



City of Del Mar Staff Report

TO: Honorable Mayor and City Council Members

FROM: Joseph D. Smith, AICP, Planning and Community Development Director
Amanda Lee, Principal Planner
Via CJ Johnson, City Manager

DATE: May 18, 2020

SUBJECT: Introduction of an Ordinance to Extend the Accessory Dwelling Unit (ADU) Pilot Program to Encourage ADUs that are Deed Restricted Affordable Units

REQUESTED ACTION/RECOMMENDATION:

Staff recommends that the City Council introduce an Ordinance (Attachment A) to approve an extension of the City's ADU Pilot Program for two years to continue to encourage production of ADUs and Junior Accessory Dwelling Units (JrADUs) that property owners agree to deed restrict for 30 years as affordable units in exchange for a floor area bonus of 500 square feet.

DISCUSSION/ANALYSIS:

ADUs and JrADUs are small dwelling units that provide for independent living on the same site as a larger primary dwelling unit. ADUs are often referred to as second units, companion units, or granny flats. As part of Del Mar's strategy to meet the City's housing obligations per State housing law, ADUs were identified as an opportunity to provide affordable housing units in Del Mar. On May 21, 2018, the Del Mar City Council adopted the ADU Pilot Program as a way to incentivize the production of ADUs and JrADUs that are deed restricted affordable. To date, the Pilot Program has resulted in the approval of one deed restricted affordable ADU that was counted towards the City's 5th Cycle Housing Element (ADU19-004 on Luzon Avenue).

The Pilot Program will expire on May 21, 2020, unless it is extended by action of the City Council. Staff recommends that the City Council introduce the Ordinance to extend the program for two years. Extension of the Pilot Program to 2022 will allow the City to continue to test the effectiveness and explore additional incentives to revise and expand the program consistent with the City's 6th Cycle Housing Element (currently in process through April 2021). The Pilot Program does not amend the City's certified Local Coastal Program; therefore, the proposed action is not subject to Coastal Commission approval.

City Council Action:

How the ADU Pilot Program Works

Under the Pilot Program, in exchange for the property owner's commitment to provide an affordable ADU or JrADU rental for 30 years (memorialized via a recorded deed restriction), the property owner is granted a 500 square foot floor area bonus as further described below:

1. Owner Must Demonstrate that the Subject Property has (or will have) ADU or JrADU:

Under the Pilot Program, the application review and approval process is a ministerial process (staff level approval). This means that any ADU or JrADU (existing or proposed) that meets the specified criteria is eligible for the Pilot Program. Currently, ADUs and JrADUs in the City of Del Mar are subject to compliance with State law (Government Code Section 65852.2 for ADUs and Government Code Section 65852.22 for JrADUs). However, once the City has an adopted ADU Ordinance that complies with State law, then the locally established rules for approval of ADUs and JrADUs in Del Mar Municipal Code Chapter 30.91 will apply. (The City's ADU Ordinance is currently in process.)

2. Owner Must Commit to Rent the ADU/JrADU as Affordable Housing for 30 years

As part of the Pilot Program commitment, the owner must record a deed restriction agreeing to rent the ADU or JrADU at an affordable rate for 30 years. The owner must provide annual reporting to the City of Del Mar (i.e. time rented, rent collected, tenant income) so that staff may incorporate the information into required annual housing reports that are submitted to the State to demonstrate compliance as an affordable unit. See Attachment B for the existing Pilot Program Contract.

3. In Exchange for the Affordable Unit, a 500 square foot Floor Area Bonus is Granted

In exchange for a commitment by the property owner to record a deed restriction to rent the ADU or JrADU as an affordable housing unit for 30 years, a 500 square foot floor area bonus is granted. The 500 square foot bonus is applied to the applicable zone maximum for floor area. The rationale for this approach is that it allows the maximum possible number of lots in Del Mar to participate, including lots already developed to maximum floor area and legal non-conforming lots that exceed the zone limit.

4. Construction Using the Floor Area Bonus is Subject to Design Review

Any proposed improvements to utilize the 500 square feet shall be subject to design review and the associated permit type in accordance with Del Mar Municipal Code Chapter 23.08. Previously, the City had to carve out an exception to specify that if the floor area bonus was used to build an ADU, then it would be exempt from design review because State law precludes discretionary review of an ADU. However, as of January 1, 2020, the City is precluded from counting an ADU towards a lot's floor area ratio; and since floor area is no longer needed to build an ADU, the entire floor area bonus can be subject to the City's typical process of design review. In the future if the number of participating properties remains low, an exemption from the design review process should be considered for the 500 square foot floor area bonus as an opportunity for additional incentive.

5. Enforcement of Pilot Program Compliance

In case of a breach of contract, the City has the authority to invoke the remedies and enforcement penalties as provided for by the Del Mar Municipal Code and other provisions of the law, including State and Federal law.

