE

ORDINANCE NO. _____ NEW SERIES

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MORGAN HILL ADDING A NEW CHAPTER 15.23 (BELOW MARKET RATE (BMR) PROGRAM ADMINISTRATION) TO TITLE 15 (HOUSING CODE) OF THE MORGAN HILL MUNICIPAL CODE, ADDING 15.23.10 PURPOSE, 15.23.20 DEFINITIONS, 15.23.30 APPLICABILITY, 15.23.40 DUTIES OF PROGRAM ADMINISTRATOR, 15.23.50 OCCUPANCY AND SALE RESTRICTIONS, 15.23.60 AFFORDABLE HOUSING AGREEMENT, 15.23.70 APPROVED PROGRAM PARTICIPANTS AND VENDORS, 15.23.80 DEFAULT, FORCLOSURE, LOSS OF UNIT, 15.23.90 ANNUAL REPORT, AND 15.23.95 ENFORCEMENT.

WHEREAS, this proposed Ordinance (ZA-16-05) was considered by the City Council of the City of Morgan Hill at its regular meeting of June 1, 2016; and

WHEREAS, testimony received at duly-noticed public hearings on the proposed Ordinance (ZA-16-05), along with exhibits and other materials submitted as a part of public hearing, have been considered in the review process; and

WHEREAS, The City of Morgan Hill Residential Development Control System (“RDCS”), awards competing developments points for provision of low-income and moderate-income housing and housing for the elderly; and

WHEREAS, Since 1977, the City has amassed one of the largest below market rate (“BMR”) property portfolios in the State and established a BMR Program that provides Ownership opportunities and affordability to low-income and moderate-income households.

WHEREAS, adoption of this proposed Ordinance (ZA-16-05) does not constitute a project under the provisions of the California Environmental Quality Act of 1970 and is exempt from environmental review under Section 15061(b)(3) of the State CEQA Guidelines, and the requirements for Below Market Rate units, as a result of the City's Below Market Rate Program, will undergo an independent analysis pursuant to the requirements of CEQA.

THE CITY COUNCIL OF THE CITY OF MORGAN HILL DOES HEREBY ORDAIN AS FOLLOWS:

BELOW MARKET RATE PROGRAM

- 15.23.10 Purpose.**
- 15.23.20 Definitions.**
- 15.23.30 Applicability.**
- 15.23.40 Duties of Program Administrator.**
- 15.23.50 Occupancy and Sale Restrictions.**

15.23.60	Affordable Housing Agreement
15.23.70	Approved Program Participants and Vendors
15.23.80	Default, Foreclosure, and Loss of Unit.
15.23.90	Annual Report.
15.23.95	Enforcement.

SECTION 1: 15.23.10, Purpose

Findings. The city council finds that:

1. The City of Morgan Hill Residential Development Control System (“RDCS”), awards competing developments points for provision of low-income and moderate-income housing and housing for the elderly.
2. Since 1977, the City has amassed one of the largest below market rate (“BMR”) property portfolios in the State and established a BMR Program that provides Ownership opportunities and affordability to low-income and moderate-income households.
3. The Excess Sales Proceeds value in each below market rate property represents a bona fide City asset that subsidizes the affordability for each BMR Property Owner (“Owner”) and is a vehicle that can be used to renovate older units, build new units and help pay for program administration.
4. The City recognizes that the declaration of restrictions, which secures the Excess Sale Proceeds, is a covenant that runs with the land by and between the BMR Property Owner and the City of Morgan Hill that restricts the right of use or enjoyment and should be enforced judicially.
5. A Program and Program Guidelines are essential to maintain integrity of the BMR program and compliance therewith and these guidelines and policies will be updated from time to time to address challenges and changes in the market and economic environment.
6. In order to respond to Program needs, the City Manager or his or her designee should be empowered to approve BMR Program Guidelines and BMR agreements.
7. In order to ensure compliance with the City’s program the program must be actively administrated. The administration of the program can be achieved by City staff and/or an outside administrator. The City is empowered to delegate the day-to-day management of the Program to a third-party administrator.
8. Either in-house or third party administration is vital to ensure program integrity and continued affordability of Below Market Rate properties.
9. In response to the dissolution of the City’s Redevelopment Agency, schedules have been put in place to pay for the costs of services funded by former Redevelopment Agency funds.

