November 4, 2019

San José City Council
200 E. Santa Clara St.
San José, CA 95113


Dear Mayor, Vice Mayor, and Councilmembers:

We write in support of Councilmember Maya Esparza’s memorandum to urge you to make no changes to the Ellis Act Ordinance and retain the ordinance’s re-control provisions in their current form. The changes proposed in the Housing Department’s memorandum would incentivize the demolition of rent-stabilized buildings and lead to the loss of one of the City’s largest sources of naturally-occurring affordable housing. This failure to preserve the City’s current affordable housing stock and protect low-income tenants from displacement would perpetuate residential segregation in San José and have a disparate impact on Hispanic and Latinx residents, single parent households, and non-citizens in violation of the federal Fair Housing Act (FHA) and California Fair Housing and Employment Act (FEHA).

In addition to these legal infirmities, the proposed changes are unsound as a matter of equitable policymaking. Rolling back the Ellis Act Ordinance’s re-control provisions would ignore the long history of discriminatory housing policy in San José and the vulnerability of the city’s naturally-occurring affordable housing stock. The core purpose of the Ordinance, which is barely two years old, is to preserve rent-stabilized units by making redevelopment of these buildings more costly for developers.

This protection was approved with overwhelming community support following several mass displacements of tenants from rent-stabilized buildings, including over 670 tenants from The Reserve Apartments. Despite the community’s need for strong preservation policies, the Ellis Act Ordinance was rolled back just last year to allow developers to re-control fewer of the affordable units they demolish and to seek exemption from the re-control requirement altogether under certain circumstances.

It would be reckless and pernicious to further weaken this important tool for preserving affordable housing given the history of racism in planning and housing policy in San José and existing pressures on low-income tenants. Throughout most of the twentieth century, the practice of redlining specifically targeted communities of color for disinvestment, often merely because people of color lived there.¹ This created severe poverty in these neighborhoods that has

incentivized developers to demolish and replace them with more profitable properties. As a result, every census tract within and surrounding downtown San José has seen or is currently experiencing either ongoing gentrification and displacement or advanced gentrification and displacement.²

Displacement is fundamentally about power – the power of developers to change places in ways that either create opportunity or exclude people, the power (or lack thereof) of tenants to choose where they live and work, and the power of government to craft policies that help tenants remain housed or put them at risk of losing their homes.

In passing the Ellis Act Ordinance just two years ago, the City chose to exercise its power with low-income communities of color by preserving the buildings these communities call home. Now, a continued focus on preservation is needed to keep current residents of San José housed and retain the City’s diverse cultural identity. Focusing its power instead on the production of new market-rate units will perpetuate a long history of inequity in San José and violate state and federal fair housing law.

Therefore, we urge you to adopt Councilmember Maya Esparza’s memorandum and make no changes to San José’s Ellis Act Ordinance.

1. **Weakening the re-control requirements of the Ellis Act Ordinance would violate the Fair Housing Act and California Fair Housing and Employment Act.**

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Further rolling back the re-control requirements of the Ellis Act Ordinance would have a disparate impact on Hispanic and Latinx residents, single-parent households, and non-citizens in violation of the Federal Fair Housing Act\(^3\) and California FEHA,\(^4\) as well as the City’s obligation to Affirmatively Further Fair Housing.\(^5\)

“Affirmatively furthering fair housing” means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.\(^6\)

In plain contradiction to this charge, the proposed changes to San José’s Ellis Act Ordinance would exacerbate current disparities in fair housing choice, perpetuate existing patterns of residential segregation, and intensify the housing needs of some individuals while addressing those of others based on race, familial status, and national origin.

\[a. \text{ Limiting the Ellis Act Ordinance’s re-control requirements will cause the loss of deeply affordable rent-stabilized units, which Hispanic and Latinx residents, single parents, and non-citizens disproportionately rely on for housing.}\]

Rent-stabilized apartment units remain an important and significant source of naturally-occurring affordable housing in San José. They represent about 30% of the City’s total rental housing stock, numbering over 39,300 apartments.\(^7\) They are also deeply affordable, with average rates for one- and two-bedroom units comparable to rents in deed-restricted units affordable to renters earning 60% of the area median income.\(^8\) Unfortunately, because these units are limited to older buildings under state law, they are at risk of loss through redevelopment pursuant to Ellis Act removals.