The existing Pilot Program is limited to the approval of two pilot program units or two years, whichever occurs first. The intent was to test the effectiveness of this approach as a means to produce local affordable units. However, only one affordable unit has been approved through the program (ADU19-004). While there has been interest from others, the low participation is likely due to the 30-year commitment to rent the ADU as an affordable unit.

To facilitate greater participation, staff recommends that the Pilot Program be extended for two years with no limit on the number of affordable units that participate in the program. During the two-year extension period, the City will increase efforts to promote the program and continue to explore and identify additional incentives in an attempt to increase participation in the program and production of affordable units. This work plan will be included in the 6th Cycle Housing Element as an incentive program strategy to increase the number of affordable housing units available to meet the needs of lower income households.

FISCAL IMPACT:

The requested action would not result in a fiscal impact to the City.

ENVIRONMENTAL REVIEW:

As set forth in Public Resources Code Section 21080.17, adoption of an Ordinance to implement the provisions of Government Code Sections 65852.1 and 65852.2 (relating to ADUs and JrADUs) is exempt from the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines Section 15282(h); and adoption of a pilot program with a floor area incentive bonus of 500 square feet maximum is exempt pursuant to CEQA Guidelines Sections 15301(e) (Additions to Existing Structures), 15302 (Replacement and Reconstruction), and 15303 (New Construction or Conversion of Small Structures).

NEXUS TO CITY COUNCIL GOALS AND PRIORITIES:

This item relates to the City's 6th Cycle Housing Element in process, which is a City Council goal and priority.

ATTACHMENT:

- Attachment A – Ordinance
- Attachment B – Existing Pilot Program Contract

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF DEL MAR, CALIFORNIA, EXTENDING A PILOT PROGRAM FOR CREATION OF DEED RESTRICTED AFFORDABLE ACCESSORY DWELLING UNITS AND JUNIOR ACCESSORY DWELLING UNITS

WHEREAS, Accessory Dwelling Units (ADUs) and Junior Accessory Dwelling Units (JrADUs) are small dwelling units that provide for independent living on the same site as a larger primary dwelling unit; and

WHEREAS, accommodating ADU and JrADU living options on the same premises as a primary dwelling unit, in proximity to services and employers, are desirable because it can result in multiple benefits to the community as a whole; and

WHEREAS, the State of California adopted multiple new laws relating to Accessory Dwelling units (ADUs) and Junior Accessory Dwelling Units (JrADUs) that amended California Government Code section 65852.2 and 65852.22 and took effect on January 1, 2020; and

WHEREAS, State law requires that all local agencies provide a streamlined, ministerial review process for ADUs and JrADUs; and

WHEREAS, the Del Mar City Council adopted the existing Pilot Program on May 22, 2018, to encourage the creation of deed restricted affordable ADUs or JrADUs that the City can use to count towards the City's regional housing obligation.

WHEREAS, the proposed Ordinance is necessary to extend the existing Pilot Program that will expire on May 21, 2020, unless it is extended by the Del Mar City Council; and

WHEREAS, this ordinance is crafted as not to conflict with California Government Code sections 65852.2 and 65852.22.; and

WHEREAS, the Pilot Program relates to the City's 6th Cycle Housing Element Update (currently in process) because the City will be able to account for ADUs and JrADUs as a housing program strategy to satisfy a portion of the City's assigned Regional Housing Needs Assessment (RHNA) housing needs [Government Code sections 65583.1(a) and 65852.2(m)] and the City is required to provide ADU-related incentive programs in the 6th Cycle Housing Element; and

WHEREAS, any property with an ADU or JrADU (existing or proposed) would be eligible for the City's pilot program; and

WHEREAS, the exact income limits for the low income, very low income, and extremely low income units identified through the Regional Housing Needs Allocation (RHNA) process is based on a combination of federal and state law whereby the United States Department of Housing and Urban Development (HUD) annually sets median family income (MFI) numbers to reflect its Section 8 income limits and changes thereto, and

California's Department of Housing and Community Development then relies on the HUD MFI numbers to annually determine California's area median income (AMI) limits; and

WHEREAS, a lower income household is defined by State law as people or families whose gross income does not exceed 80 percent of AMI and includes low income, very low income, and extremely low income households; and

WHEREAS, an "Eligible Household" shall mean a household that has been determined to be eligible to be a tenant of the ADU as a lower income household; and

WHEREAS, "Affordable Rent" shall mean the maximum allowable rent for the Accessory Dwelling Unit, equal to one-twelfth (1/12th) of thirty percent (30%) of seventy percent (70%) of the Median Household Income, adjusted for assumed household size of two persons in a one-bedroom or three persons in a two-bedroom; and

WHEREAS, a commitment by the property owner to create a deed restricted affordable ADU or JrADU for rent for 30 years at an "affordable rent" in accordance with the pilot program would make the property eligible for a floor area bonus of 500 square feet via this Ordinance; and

WHEREAS, the Pilot Program will be effective for two years from the program effective date, without limit on the number of participating units, and may be extended by action of the City Council.