SECTION 2: 15.23.20, Definitions

When used in this chapter, these terms mean the following:

1. “Adjacent lots” means parcels with boundary lines that touch at any point. “Adjacent lots” includes parcels that are separated only by a private or public street, other than

highways and expressways, or that are separated only by other parcels owned or controlled by the same owner or applicant.

2. “Administrator” means Below Market Rate Program Administrator which may either be the City itself or a third party administrator acting as an agent for the City in connection with all aspects of the operation of the City’s Below Market Rate program pursuant to an Agreement entered into between the City and the Administrator, as such agreement may be amended or replaced from time to time.
3. Area median income (AMI)” means the median household income of households in Santa Clara County, adjusted for household size, as determined and published by the California Housing and Community Development Department (HCD).
4. “BMR Assisted housing” means any project that receives development funding from any local, state, or federal governmental or non-profit source, which meets the criteria for below market rate housing.
5. “Assumed household size” means, for the purpose of establishing affordable sales prices, a household with a total number of members equal to the number of bedrooms in the below market rate home, plus one, consistent with Section 50052.5(h) of the California Health and Safety Code and applicable federal rules (if any). For example, the assumed household size for a 3-bedroom home is a 4-person household.
6. “Below market rate (BMR) ownership housing” means dwelling units developed to be sold and affordable to lower to moderate income households and regulated by this chapter. “BMR unit” means one BMR ownership housing dwelling unit.
7. “CC&Rs” means, covenants, conditions and restrictions containing a covenant that runs with the land existing in favor of the City where a development project contains at least one BMR unit.
8. “Covenant that runs with the land” means the BMR property interest held by the City of Morgan Hill as a result of the recorded declaration of restrictions that restrict the right of use of enjoyment by the BMR Owner-Occupant.
9. “Decision-making body” means the Planning Commission or City Council, whichever is authorized to make a final decision on the project application for land use approvals.
10. “Excess Sale Proceeds” means the difference between the fair market value of a BMR Property and the maximum restricted resale price.
11. “Eligible buyer” means a household which meets the requirements of this chapter to buy, or in the case of acquisition of a BMR unit through devise or inheritance, to occupy, a BMR unit; or a public or non-profit housing agency able to acquire and manage dwelling units for rental to eligible persons.
12. “Fee Schedule” means the schedule of fees, adopted by City Council Resolution and published annually, that outlines charges to program participants, including, but not limited to applicants, owner-occupants, housing professionals and developers.
13. “Gross annual household income” means the gross, pre-tax income of all adult occupants of the applicant household, and as may be further defined in the BMR Ownership Housing Guidelines.
14. “Housing cost” means the monthly mortgage payment (principal and interest), property taxes, Owners’ association dues, and Owner’s insurance.

15. “Low income household” means a household with a gross annual household income between 51%-80% of AMI for Santa Clara County. This definition corresponds to the definition of lower income household used for state- and federally-assisted housing programs.
16. “Market rate unit” means a dwelling unit that is not subject to the occupancy or sale regulations in this chapter or any other affordability restrictions or covenants.
17. “Moderate income household” means a household with a gross annual household income between 80 to 120% of AMI for Santa Clara County. This definition corresponds to the definition of moderate income household for state-assisted housing programs.
18. “Project” means one or more applications filed for City approval of a residential development. “Project” includes a development across adjacent lots or a multi-phased development, on the same or adjacent lots. “Project” also includes developments on adjacent lots for which applications are filed by the same owner or applicant within a period of 10 years.
19. “Property” means properties contained with the Below Market Rate Program portfolio subject to occupancy and sale restrictions.
20. “Very low income household” means a household with a gross annual household income that does not exceed 50% of AMI for Santa Clara County. This definition corresponds to the definition of very low income household used for state- and federally-assisted housing programs. Very low income households are a subset of lower income households.