The loss of rent-stabilized units and resulting displacement will have a disparate impact on Hispanic and Latinx residents, single parent households, and non-citizens, who are all disproportionately represented in rent-stabilized units. Hispanic and Latinx renters live in nearly

\(^4\) See Yazdian v. Las Virgenes Vill. Cmty. Ass’n, 2012 U.S. Dist. LEXIS 191221, *14 (C.D. Cal. 2012) (“Plaintiffs must demonstrate that the objected-to action results in, or can be predicted to result in, a disparate impact upon a protected class compared to a relevant population as a whole.” (citing Charleston Hous. Auth. v. USDA, 419 F.3d 729, 740-741 (8th Cir. 2005))).
\(^5\) See Cal. Gov’t Code § 8899.50.
\(^6\) Id. at § 8899.50(a)(1).
\(^7\) ECONOMIC ROUNDTABLE, CITY OF SAN JOSÉ ARO RESEARCH UPDATE 2 (Nov. 2019).
\(^8\) Memorandum from San José Housing Department to City Council RE: Item 4.5 – Ellis Act Ordinance Re-control Provisions, at 6 (Oct. 24, 2019).
half of all rent-stabilized apartments but comprise only 28% of San José’s general population.\(^9\) Single-parent households also disproportionately rely on rent-stabilized units for housing, occupying 29% of rent-stabilized units but only 20% of the City’s general population. Additionally, female heads of households are among the most highly-rent-burdened and frequently-evicted for not being able to afford rent or for no cause in Santa Clara County.\(^{10}\) Finally, non-citizens, who are protected from discrimination under fair housing laws based on their national origin, live in around 30% of rent-stabilized units but only represent 14% of those San José residents who do not live in rent-stabilized apartments.\(^{11}\)

Each of these groups of individuals are protected under state and federal fair housing laws. Hispanic and Latinx households are protected on account of their race and national origin; single parent households are protected on account of their familial status and sex if that parent is a single mother; and non-citizens are protected on account of their national origin.\(^{12}\)

One reason rent-stabilized units are lost through an Ellis Act conversion is that many of the demolished rent-stabilized units never return to the rental market. Frequently, the building is replaced with a commercial use or for-sale housing instead of rental housing.\(^{13}\) Rent-stabilized units are also frequently lost when developers do not return the building to the rental market within five years as required under the Ellis Act’s re-control provisions.\(^{14}\) Thus, even in jurisdictions that require 100% of new rental units to be re-controlled, the demolition of buildings with rent-stabilized units under the Ellis Act drives a steady loss of affordable units. San Francisco, for example, requires 100% re-control, but still lost 1,257 affordable units due to Ellis Act conversions alone between 2008 and 2018.\(^{15}\)

San José will suffer even greater losses to its affordable housing stock if it incentivizes Ellis Act conversions by allowing developers to re-control fewer units or more easily seek exemption from the re-control requirement. Given that under the state Ellis Act the City cannot stem the loss of affordable units where these units are taken off the market completely as explained above, it must retain the strongest possible protection against redevelopment through Ellis Act conversion where the rental units are returning to the rental market to ensure it is not needlessly losing naturally-occurring affordable units as it incentivizes market-rate development.

Another reason that a strong re-control requirement that disincentivizes the demolition of rent-stabilized buildings is needed is that most of the tenants displaced during construction will never be able to remain or return to San José, even if provided relocation assistance and a right to