NOW THEREFORE, BE IT RESOLVED that the City Council of the City of Del Mar, California, does hereby ordain as follows:

SECTION ONE

An applicant for the Pilot Program shall submit the City's universal development application and the Accessory Dwelling Unit application forms.

SECTION TWO

The applicant shall demonstrate that the unit meets the adopted criteria applicable to a standard ADU or JrADU.

SECTION THREE

The property owner shall record a deed restriction to memorialize the owner's commitment to 1) rent the ADU or JrADU at an "affordable rent" for a minimum of 30 years to any "eligible household", and 2) to ensure the ADU or JrADU is continuously available for rental as a low income affordable unit, that the ADU or JrADU is not rented at market rate during the 30 year deed restriction, and that the ADU or JrADU shall not be used for any other purpose than rental as a low income affordable unit.

SECTION FOUR

State law requires that the City provide an annual report to California's Department of Housing and Community Development by April 1 of each year to report on the status of the City's progress in meeting its regional housing obligation and in the implementation of adopted Housing Element goals. The property owner shall agree to provide annual reports by February 1 that identify the status of the deed restricted ADU or JrADU. Annual reports from the owner shall identify the total time rented during the prior calendar year, the rent collected, and shall include a statement of qualifying tenant income to demonstrate compliance with the maximum 80% area median income requirement.

SECTION FIVE

Lots that are developed to the maximum floor area of the applicable zone or that are legal non-conforming are eligible to participate in the Pilot Program.

SECTION SIX

Property owners who meet the requirements of the Pilot Program and program commitment shall be granted a floor area bonus of 500 square feet. Any proposed improvements to utilize the 500 square feet shall be subject to design review and the associated permit type in accordance with Del Mar Municipal Code Chapter 23.08.

SECTION SEVEN

The City shall have the authority to invoke the remedies and enforcement penalties for violation of this ordinance as set forth in Chapter 1.08, or any successor section thereof, of the Del Mar Municipal Code. Breach of any agreement entered into arising from this ordinance shall be considered a violation of this ordinance. Notwithstanding the foregoing, the City shall also have the right to sue a property owner, for breaching the contract required by this ordinance, in the applicable state or federal court, not only for damages, but for specific performance of the contract. Nothing set forth in this Section shall serve to limit any other remedies available to the City at law or in equity and the City shall have the right to pursue all available remedies.

SECTION EIGHT

The City Council finds that approval of this ordinance is exempt from the preparation of an environmental document pursuant to CEQA Guidelines Article 19, Sections 15301 (Existing Facilities), 15302 (Replacement and Reconstruction), and 15303 (New Construction or Conversion of Small Structures). The City Council bases this finding upon the record prepared by the City and the City's analysis of the potential environmental effects of this ordinance.

SECTION NINE

This Ordinance was introduced by the City Council on May 18, 2020.

SECTION TEN

The City Clerk is directed to prepare and have published a summary of this Ordinance no less than five days prior to the consideration of its adoption and again within 15 days following adoption indicating votes cast.

SECTION ELEVEN

If any section, subsection, sentence, clause, phrase or portion of this Ordinance is, for any reason, held invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this Ordinance.

SECTION TWELVE

Upon adoption, the Ordinance will take effect and be in force 30 days from the date of City Council adoption.

PASSED, APPROVED AND ADOPTED at a regular meeting of the City Council held on the 1st day of June, 2020.

Ellie Haviland, Mayor
City of Del Mar

APPROVED AS TO FORM:

Leslie E. Devaney, City Attorney
City of Del Mar

ATTEST AND CERTIFICATION

STATE OF CALIFORNIA
COUNTY OF SAN DIEGO
CITY OF DEL MAR

I, ASHLEY JONES, Administrative Services Director/City Clerk of the City of Del Mar, California, DO HEREBY CERTIFY, that the foregoing is a true and correct copy of Ordinance No. _____, which has been published pursuant to law, and adopted by the City Council of the City of Del Mar, California, at a Regular Meeting held the 1st day of June, 2020, by the following vote:

AYES:
NOES:
ABSENT:
ABSTAIN:

Ashley Jones, Administrative Services
Director/City Clerk
City of Del Mar

RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:

City of Del Mar
City Clerk's Office
1050 Camino Del Mar
Del Mar, CA 92014-2698

No fee for recording pursuant to
Government Code Section 27383

**COVENANT AGREEMENT PER THE CITY OF DEL MAR PILOT PROGRAM
GOVERNING RENTAL OF THE ACCESSORY DWELLING UNIT AS AN
AFFORDABLE HOUSING UNIT BY THE PARTICIPATING OWNER**

THIS COVENANT AGREEMENT PER THE CITY OF DEL MAR PILOT PROGRAM GOVERNING RENTAL OF THE ACCESSORY DWELLING UNIT AS AN AFFORDABLE HOUSING UNIT BY THE PARTICIPATING OWNER (the "Covenant Agreement") is made and entered into as of _____, 20____ (the "Effective Date"), by and between the City of Del Mar, a municipal corporation (the "City"), and _____, or any successor in interest (collectively, the "Owner") with reference to the following:

RECITALS

A. Whereas, the Owner is the fee owner of certain real property in the City of Del Mar, California, which is more particularly described in Exhibit A (the "Property"). As of the Effective Date of the Covenant Agreement, two (2) housing units are located, or will be constructed, on the Property. One unit shall be referred to herein as the "Primary Unit" and the other unit shall be referred to herein as the "Accessory Dwelling Unit". Such units are designated on Exhibit B.