SECTION 3: 15.23.30, Applicability

1. **Residential Development Control System (“RDCS”).** All projects subject to RDCS that provide units to meet the city’s need for low and moderate income and elderly housing and the extent to which such units meet the goals of the housing element of the general plan, including the distribution of housing types to provide neighborhoods of ethnic and economic diversity.
2. **BMR Ownership Housing Guidelines.** The Administrator develops detailed procedures and guidelines to ensure the orderly and efficient administration of the requirements of this chapter. The BMR Ownership Housing Guidelines shall be approved by the City Manager or the City Manager’s designee, and approved by the City Council from time to time.
3. **BMR Program Letters.** BMR Program Letters may be issued by the Administrator to update procedures and guidelines not yet incorporated into the BMR Ownership Housing Guidelines. These Letters shall be approved by the City Manager or designee and serve as amendments to the Guidelines that will be published online and made available to the public including guidelines for refinances, purpose and hardship review.
4. **BMR Agreements.** Declaration of Restrictions and Affordable Housing Agreements may be amended from time to time subject to the approval by the City Manager or the City Manager’s designee.

SECTION 4: 15.23.40, Duties of Program Administrator

The City may either handle in-house or contract responsibility for administration of the BMR Ownership Housing Program and monitoring compliance with the requirements to a Program Administrator pursuant to an Agreement executed between the City and the Administrator.

The Administrator shall perform the following services, among others:

1. Maintain and update the BMR Ownership Housing Guidelines and BMR Program Letters;
2. Conduct ongoing homebuyer education training programs, including preparation of program materials;
3. Screen and select qualified buyers according to BMR Ownership Housing Guidelines and maintain qualified owner eligibility list;
4. Assist in seeking and arranging mortgage financing for purchase of the Below Market units;
5. Administer programs for monitoring compliance with terms and conditions of the occupancy and sale restrictions;
6. Administer BMR Ownership Housing Guidelines concerning sale and resale of the Below Market units at a restricted price, including exercise of the City's option to buy the Below Market units upon assignment of such option, and assist in resale of the unit to Eligible Purchasers or families; and
7. In cases of default, administer the process of taking possession of the BMR Property as appropriate, and completing the acquisition, rehabilitation and resale to an Eligible Buyer.

SECTION 5: 15.23.50, Occupancy and Sale Restriction

Recordation of Declaration of Restrictions. Before issuance of any building permit for a BMR unit, the property owner, Administrator, and the City shall execute and record a declaration containing the occupancy and sale restrictions in this chapter. The declaration establishes a valid and enforceable covenant that runs with the land in favor of the City and is binding to the heirs, assigns and successors in interest of the property owner.

1. **Timing of Sale.** At completion of each BMR unit, the Administrator will be contacted to coordinate the sale of the property to an Eligible Buyer. The seller shall accept the first valid offer from a buyer deemed eligible by the Administrator, and shall cooperate to close escrow within the timeframe outlined in the Affordable Housing Agreement.
2. **Term of Restrictions.** BMR units shall be reserved for lower and moderate income households subject to guidelines of the RDCS and shall be subject to the occupancy and sale restrictions for a specified period of time. This term begins upon sale to an eligible buyer. If the BMR unit is sold to another eligible buyer during the term, a new term shall begin upon resale and shall be secured by a new declaration of restrictions.

