

Chapter 19.67
BELOW MARKET RATE OWNERSHIP HOUSING

- 19.67.010 Purpose.**
- 19.67.020 Definitions.**
- 19.67.030 Applicability.**
- 19.67.040 Below Market Rate Housing (BMR) Requirement.**
- 19.67.050 Density Bonus.**
- 19.67.060 Development Standards.**
- 19.67.070 Occupancy and Sale Restrictions.**
- 19.67.080 BMR Housing Agreement.**
- 19.67.090 Alternatives to Satisfy BMR Housing Requirement.**
- 19.67.100 Default, Foreclosure, and Loss of Unit.**
- 19.67.110 BMR Housing Trust Fund.**
- 19.67.120 Annual Report.**
- 19.67.130 Enforcement.**
- 19.67.140 Appeals.**
- 19.67.150 Severability.**

19.67.010. Purpose.

(a) **Findings.** The city council finds that:

- (1) A shortage of affordable housing is detrimental to the public health, safety and welfare in the City of Sunnyvale;
- (2) Persons with lower to moderate incomes who work or live in the City are experiencing a shortage of affordable housing opportunities and those with very low incomes are increasingly excluded from living in the City;
- (3) Federal and state housing subsidy programs are not sufficient by themselves to satisfy the housing needs of lower to moderate income households;
- (4) Continued new development without housing at prices affordable to these persons will worsen the shortage of affordable housing; and
- (5) It is the City’s goal and a public policy of the State of California to ensure there is adequate supply of housing for persons of all economic segments of the community.

(b) **Purpose.** This chapter establishes requirements for below market rate housing in new ownership housing developments. These requirements assure that the City’s affordable housing stock increases in proportion to the overall increase in new housing; to achieve the housing objectives contained in state law and in the general plan; and to enhance public welfare.

19.67.020. 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) **“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).
- (3) **“Assumed household size”** means, for the purposes 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. For example, the assumed household size for a 3-bedroom home is a 4-person household.

(4) **“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) **“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.

(6) **“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.

(7) **“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.

(8) **“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.

(9) **“Housing cost”** means the monthly mortgage payment (principal and interest), property taxes, homeowners’ association dues, and homeowner’s insurance.

(10) **“Lower income household”** means a household with a gross annual household income at or below 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.

(11) **“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.

(12) **“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.

(13) **“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.

(14) **“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.

19.67.030. Applicability.

(a) **Projects with 8 or more Units.** This chapter applies to any project that would create 8 or more ownership housing units or single-family lots. Projects not deemed complete before the enactment of this chapter are subject to the regulations in this chapter.

(b) **Rental Housing Developments Exempt.** This chapter does not apply to rental housing developments.

(c) **BMR Ownership Housing Guidelines.** The director of community development (director) shall develop detailed procedures and guidelines to ensure the orderly and efficient administration of the requirements of this chapter. These procedures and guidelines are incorporated into this chapter as the BMR Ownership Housing Guidelines.

19.67.040. Below Market Rate Ownership Housing (BMR) Requirement.

At least 12.5% of the total number of ownership housing units or single-family lots in a project shall be developed as BMR ownership housing, unless the decision-making body allows the BMR ownership housing requirement to be satisfied through the alternatives under Section 19.67.090 (Alternatives to Satisfy Below Market Rate Housing Requirement). In calculating the number of BMR units required, any fraction of a whole number shall be satisfied by either developing one additional BMR unit or by paying an in-lieu fee. For example, for a 10-unit project that is required to have 1.25 BMR units, the applicant may develop one BMR unit and pay a fee for the remaining 0.25 units required, or develop a total of 2 BMR units.

19.67.050. Density Bonus.

BMR units developed to satisfy the requirements of this chapter may be counted toward the number of affordable housing units required to earn a density bonus under California Government Code Sections 65915-65918. To earn the density bonus, BMR units shall meet the applicable affordability definitions in California Health and Safety Code Sections 50052.5(b) and Section 50053(b).

19.67.060. Development Standards.

BMR units are subject to the following development standards:

(a) **Location.** BMR units shall be distributed evenly throughout the project. The decision-making body may waive the location requirement if:

- (1) Significant physical site constraints prevent even distribution; or
- (2) Granting the waiver would result in improved site or building design, or a more favorable location of the BMR units than would otherwise be provided.