B. Whereas, the Owner voluntarily requested to participate in the City's Pilot Program in accordance with City Council Ordinance No. 2018-xx, which requires that the City and the participating Owner enter into the Covenant Agreement governing rental of the Accessory Dwelling Unit as an affordable housing unit.

C. Whereas, City Council Ordinance No. 2018-xx requires that the Covenant Agreement be recorded with the San Diego County Recorder.

D. Whereas, this Covenant Agreement shall run with the land and be binding upon the parties, their heirs, assigns, and successors in interest.

E. Whereas, in conjunction with the Covenant Agreement, and commitment by the Owner to rent the Accessory Dwelling Unit at a maximum of thirty percent (30%) of gross income for a person earning no more than eighty percent (80%) of the area median income for a

minimum of 30 years, the Owner received approval of a 500 square foot floor area bonus Incentive from the City in exchange for the Owner's commitment to participate in the Pilot Program pursuant to City Council Ordinance No. 2018-xx.

NOW THEREFORE, it is hereby agreed by and between the City and the Owner (each a "Party", and, collectively, the "Parties") as follows:

ARTICLE 1 DEFINITIONS

As used in this Covenant Agreement, the terms set forth below shall have the following meanings (other defined terms herein not referenced below shall have the meanings where first used).

1.1 "Affordable Rent" means the maximum allowable Rent for the Accessory Dwelling Unit, equal to one-twelfth (1/12th) of thirty percent (30%) of seventy percent (80%) of the Median Household Income, adjusted for assumed household size of two persons in a one-bedroom or three persons in a two-bedroom.

1.2 "Eligible Household" means a household that has been determined to be eligible to be a Tenant of the Accessory Dwelling Unit as a Low Income Household.

1.3 "HCD" means the State of California Department of Housing and Community Development, or any successor

1.4 "HUD" means the U.S. Department of Housing and Urban Development, or any successor.

1.5 "Low Income Household" means a household whose income does not exceed the low income limits applicable to San Diego County, adjusted for household size, as determined by HUD and published annually by the State of California. As of the Effective Date, such income limit is approximately equal to eighty percent (80%) of Median Household Income.

1.6 "Median Household Income" means median yearly income in San Diego County as determined by HUD and published by HCD.

1.7 "Rent" means the total monthly payment by the Tenant of the Accessory Dwelling Unit for all of the following: (1) use and occupancy of the Accessory Dwelling Unit and land and all facilities associated with the Accessory Dwelling Unit, including but not limited to parking, storage, and use of any common areas; (2) any separately charged fees or service charges assessed by the Owner to the Tenant, except security deposits; (3) an allowance for utilities paid by the Tenant as established by the San Diego County Housing Authority, including garbage collection, sewer, water, electricity, gas and other heating, cooking and refrigeration fuel, but not telephone service, Internet, or cable or subscription TV; and (4) any other interest, taxes, fees or charges for use of the Property or associated facilities that are assessed by a public or private entity other than the Owner and paid by the Tenant.

1.8 "Tenant" means an Eligible Household entitled by written or oral agreement with the Owner to have the exclusive right to occupy the Accessory Dwelling Unit as a home or residence to the exclusion of all others.

ARTICLE 2 OWNER'S OBLIGATIONS

2.1 Rental of Accessory Dwelling Unit to Eligible Households. The Owner shall ensure that the Accessory Dwelling Unit is rented to, and occupied by, an Eligible Household in accordance with this Agreement. The Owner shall not use the Accessory Dwelling Unit for any other purpose other than as set forth in this Covenant Agreement. The Accessory Dwelling Unit shall remain continuously available for rent by an Eligible Household and shall not be used for any purpose other than rental as an affordable unit to an Eligible Household.

(a) Income Certification. The Owner shall not enter into a lease or rental agreement, or receive Rent from a Tenant, for the Accessory Dwelling Unit unless the Owner has made a good faith effort to verify that the income provided by an applicant in an income certification is accurate by taking one or more of the following steps as a part of the verification process: (1) obtain a pay stub for the most recent pay period; (2) obtain an income tax return for the most recent tax year; (3) conduct a credit agency or similar search; (4) obtain an income verification form from the applicant's current employer; (5) obtain an income verification form from the Social Security Administration and/or the California Department of Social Services if the applicant receives assistance from either of such agencies; or (6) if the applicant is unemployed and has no such tax return, obtain another form of independent verification. Copies of initial tenant income certifications and documents used to verify income obtained by Owner shall be provided to the City upon execution of any lease agreement with a Tenant.