3. **Maximum Sales Price.** The Administrator shall establish and publish annually the maximum sale prices for each BMR unit size in the BMR Ownership Housing Guidelines as approved by the City Manager. The maximum BMR unit sale prices shall not exceed a price affordable to households at the applicable income level, based on a predetermined housing cost, specified with a maximum percentage of monthly gross household income for the unit's assumed household size. The percentage of AMI used shall be published annually by the Administrator.
4. **Sale Requirements.** The following requirements shall be met in any sale and resale of a BMR unit after the issuance of a building permit and during the term of restrictions:
 - a. The seller shall notify the Administrator of the intent to sell before offering the unit for sale, contacting a real estate agent or listing the property on any listing service
 - b. The Administrator shall respond to the seller with the sales procedure and maximum sale price
 - c. The Administrator shall follow the process outlined in the BMR Ownership Housing Guidelines to locate and deliver an eligible buyer to complete the home purchase
 - d. The eligible buyer shall execute and record a new declaration of restrictions which incorporates all current occupancy and sale restrictions in this chapter and in the BMR Ownership Housing Guidelines; and
 - e. Closing costs and title insurance fees shall be paid or according to the BMR Ownership Housing Guidelines.
5. **Eligible Buyers.** The Administrator shall determine the eligibility of prospective buyers of BMR units. It is prohibited for any person to willfully make a false or misleading representation or fail to disclose information for the purpose of qualifying as eligible to purchase a BMR unit. Prospective buyers must meet the following requirements:
6. **Income Limits.** The prospective buyer's combined household income and assets shall not exceed specific household income limits, as further defined in the BMR Ownership Housing Guidelines;
7. **Conflict of interest.** The following individuals, by virtue of their position or relationship, are ineligible to purchase a BMR unit:
 - a. Any Administrator, City official or employee who administers or has policy-making authority over City housing programs;
 - b. The developer of the unit; or
 - c. The immediate relative or employee of, and anyone gaining significant economic benefit from a direct business association with, Administrator employees, City employees, officials, developers, or owners who are not eligible to purchase a BMR unit; and
8. **Additional Criteria.** The Administrator may establish other reasonable eligibility criteria, ownership and occupancy requirements in the BMR Ownership Housing Guidelines to ensure the buyer's ability to close escrow, maintain ownership of the unit, and to ensure effective operation of the program and equitable access to the units among eligible buyers.

9. **Occupancy and Rental Restrictions.** BMR units shall be occupied as the primary residence of the eligible buyer for the duration of their ownership of the unit and shall not be rented to other occupants at any time, except that:
 - A. BMR units that are owned by a public or nonprofit housing agency may be rented to eligible households with prior written approval of the Administrator; and
 - B. The Administrator may allow the temporary rental of a BMR unit upon a finding of hardship beyond the control of the owner and after a full review of the hardship documentation.
10. **Refinancing.** BMR home owners shall not refinance a BMR unit without prior written approval of the Administrator. BMR units shall not be used as collateral to secure liens or debts with a combined loan to value ratio in excess of the BMR Ownership Housing Guidelines of the maximum BMR resale price applicable to the unit at the time of the proposed refinancing.
11. **Additional Refinancing Criteria.** The Administrator may establish other refinancing criteria in the course of seeking financing to change the rate and/or term of a mortgage, consolidate Purchase Money lines or cash out a portion of the Excess Sale Proceeds that would be due to the owner upon sale.

SECTION 6: 15.23.60, Affordable Housing Agreement

Required Before Final Map or Building Permit. Before final recordation of a subdivision map or issuance of any building permits for the project, whichever occurs first, the property owner shall execute and record an Affordable Housing Agreement (Agreement) with the Administrator and City outlining the details of the Below Market Rate unit commitment as outlined in the “SPECIFIC RESTRICTIONS AND REQUIREMENTS (INCLUDING RDCS REQUIREMENTS)” of the Development Agreement.

Agreement Provisions. The Agreement shall include, at a minimum, the following provisions:

1. **Binding of Persons.** A provision that binds the heirs, assigns, and successors in interest of the property owner to the Agreement;
2. **Binding of Project Site.** The obligation for the entire project site to fulfill the for the project under this chapter;
3. **Liens.** A lien on each unit identified to meet the BMR ownership housing requirement, or if the alternative to pay an in-lieu fee is approved, a lien on every unit;
4. **Transaction Processing Fee.** For each BMR unit, the Developer shall pay a BMR Transaction Processing Fee to the City according to the most current fee schedule approved by the City. The City may provide this fee to the Administrator as an offset to charges incurred. This fee is not a Real Estate Commission or Real Estate Broker Commission. This fee shall be listed as an “Additional Settlement Charge” fee paid by the Seller as reflected in section 1300 of the U.S. Department of Housing and Urban Development (HUD) Settlement Statement (HUD-1) or “Other Costs” paid by the Seller in the new Closing Disclosure as determined by the TILA-REPA Integrated Disclosure rule.