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9 Memorandum from San José Housing Department to Housing and Community Development Commission RE: Demographic Study of Renters Living in Apartments Covered by the Apartment Rent Ordinance, at 3 (Oct. 22, 2019).
11 Economic Roundtable, City of San José ARO Research Update 42 (Nov. 2019).
12 See 42 U.S.C § 3604; Cal. Gov’t Code § 12955.
13 See Memorandum from San José Housing Department to City Council RE: Item 4.2 – Ellis Act Ordinance Re-control Provisions, at 5 (Apr. 9, 2019).
14 Id.
return. In the three buildings that have been withdrawn from the rental market under the Ellis Act Ordinance since its passage, only 28% of tenants were able to remain in San José.\textsuperscript{16} And, in interviewing tenants in buildings currently in the process of withdrawal from the rental market under the Ellis Act, the Housing Department found that these tenants “would be displaced by the redevelopment regardless of the option chosen by the developer because of the timing of when the units would be made available.”\textsuperscript{17} Indeed, displaced tenants typically cannot access affordable units constructed following an Ellis Act conversion because tenants in rent-stabilized apartments are displaced prior to their building’s demolition, but fees for affordable housing development are not collected until the certificate of occupancy is issued.

Therefore, incentivizing the demolition and redevelopment of rent-stabilized buildings by limiting the Ellis Act Ordinance’s re-control requirements will cause the loss of these naturally-occurring affordable units and this loss will disproportionately make housing unavailable for Hispanic and Latinx residents, single parent households, and non-citizens.

\textit{b. The proposed changes would perpetuate residential segregation.}

Residential segregation in San José has persisted throughout most of the last century, thanks in large part to the explicitly discriminatory practice of redlining. Redlining, the official policy of the federal government from the 1930’s to 1976, identified neighborhoods where people of color lived as blighted, undesirable, and unfit for private investment, often merely because people of color lived there.\textsuperscript{18} An area that now covers part of the East Side of San José south of Alum Rock Ave was redlined, for example, because of “inharmonious racial elements,” “the largest concentration of Mexicans in the community,” and “a lower stratum of Italians and Portuguese,” which lead the federal government to conclude that “From a racial standpoint, this area is extremely undesirable.”\textsuperscript{19}

These overtly racist investment grades prevented residents from securing federally-insured loans to buy homes, precluded private investment, and virtually guaranteed that redlined neighborhoods would fall into disrepair and dilapidation. This made formerly-redlined neighborhoods targets for redevelopment by the San José Redevelopment Agency in the 1980’s and 90’s. Massive projects such as the Guadalupe corridor transportation project, a widening of the Guadalupe River channel, and the construction of what is now the SAP Center destroyed a significant number of housing units in these neighborhoods, a disproportionate number of which were Hispanic households.\textsuperscript{20}

Redlining and the activities of the San José Redevelopment Agency, which displaced communities of color while preserving wealthier, more predominately white neighborhoods,

\textsuperscript{16} Memorandum from San José Housing Department to City Council RE: Item 4.5 – Ellis Act Ordinance Re-control Provisions, at 10 (Oct. 24, 2019).
\textsuperscript{17} Id. at 11–12.
\textsuperscript{19} Area Description: Area No. D10, San Jose, California, HOME OWNERS LOAN CORP. (Sep. 1937), available at: http://salt.umd.edu/T-RACES/data/sj/ad/ad0041.pdf.
have left us with a highly segregated city. The City of San José’s Housing Element for 2014–2023 observes that “certain race/ethnic groups tend to concentrate in specific parts of the City.”\textsuperscript{21} Hispanic residents live in higher numbers “on the east side of San José (Central, Alum Rock, and Alviso areas) where traditionally lower income neighborhoods exist, while Asians and Whites are the majority group in the northern, southern, and western parts (Berryessa, Evergreen, Willow Glen, West Valley, Cambrian, and Almaden areas) where traditionally higher income neighborhoods are found.”\textsuperscript{22}

These patterns of segregation mean that the majority of aging properties with rent-stabilized units that are being considered for demolition under the Ellis Act are located in predominately Hispanic, low-income neighborhoods.\textsuperscript{23} As explained above, Ellis Act demolitions displace tenants even where relocation benefits are provided. Although renters of all racial backgrounds typically see a rent hike when moving, low-income renters who are people of color frequently end up in highly segregated, high-poverty regions while low-income white renters are able to access more resource-rich areas.\textsuperscript{24}