(b) Maximum Allowable Rent. The maximum Rent charged to the Tenant of the Accessory Dwelling Unit shall not exceed Affordable Rent.

(c) Increased Income of Tenants. If, upon recertification of a Tenant's income pursuant to Section 2.2, the Owner determines that the Tenant's household income has increased and exceeds the qualifying income for a Low Income Household, then such Tenant shall continue to be considered an "Eligible Household", and shall be permitted to continue to occupy the Accessory Dwelling Unit, at the rent set forth in subsection (c), above; provided, however, nothing in this Agreement shall prohibit the Owner from terminating such tenancy upon the expiration of such Tenant's lease. Following such Tenant's vacancy, the Owner shall lease the Accessory Dwelling Unit to an Eligible Household.

(d) Information. At the request of the Owner, the City shall provide the Owner with the low and very low income limits applicable to San Diego County, adjusted for household size, as published from time to time by HCD.

2.2 Annual Certification. The Owner shall certify the Tenant's household income on an annual basis using the process set forth in Section 2.1(a) above. The Owner shall

provide the City with a certification, in the form attached as Exhibit C, as well as copies of supporting documents used to verify the certification, no later than June 30th of each year of the Term setting forth the following information with respect to the Tenant occupying the Accessory Dwelling Unit: unit address, Tenant name, size of Tenant's household, unit size, and date first occupied, and a copy of the annual income certification obtained by the Owner from the Tenant. The purpose of the yearly Owner certification is to document Owner's compliance with the restrictions set forth herein.

2.3 Lease Provisions. The Owner shall use a form of Tenant lease (the "Tenant Lease") approved by the City for the Accessory Dwelling Unit. The City shall either approve or specify its basis for disapproval, if any, within thirty (30) days after the Owner submits such proposed form lease to City. The Tenant Lease shall, among other matters:

(a) Provide that the Rent may not be raised more often than once every twelve (12) months. The Owner will provide the Tenant with at least sixty (60) days written notice of any increase in Rent, and any Rent increase shall not violate the limitations imposed by this Agreement;

(b) Prohibit the Accessory Dwelling Unit (or any portion of the Accessory Dwelling Unit) from: (i) any sublease, except as permitted by Section 2.6 below; (ii) use as a "short-term vacation rental" for rent less than 30 days for tourist or transient use; and (iii) being listed on any "hosting platform" (as defined in California Business & Professions Code 22590, as may be amended from time to time), including, but not limited to any Internet-based "hosting platform", such as "airbnb.com", or any similar service;

(c) Require the Tenant to provide an annual income certification to the Owner with supporting documentation as set forth in Section 2.1(a) above;

(d) Include, at Owner's option, the obligation for Tenant to provide a security deposit not exceeding two months' rent; and

(e) Be for an initial term of one year.

2.4 Inspection. For purposes of confirming compliance with this Agreement, the Accessory Dwelling Unit shall be made available by Owner to be inspected by the City during regular business hours upon seventy-two (72) hours' written notice; provided, however, that any such inspection shall occur only once during any twelve (12) calendar month period unless: (i) the City receives a complaint that a Tenant is occupying the Accessory Dwelling Unit in violation of this Agreement (or that the Owner is otherwise violating this Agreement); or (ii) a new Tenant is occupying the Accessory Dwelling Unit, in which case City may re-inspect. The Owner hereby irrevocably grants the City (and its agents) a right of entry to enter the Property for the purposes of such inspection.

2.5 Records. The Owner shall maintain reasonably complete and accurate records pertaining to such rental of the Accessory Dwelling Unit throughout the duration of each tenancy. Owner shall permit any authorized representative of the City to inspect such records of any current Tenant upon reasonable notice, including those resident files pertaining to said

rental, for the purpose of confirming compliance with the terms, conditions and covenants of this Agreement.

2.6 Assignments and Subletting. The Owner shall at no time permit the Tenant to assign its leasehold interest in the Accessory Dwelling Unit or to sublet all or a portion of the Accessory Dwelling Unit to any person other than to another Eligible Household. Owner shall have the right to approve or disapprove any proposed assignment or sublease at Owner's sole discretion; provided that prior to approving any proposed assignment or sublease, Owner shall comply with the provisions of Section 2.1 above to confirm the eligibility of the proposed assignee or sub-lessee.