5. **Project Covenants, Conditions and Restrictions.** A provision that prohibits any amendments to the development's Covenants, Conditions and Restrictions that would increase the proportion of the Owners' association dues or assessments payable by any BMR unit. The provision must also acknowledge the covenant that runs with the land in favor of the City where the development project contains at least one BMR unit. This provision shall create a right of judicial enforcement by the City or the owner of any affected BMR unit.
6. **Enforcement.** A provision that shall require the property owner to pay the City rent for a BMR unit from the date of any unauthorized use of the unit, and for the City's recovery of reasonable attorney's fees and costs to pursue legal action in enforcing this agreement.
7. **Amendments.** Major amendments to the Agreement, including any proposal to change any approved alternatives shall be reviewed by the Decision-Making Body. Minor amendments to the Agreement may be reviewed by the Administrator. Upon approval, a new Agreement containing the amendments shall be executed and recorded.

SECTION 7: 15.23.70, Approved Program Participants and Vendors

The City and Administrator shall maintain a list of approved Program Participants and Vendors to protect the integrity of the BMR Program, BMR Properties contained within the portfolio, and Excess Sale Proceeds. The approval requirements and process will be included in the BMR Ownership Housing Guidelines. The program participant list will include, but will not be limited to:

1. **Mortgage Lenders.** Due to the integral role that mortgage loan officers and lenders play in purchase and refinance transactions, first mortgage and subordinate loan officers and lenders must be approved by the Administrator and a lender agreement will be put in place concerning BMR Program Compliance during loan origination, underwriting and servicing. In no event shall a deed of trust securing any loan to a BMR Owner be valid or enforceable as to any recorded interest, resale agreement or option of the City of Morgan Hill unless the following conditions are satisfied:
 - a. The City of Morgan Hill or its Administrator has first approved the loan;
 - b. The loan is in accordance with the BMR Ownership Housing Guidelines and any and all recorded deed restrictions;
 - c. The City of Morgan Hill or its Administrator has expressly subordinated its recorded restrictions to the specific deed of trust; and
 - d. Prior to making any loan to a BMR property owner for the purchase of a BMR unit intended to be secured by a deed of trust against the BMR unit, a lender shall disclose to the City of Morgan Hill or its Administrator the following information:
 - i. The borrower's loan application describing the loan terms; and
 - ii. Provide an acknowledgement in writing that that the total encumbrance does not exceed the maximum restricted resale value for the BMR unit as determined by the City of Morgan Hill or its Administrator according to the BMR Ownership Housing Guidelines.

2. **Real Estate Agents.** Real Estate Agents and Brokerages involved in the purchase or sale of BMR Properties must be approved by the Administrator and a vendor agreement will be put in place concerning BMR Program Compliance during the listing, purchase and escrow process.
3. **Escrow Companies.** An approved list of Escrow Officers and Escrow Companies will be maintained by the Administrator.
4. **Contractors.** For work on BMR Properties that exceed certain dollar amounts, as outlined in the BMR Ownership Housing Guidelines, an approved list of contractors will be maintained by the Administrator.

SECTION 8: 15.23.80, Default, Foreclosure, and a Loss of Unit

1. **Default.** Upon declaration of a default by the City of any agreement between the City and the Owner or if the Owner or Owner's proposed purchaser makes any misrepresentation in connection with receiving any benefits under the declaration of restrictions, the City or Administrator may apply to a court of competent jurisdiction for specific performance of this chapter, for an injunction prohibiting a proposed sale or transfer in violation of this chapter, for a declaration that a transfer in violation of this chapter is void or any such other relief at law or in equity as may be appropriate.
2. **Option to Purchase.** If a notice of default is recorded on a BMR unit by a third party secured creditor or a lien is filed against the BMR unit, or any breach of any provision of any agreement between the City and the Owner, and the Owner fails to correct it, an eligible buyer, or the Administrator on behalf of the City or the City itself, may purchase the unit. The unit shall be purchased at a sale price equal to the amount the owner would have received on the date of the foreclosure sale under the BMR Ownership Housing Guidelines. The eligible buyer may purchase the unit by paying any amounts due to lien holders and paying to the owner any balance of funds remaining after payment of the costs of sale and any repairs chargeable to the Owner. All other resale provisions of the Guidelines apply.
3. **Loss of Unit.** BMR units which have not been completed or sold to initial eligible buyers shall not be released from the restrictions of this chapter through a trustee's sale or judicial foreclosure.
4. **Distribution of Proceeds.** This subsection applies to any BMR unit lost by sale at a trustee's sale or foreclosure, destruction, condemnation, or by liquidation of the Owners' association. If a BMR unit is restored, the remaining term of occupancy and sale restrictions shall continue upon completion. Any proceeds remaining after payment of encumbrances on the unit shall be distributed as follows.
 - a. **Owner.** To the Owner, up to the net amount the Owner would have received under the sale price in the BMR Ownership Housing Guidelines if the City had purchased the unit on the date of the loss; and
 - b. **City.** To the City, any surplus remaining after payment to the Owner.