(b) **Lot Size.** Lot size shall be at least the same size as the smallest lot of a market rate unit within the project;

(c) **Bedroom Count.** Average bedroom count shall be the same as the average bedroom count in the market rate units in the project;

(d) **Unit Size.** Unit size shall be at least 75% of the average size of market rate units with the same number of bedrooms in the project.

(e) **Exterior.** The exterior shall be consistent with the market rate units in the project in terms of details, materials, and visual appeal. There shall be no significant identifiable differences visible from the exterior;

(f) **Interior.** Interior finishes and amenities shall be consistent with those of the market rate units in the project.

(g) **Timing of Construction.** BMR units shall be constructed in proportion to the BMR ownership housing requirement applicable to the project. For example, for a project with a 12.5% BMR ownership housing requirement, at least one BMR unit shall be constructed before or concurrently with every 7th market rate unit constructed. The last market rate unit to be completed in the project may not receive a certificate of occupancy until the last BMR unit has received a certificate of occupancy. The director may approve a modified schedule if the timing requirement will create unreasonable delays in the issuance of certificates of occupancy for market rate units.

19.67.070. Occupancy and Sale Restrictions.

(a) **Recordation of Declaration of Restrictions.** Before issuance of any building permit for a BMR unit, the property owner and the City shall execute and record a declaration containing

the occupancy and sale restrictions in this chapter. The declaration is binding to the heirs, assigns and successors in interest of the property owner.

(b) **Timing of Sale.** At completion, BMR units shall be listed for sale and occupied before or concurrently with the market rate units in the project. The seller shall accept the first valid offer from a buyer deemed eligible by the director, and shall cooperate to close escrow within a customary time period.

(c) **Term of Restrictions.** BMR units shall be reserved for lower and moderate income households and shall be subject to the occupancy and sale restrictions in this chapter for 30 years. 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 of 30 years shall begin upon resale and shall be secured by a new declaration of restrictions.

(d) **Maximum Sales Price.** The director shall establish and publish annually the maximum sale prices for each BMR unit size in the BMR Ownership Housing Guidelines. The maximum BMR unit sale prices shall not exceed a price affordable to median income households, based on a housing cost of up to 30% of monthly gross household income for the unit's assumed household size. The percentage of AMI used to establish maximum sale prices shall be 100%, except that the director may adjust the percentage within a range of 80% to 110% of AMI to address major shifts in the housing market or other related economic conditions affecting the demand for BMR housing.

(e) **Sale Requirements.** The following requirements shall be met in any sale and resale of a BMR unit during the term of restrictions:

- (1) The seller shall notify the director of the intent to sell before offering the unit for sale;
- (2) The seller shall notify the director of the proposed sale price before the close of the sale;
- (3) 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
- (4) Closing costs and title insurance fees shall be shared equally between buyer and seller. The buyer shall not be charged fees above those imposed on buyers of a market rate unit, except for administrative fees charged by the City.
- (5) Certain transfers of title by marriage, divorce proceeding, devise or inheritance shall not be subject to these required sale procedures.

(f) **Eligible Buyers.** The director shall determine the eligibility of prospective buyers of BMR units. It is unlawful for any person to willfully make a false 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:

- (1) **Income Limits.** The prospective buyer's combined household income and assets shall not exceed the limits for a moderate income household, as further defined in the BMR Ownership Housing Guidelines;
- (2) **Priority to Purchase.** Applicants who reside or are employed in Sunnyvale at the time of application, including qualified public school employees, city employees, and childcare workers, shall have priority to purchase the BMR units;
- (3) **Conflict of interest.** The following individuals, by virtue of their position or relationship, are ineligible to purchase a BMR unit:
 - (A) Any 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, City employees, officials, developers, or owners who are not eligible to purchase a BMR unit; and

(4) **Additional Criteria.** The director 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.

(g) **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:

(1) BMR units that are owned by a public or nonprofit housing agency may be rented to eligible households with prior written approval of the director; and

(2) The director may allow the temporary rental of a BMR unit, subject to the rental and occupancy requirements in Chapter 19.69 (Existing Below Market Rate Rental Housing), upon a finding of hardship beyond the control of the owner.