2.7 Agreement to Limitation on Rents.

(a) The Owner acknowledges that the Property, as a component of the agreement to participate in the Pilot Program, received a 500 square foot floor area bonus from the City as an Incentive, and the Incentive is a form of assistance specified in Chapter 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code. Sections 1954.52(b) and 1954.53(a)(2) of the Costa-Hawkins Act provide that, where an owner has received such assistance, certain provisions of the Costa-Hawkins Act do not apply if a property owner has so agreed by contract. The Owner hereby agrees to limit the Rents for the Accessory Dwelling Unit, as provided in this Agreement, in consideration of the Property's receipt of the Incentive and further agrees that any limitations on Rents imposed on the Accessory Dwelling Unit are in conformance with the Costa-Hawkins Act.

(b) The Owner further warrants and covenants that the terms of this Agreement are fully enforceable. The Owner agrees and acknowledges that the City would not have provided approval of the 500 square foot floor area bonus Incentive without the Owner's commitment to record this Covenant Agreement against the Property and comply with the restrictions imposed by this Agreement.

2.1 Deeds. Owner acknowledges that this Covenant Agreement shall be recorded against the Property with the San Diego County Recorder and shall be a covenant running with the land for the term set forth herein as set forth in Section 5.6 below. Any deed transferring any fee interest in the Property shall include the following language; provided, however, the failure to include the following language shall not limit, waive, or impair the obligations set forth in this Covenant Agreement:

2.2

NOTICE: THE ACCESSORY DWELLING UNIT ON THIS PROPERTY IS REQUIRED TO BE RENTED TO PERSONS MEETING CERTAIN ELIGIBILITY REQUIREMENTS AT A BELOW-MARKET RATE RENT, PURSUANT TO THE CITY OF DEL MAR PILOT PROGRAM. FOR MORE INFORMATION, SEE THE AGREEMENT RECORDED AGAINST THIS PROPERTY ENTITLED "COVENANT AGREEMENT PER THE CITY OF DEL MAR PILOT PROGRAM GOVERNING RENTAL OF THE ACCESSORY DWELLING UNIT AS AN AFFORDABLE HOUSING UNIT BY THE PARTICIPATING OWNER". THE

RESTRICTIONS SET FORTH IN THE COVENANT AGREEMENT BIND ALL HEIRS, ASSIGNS, AND SUCCESSORS IN INTEREST TO THIS DEED.

**ARTICLE 3
TERM**

3.1 Term. This Agreement shall become effective as of the Effective Date and shall remain in full force and effect for a term of thirty (30) years following the recordation of this Agreement with the San Diego County Recorder unless the City elects, in the City's sole discretion, to terminate this Covenant Agreement by written instrument recorded with the San Diego County Recorder.

**ARTICLE 4
DEFAULT**

4.1 Violations by Owner. Failure of the Owner to cure any default in the Owner's obligations under the terms of this Covenant Agreement within thirty (30) days after the delivery of a written notice of default from the City (or such longer period of time up to an additional sixty (60) days as may be necessary to remedy such default, provided that the Owner has commenced action during the thirty (30) days necessary to remedy such default, and the Owner is proceeding with reasonable diligence to remedy such default) will constitute a default under this Agreement.

4.2 Remedies. Subject to the applicable notice and cure period set forth above, the City may exercise any and all remedies available to it at law or equity with respect to the Owner's failure to satisfy the terms of this Covenant Agreement. Owner acknowledges that any breach in Owner's performance of Owner's obligations under this Covenant Agreement shall cause irreparable harm to the City, and materially impair the public policy objectives set forth by the Del Mar City Council in the Del Mar Community Plan and Housing Element. Therefore, Owner agrees that the City is entitled to equitable relief in the form of specific performance, and that an award of damages may not be adequate to compensate the City for Owner's failure to perform according to the terms of this Covenant Agreement. Notwithstanding the foregoing, the City, in its sole and absolute discretion, may elect the appropriate remedy for Owner's default under this Covenant Agreement. The rights and remedies set forth in this Agreement are not exclusive and the exercise by either party of any right or remedy does not preclude the exercise of any other rights or remedies that may now or subsequently exist in law or in equity or by statute or otherwise.

**ARTICLE 5
GENERAL PROVISIONS**

5.1 Notices. All notices required pursuant to this Covenant Agreement shall be in writing and shall be deemed to have been duly given (a) upon personal delivery, including

delivery by courier, or (b) three (3) business days after the mailing by registered or certified mail, return receipt requested, to the Party to receive such notice at the addresses set forth below:

To the City:

City of Del Mar
Planning Department
1050 Camino Del Mar
Del Mar, CA 92014-2698
Attn: Planning Director

To the Owner:

Any Party may change the address to which notices are to be sent by notifying the other Parties of the new address, in the manner set forth above.