SECTION 9: 15.23.90, Annual Report

The Administrator shall provide an annual informational report to the city council on the status of BMR units developed under this chapter. The report shall include the number, size, type, tenure, and general location of each BMR unit completed during the year, as well as the number of BMR resales and BMR defaults and losses, if applicable.

SECTION 10: 8.79.95, Enforcement

The City, or Administrator if authorized, may institute injunction, mandamus, or any appropriate legal actions or proceedings necessary for the enforcement of this chapter, including actions to suspend or revoke any permit, including a development approval, building permit or certificate of occupancy; and for injunctive relief or damages.

Attachments:

With City Council Approval of the Proposed BMR Ordinance, Authority is hereby granted for the City Manager to be empowered to review and issue approval]

1. BMR Ownership Housing Guidelines
2. Updated Resale Restriction Agreement
3. Updated Affordable Housing Agreement
4. Updated RDCS Page for New Developers with a Development Flowchart

SECTION 11: The City Council hereby finds that the proposed Ordinance is exempt from the California Environmental Quality Act (CEQA) under Section 15061(b)(3) of Guidelines for CEQA. The proposed Below Market Rate Program Ordinance to the Morgan Hill Municipal Code are covered by the general rule that CEQA applies to projects that have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. Adoption of this ordinance does not create changes in the physical environment and are therefore exempt pursuant to the exemption described above.

SECTION 12. The City Council hereby adds Chapter 15.23 (Below Market Rate (BMR) Program Administration) to Title 15 (Housing Code) of the Morgan Hill Municipal Code, adding the following sections.

- 15.23.10 Purpose.
- 15.23.20 Definitions.
- 15.23.30 Applicability.
- 15.23.40 Duties of Program Administrator.
- 15.23.50 Occupancy and Sale Restrictions.
- 15.23.60 Affordable Housing Agreement

- 15.23.70 Approved Program Participants and Vendors
- 15.23.80 Default, Foreclosure, and Loss of Unit.
- 15.23.90 Annual Report.
- 15.23.95 Enforcement.

SECTION 13. Severability. If any part of this Ordinance is held to be invalid or inapplicable to any situation by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance or the applicability of this Ordinance to other situations.

SECTION 14. Effective Date; Publication. This Ordinance shall take effect thirty (30) days after the date of its adoption. The City Clerk is hereby directed to publish this ordinance pursuant to §36933 of the Government Code.

The foregoing ordinance was introduced at a meeting of the City Council held on the 1st day of June, 2016 and was finally adopted at a meeting of the City Council held on the ___ day of ___, 2016 and said ordinance was duly passed and adopted in accordance with law by the following vote:

AYES: COUNCILMEMBERS:

NOES: COUNCILMEMBERS:

ABSTAIN: COUNCILMEMBERS:

ABSENT: COUNCILMEMBERS:

ATTEST:

APPROVED:

IRMA TORREZ, City Clerk

STEVE TATE, Mayor

CERTIFICATION

I, IRMA TORREZ, CITY CLERK OF THE CITY OF MORGAN HILL, CALIFORNIA, do hereby certify that the foregoing is a true and correct copy of Ordinance No. , New Series, adopted by the City Council of the City of Morgan Hill, California at its regular

meeting held on the day of , 2014.

WITNESS MY HAND AND THE SEAL OF THE CITY OF MORGAN HILL.

DATE:

IRMA TORREZ, City Clerk