(h) **Refinancing.** BMR home owners shall not refinance a BMR unit without prior written approval of the director. BMR units shall not be used as collateral to secure liens or debts with a combined loan to value ratio in excess of 95% of the maximum BMR resale price applicable to the unit at the time of the proposed refinancing.

19.67.080. Below Market Rate (BMR) Housing Agreement.

(a) **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 a BMR Housing Agreement (Agreement) with the City.

(b) **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 BMR ownership housing requirement 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) **Alternatives.** Any alternatives approved for the applicant to satisfy the BMR ownership housing requirement;

(5) **Project Covenants, Conditions and Restrictions.** Provision that prohibits any amendments to the development's Covenants, Conditions and Restrictions that would increase the proportion of the homeowners' association dues or assessments payable by any 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 fees and costs to pursue legal action in enforcing this agreement; and

(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 director. Upon approval, a new Agreement containing the amendments shall be executed and recorded.

19.67.090. Alternatives to Satisfy Below Market Rate (BMR) Housing Requirement

(a) **City Council Approval.** The applicant may satisfy the BMR ownership housing requirement of a project using one or more of the alternatives in this section, subject to approval by city council. The applicant shall identify the required BMR units in the project application materials regardless of a request to use an alternative to meet the BMR ownership housing requirement.

(b) **Payment of In-Lieu Fee.** The applicant may pay an in-lieu fee, as follows:

(1) **Amount of In-Lieu Fee.** The amount of the in-lieu fee shall be equal to 7% of the contract sales price of all units in the project. If the applicant is paying an in-lieu fee for a fractional unit only, the minimum fee rate may be adjusted proportionally.

(2) **Fee Payment.** A lien shall be placed on each ownership housing unit in order to collect payment of the in-lieu fee before close of escrow, as required in the BMR Housing Agreement. The lien shall be released by the City upon receipt of the in-lieu fee at close of escrow.

(c) **Transfer of Credits.** The applicant may provide affordable housing in another residential development in Sunnyvale, preferably in proximity to the project required to provide BMR ownership housing, as follows:

(1) **More Units or Greater Affordability.** Affordable housing provided in another development shall result in more affordable units than the required number of BMR units, or result in the same number of BMR units but at a greater level of affordability. If the other development is a rental housing development, at least 2 rental units shall be provided in lieu of each BMR unit required, unless otherwise approved by city council.

(2) **Partnership.** The applicant may satisfy the BMR ownership housing requirement through a partnership with another developer providing affordable housing units in another development, if the following requirements are met:

(A) **Proof of Partnership.** Legal agreements between the applicant and the partner show that the applicant is providing reasonable funding, land, development services, or other support to the affordable housing units.

(B) **Financial Contributions.** The applicant's financial contributions to the partnership shall be at least equal to the amount of the in-lieu fee that would otherwise be due from the project, and shall be held in trust by the City until needed by the partner to develop the affordable housing units;

(C) **Site Acquired.** The applicant or the partner has control of or the right to build on the site where the affordable housing units will be developed;

(D) **Affordable Housing Development Application.** The affordable housing development application has been approved or at least deemed complete at the time the project required to provide BMR housing is approved;

(E) **Funding Acquired.** The partner has obtained legal commitments for all necessary financing, or the City has approved the financing plan for the affordable housing development;

(F) **Construction in 2 Years.** The affordable housing units can be constructed and occupied within 2 years of completion of the applicant's project, unless the director approves an extension not to exceed an additional 2 years. If the development is not completed within this time period, the City may transfer the applicant's financial contributions to the BMR Housing Trust Fund; and

(G) **Average Number of Bedrooms per Unit.** The average number of bedrooms per unit of the affordable housing units in the other development is comparable to the

average number of bedrooms per unit in the project required to provide BMR ownership housing. This requirement may be modified if the affordable housing units in the other development are designed to serve a special needs population which would not require an equivalent number of bedrooms per unit.