5.2 Entire Agreement. The Recitals set forth above, and all exhibits attached hereto, are hereby incorporated into this Covenant Agreement by this reference. This Covenant Agreement contains the entire agreement between the Parties as to the subject matter hereof, and supersedes any and all prior arrangements and understandings between the Parties, and no other agreement, statement or promise made by either Party hereto which is not contained herein shall be binding or valid provided, however, that nothing in this Section limits the effect or enforceability of the City of Del Mar Municipal Code. This Covenant Agreement shall not be construed as if it had been prepared by one of the Parties, but rather as if both Parties had prepared it. The Parties have read and reviewed this Covenant Agreement and agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party (including but not limited to Civil Code Section 1654 as may be amended from time to time) shall not apply to the interpretation of this Covenant Agreement. In the event of any conflict between the terms of this Covenant Agreement, and the terms of the disclosure statement executed by the City and the Owner in conjunction with this Covenant Agreement, the terms of this Covenant Agreement shall prevail.

5.3 Amendment. This Covenant Agreement may be amended only by the written agreement of the Parties which shall be recorded with the County Recorder.

5.4 Severability. In the event any limitation, condition, restriction, covenant, or provision contained in this Agreement is held to be invalid, void or unenforceable by any court of competent jurisdiction, or if any provision of this Agreement is rendered invalid or

unenforceable pursuant to any California statute which became effective after the Effective Date, the remaining portions of this Agreement shall nevertheless remain in full force and effect.

5.5 Waiver. The waiver of or failure to enforce any provision of this Agreement shall not operate as a waiver of any future breach of any such provision or any other provisions hereof.

5.6 Covenant Running with the Land. The covenants and conditions herein contained shall apply to and bind, during their respective periods of fee ownership, Owner and its heirs, executors, administrators, successors, transferees, and assignees (each a "Transferee") having or acquiring any right, title or interest in or to any part of the Property, whether by operation of law or in any manner whatsoever, and shall run with and burden the Property for the entire Term unless or until released in accordance with Article 3. All of the provisions of this Covenant Agreement shall be enforceable as equitable servitudes and shall constitute covenants running with the land pursuant to applicable laws, including without limitation Section 1468 of the California Civil Code. Each covenant to do, or to refrain from doing, some act on the Property hereunder: (a) is for the benefit of the Property and is a burden on the Property, (b) runs with the Property, and (c) is binding upon each Party and each successive owner during its ownership of the Property or any portion thereof, and shall be a benefit to and a burden upon each Party and the Property hereunder and each other person or entity succeeding in an interest to the Property.

5.7 Assignment and Assumption; Release. Provided that a Transferee expressly assumes Owner's obligations hereunder pursuant to an assignment and assumption agreement in a form approved by the City in connection with the transfer of any part of the Property, the Owner shall be released from all obligations following the recordation of such assignment and assumption agreement in the Official Records.

5.8 Non-Discrimination. The Accessory Dwelling Unit shall be available for occupancy to members of the general public. The Owner shall not give preference to any particular class or group of persons in renting the Accessory Dwelling Unit or selling the Property, except to the extent that the Accessory Dwelling Unit is required to be rented to Eligible Households; provided, however, there shall be no discrimination against or segregation of any person or group of persons, on account of race, color, creed, religion, sex, sexual orientation, marital status, national origin, source of income (e.g., SSI), age, ancestry, disability, or any other basis prohibited by the Fair Housing Act or the Fair Employment and Housing Act in the leasing, transferring, use, occupancy, tenure, or enjoyment of the Accessory Dwelling Unit nor shall the Owner or any person claiming under or through the Owner, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy of Tenants of the Accessory Dwelling Unit. The Owner has agreed to the obligations set forth in this Section in consideration for the Incentive.

5.9 Relationship of Parties. Nothing contained in this Covenant Agreement shall be deemed or construed by the Parties or any third party to create the relationship of principal and agent or of partnership or of joint venture or of association. The relationship of the Parties is that of an owner of real property and an administrator of a City pilot program to incentivize production of Accessory Dwelling Units that are deed restricted as affordable

housing; furthermore, the Parties agree and acknowledge that this Agreement is in furtherance of the inherent power of City to regulate the use of land within City's jurisdiction. Owner further acknowledges, understands and agrees that the City does not undertake or assume any responsibility for or duty to Owner to select, review, inspect, supervise, pass judgment on, or inform Owner of the quality, adequacy or suitability of the Accessory Dwelling Unit (or any other portion of the Property). The City owes no duty of care to protect Owner against negligent, faulty, inadequate or defective building or construction or any condition of the Property and Owner agrees that neither Owner, or Owner's heirs, successors or assigns shall ever claim, have or assert any right or action against the City for any loss, damage or other matter arising out of or resulting from any condition of the Property and will hold the City harmless from any liability, loss or damage as set forth in Section 5.10. Any review by the City of any documents submitted by the Owner to the City pursuant to this Agreement, including, but not limited to any Tenant Lease, is solely to confirm compliance with the requirements of this Agreement and shall not be deemed to be a representation of any kind of the validity or legal enforceability of such document(s).

5.10 Hold Harmless; Indemnity. Owner shall indemnify, defend (with counsel reasonably selected by the City), and hold harmless the City and its officers, officials, agents, and employees against any and all liability, claims, actions, causes of action or demands whatsoever against any of them, including any injury or death of any person or damage to property or other liability of any nature, or any claims by a Tenant, a former Tenant or prospective Tenant, arising out of Owner's performance of its obligations hereunder, except where the cause of such is the gross negligence or willful misconduct of the City. The indemnification obligations set forth in this Section shall survive any termination or expiration of this Agreement.

5.11 Applicable Law and Venue. This Covenant Agreement shall be governed by California law. Jurisdiction for any dispute arising from this Covenant Agreement shall be the Superior Court of California. Venue for any dispute arising out of this Covenant Agreement shall be San Diego County, or as set forth in the California Civil Code for agreements relating to real property.

5.12 Attorneys' Fees and Costs. In the event any action or proceeding in court or other dispute resolution mechanism permitted under this Covenant Agreement is commenced by either party to interpret or enforce the terms of this Agreement, the prevailing Party therein shall be entitled to recover from the non-prevailing Party all of the prevailing Party's reasonable costs and expenses in connection therewith, including on any appeal and including expert witness fees, document copying expenses, exhibit preparation costs, carrier expenses and postage and communication expenses, and reasonable attorneys' fees and costs for the services rendered to the prevailing Party in such action or proceeding (which shall include the reasonable costs for services of the City's in-house counsel).

5.13 Time is of the Essence. In all matters under this Covenant Agreement, the Parties agree that time is of the essence. References in this Agreement to days shall be to calendar days. If the last day of any period to give or reply to a notice, meet a deadline or undertake any other action occurs on a day that is not a day of the week on which the City of Del Mar is open to the public for carrying on substantially all business functions (a "Business Day"),

then the last day for giving or replying to such notice, meeting such deadline or undertaking any such other action shall be the next succeeding Business Day. In no event shall a Saturday or Sunday be considered a Business Day.

5.14 Interpretation. The use in this Covenant Agreement of the words "including", "such as" or words of similar import when used with reference to any general term, statement or matter shall not be construed to limit such statement, term or matter to the specific statements, terms or matters, unless language of limitation, such as "and limited to" or words of similar import are used with reference thereto. The headings of this Agreement are for convenience only and do not in any way limit or amplify the terms or provisions hereof. All pronouns and variations thereof shall be deemed to refer to the masculine, feminine, or neuter, and to the singular or plural, as the identity of the party or parties may require.

5.15 Government Standards. In the event any standard established and maintained by any governmental agency which is necessary to give effect to this Covenant Agreement ceases to exist, and no comparable replacement is issued, the Parties shall create a replacement standard utilizing the formula and factors previously used to create the discontinued standard.

5.16 No Limitation on Municipal Powers. Nothing in this Covenant Agreement shall limit, waive, or otherwise impair the authority and discretion of: (a) the City's Building Department, in connection with the review and approval of any proposed construction plans for the Property (or any change to such plans), or any use, or proposed use, of the Property; or (b) any other office or department of the City acting in its capacity as a governmental regulatory authority with jurisdiction over the development, use, or operation of the Property.

5.17 Counterparts. This Covenant Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts, which shall constitute one and the same agreement.

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IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the Effective Date.

PROPERTY OWNER: [Notarization of signature shall be attached or provided below]

By: _____ Date: _____

Signature: _____

CITY OF DEL MAR: [Notarization not required]

By: _____ Date: _____

Signature: _____

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 SAN DIEGO

On _____ before me, _____

(here insert name and title of the officer), 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.

Notary Signature

EXHIBIT A
PROPERTY LEGAL DESCRIPTION

[To be Inserted]

EXHIBIT B

**DRAWING DEPICTING PRIMARY UNIT AND
ACCESSORY DWELLING UNIT ON PROPERTY**

[To be Inserted]

EXHIBIT C

FORM OF OWNER CERTIFICATION

To: City of Del Mar ("City")

From: _____ [name of owner(s)] ("Owner(s)")

Address of Property: _____ ("Property")

Date: _____

By signature below, I/we _____ [insert name or names of Owner(s)] hereby certify to the City, under penalty of perjury, that the second dwelling unit located on the Property (the "Accessory Dwelling Unit") is being utilized in accordance with the "Covenant Agreement per the City of Del Mar Pilot Program Governing Rental of the Accessory Dwelling Unit as an Affordable Housing Unit by the Participating Owner" (the "Covenant Agreement") recorded against the Property.

In accordance with Section 2.2 of the Covenant Agreement, I/we provide the following information regarding the Accessory Dwelling Unit:

1. Tenant name: _____
2. Size of Tenant's household: _____
3. Accessory Dwelling Unit size (interior floor space in square feet): _____
4. Date Accessory Dwelling Unit first occupied by Tenant: _____
5. A copy of the Tenant's annual income certification is attached.

This Owner Certification is signed on _____, 20____, under penalty of perjury.

By: _____
Owner signature

Date: _____

Due Date: June 30 of each calendar year.