(d) **Unit Conversion Program.** The applicant may convert an existing residential development into affordable housing or rehabilitate an expiring affordable housing development through the City's Unit Conversion Program, as follows:

(1) **Affordability.** Dwellings shall be made affordable to lower to moderate income households;

(2) **2 for 1 Ratio.** For every required BMR unit, at least 2 dwelling units shall be converted or rehabilitated, unless otherwise approved by the decision-making body. Approval shall be based on a finding that a ratio of less than 2 to 1 would satisfy the purpose of the BMR ownership housing requirement;

(3) **Declaration of Restrictions.** Dwellings converted into ownership housing shall be secured by recording a declaration of restrictions to bind the units to the requirements of Section 19.67.070 (Occupancy and Sale Restrictions); and

(4) **Timing of Completion.** Dwellings shall be converted or rehabilitated and available for occupancy before or at the same time the project required to provide BMR ownership housing is available for occupancy, unless a modified schedule is approved by the director.

19.67.100. Default, Foreclosure, and Loss of Unit.

(a) **Option to Purchase.** If a notice of default is recorded on a BMR unit and the homeowner fails to correct it, an eligible buyer, or the director on behalf of the City, 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 homeowner. All other resale provisions of the Guidelines apply.

(b) **Loss of Unit.** If the BMR unit is not purchased before the trustee's sale or foreclosure, the unit is free from the restrictions of this chapter and the homeowner will be deemed in compliance with this chapter, with the exception of subsection (c). BMR units which have not been completed or sold to initial eligible buyers, and any affordable rental units developed as an alternative to BMR ownership units, shall not be released from the restrictions of this chapter through a trustee's sale or judicial foreclosure.

(c) **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 homeowners 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;

(1) **Homeowner.** To the homeowner, up to the net amount the homeowner 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

(2) **BMR Housing Trust Fund.** To the City, any surplus remaining after payment to the homeowner. The proceeds shall be deposited into the BMR Housing Trust Fund.

19.67.110. Below Market Rate (BMR) Housing Trust Fund.

This section establishes the BMR Housing Trust Fund for the deposit of all monies collected under this chapter. Trust funds shall be used for developing or preserving affordable housing in the City.

19.67.120. Annual Report.

The director 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 rental vacancy rate, if applicable.

19.67.130. Enforcement.

In addition to the provisions in Chapter 19.98.140 (Violations), the following provisions also apply to the enforcement of this chapter:

(a) **Agents, Successors and Assigns.** The provisions of this chapter apply to all agents, successors and assigns of the applicant.

(b) **Penalties and Fines.** Any person, firm, or corporation, whether as principal or agent, violating or causing the violation of this chapter is guilty of a misdemeanor. Each offense shall be punishable by a fine in the amount established in the City Fee Schedule, or by imprisonment in the Santa Clara County jail for a term up to 6 months, or both. 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 may be punishable as provided in this section.

(c) **Civil Action.** Any buyer of a BMR unit for a sale price in excess of that allowed by this chapter, or any tenant who rented a BMR unit for rents in excess of those allowed by Chapter 19.69 (Existing Below Market Rate Rental Housing Requirements), and who has given written notice to the director, may file a civil action to recover the excess costs, whether rental of such BMR unit was prohibited by this chapter or expressly permitted in writing by the director as an exception or alternative to the standard BMR requirement. The buyer or tenant shall have met the income eligibility requirements of this chapter or Chapter 19.69, as applicable, during the period of time for which the individual seeks reimbursement of the excess costs.

(d) **Fines.** If it is determined that sales prices in excess of those allowed by this chapter and the BMR Ownership Housing Guidelines have been charged to a buyer of a BMR unit, or if unauthorized or excess rents have been charged to a tenant or subtenant of a BMR unit of any kind subject to the restrictions of this chapter, the property owner shall be subject to a civil penalty. The civil penalty amount shall be as set forth in Chapter 1.04 or 1.05, as amended from time to time, and any excess sales proceeds not recovered by a buyer or tenant under subsection (c). If the City does not otherwise recover its reasonable attorney fees and other legal costs from the landlord, the City shall deduct these costs from the amounts collected under this section and deposit the balance into the BMR Housing Trust Fund.

(e) **Legal Action.** The City 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.

19.67.140. Appeals.

Any person aggrieved by a decision on any permit may appeal the decision following the procedures in Chapter 19.98.070 (Appeals).

19.67.150. Severability.

If any portion of this chapter is held to be invalid, unconstitutional, or unenforceable by a court of competent jurisdiction, that decision shall not affect the validity of the remaining portions of this Zoning Code. The city council declares that this chapter and each portion would have been adopted without regard to whether any portion of this chapter would be later declared invalid, unconstitutional, or unenforceable.