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\textbf{KEY:}

\begin{itemize}
\item \textbf{PUBLICLY-ANNOUNCED ELLIS ACT CONVERSION}
\item \textbf{HOME OWNER'S LOAN CORPORATION (HOLC) GRADE:}
\begin{itemize}
\item \textbf{FORMER FOURTH-GRADE ("REDLINED") NEIGHBORHOOD}
\item \textbf{FORMER THIRD-GRADE NEIGHBORHOOD}
\item \textbf{FORMER THIRD-GRADE NEIGHBORHOOD}
\item \textbf{FORMER FIRST-GRADE NEIGHBORHOOD}
\end{itemize}
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\textbf{Map of publicly-announced Ellis Act conversions and formerly redlined areas of San José showing that Ellis Act conversions are only occurring in neighborhoods that received the lowest HOLC investment grades.}\textsuperscript{25}

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\textsuperscript{21} \textit{City of San José, Housing Element II-9} (2015).

\textsuperscript{22} \textit{Id. at II-9}.

\textsuperscript{23} \textit{See Attachment A to Memorandum from San José Housing Department to City Council RE: Item 4.2 – Amendments to Procedures for Removal of Rent Stabilized Units from the Rental Market (Ellis Act Ordinance) (Mar. 15, 2018), https://sanjose.legistar.com/View.ashx?M=F&ID=6190894&GUID=12094E01-AB81-4478-B7BD-7759773FE62B (providing the location of properties up for conversion under the Ellis Act).


\textsuperscript{25} \textit{Map adapted from:} Josh Begley, \textit{San Jose, Redlining California, 1936-1939}, https://joshbegley.com/redlining/sanjose (last visited October 30, 2019).
\end{flushleft}
Thus, redevelopment of these buildings and surrounding neighborhoods will not only disproportionately displace Hispanic tenants, it will likely concentrate them in high-poverty areas with fewer resources, leaving them worse-off. Therefore, weakening the Ellis Act Ordinance’s re-control provisions will only perpetuate existing residential segregation in San José.

c. The proposed changes are not necessary to serve a valid, non-discriminatory interest of the City of San José.

Under federal and state fair housing laws, the City of San José must prove the modifications to its Ellis Act Ordinance are necessary to serve a valid, non-discriminatory interest if it intends to implement policies that will have a disparate impact on multiple protected classes of individuals. The City will not be able to make this showing given the legislative history of the proposed changes.

The impetus for revisiting the Ellis Act Ordinance’s re-control requirement was the mere observation that Councilmembers “have seen very few Ellis-relevant housing development proposals emerge, and have heard anecdotally that the re-control requirement undermines the viability of several projects.” Of course, this observation belies the fact that the policy is working as intended to preserve rent-stabilized buildings if properties covered by the Ellis Act Ordinance are not being redeveloped.

Nevertheless, Housing Department staff diligently investigated the impact of the Ellis Act Ordinance on the production of affordable housing. In speaking with developers, they found that “no one has been rejected for financing because of the Ellis re-control provision.” Likewise, in speaking with lenders, the Department found that “it is unclear if they would refuse to loan on a development or offer less competitive rates because of the re-control provision.” In fact, no lenders that the Department spoke with were actually aware of the Ellis Act Ordinance and several explained that loans are underwritten assuming a rent growth rate tracking the Consumer Price Index, which has not exceeded the 5% limit on rent increases applicable to rent-stabilized units in the past 18 years. The most logical conclusion to draw from these findings is that the Ellis Act Ordinance’s re-control requirements is not a barrier to the overall production of housing in San José.

This conclusion bears out in the data on the City’s progress on its Regional Housing Needs Allocation (RHNA). According to the City’s 2018 Annual Progress Report on the City’s General Plan Housing Element, the City has issued building permits for less than 8.5% of needed units affordable to households with low- and very low-income incomes (1,226 of

26 Inclusive Communities, 135 S. Ct. 2523.
27 Memorandum from Mayor Sam Liccardo and Vice Mayor Chappie Jones to City Council RE: Rent Stabilization Program Implementation Plan, at 1 (Feb. 1, 2019) (emphasis added).
29 Id.
30 See id.
14,661 needed), but it has issued permits for over 83% of needed units for renters at market rate (11,827 of 14,231 needed). The fact that the City is falling behind in its production goals only with regard to the housing needs of renters with the lowest incomes is also evident in the fact that for each person exiting homeless in Santa Clara County, “the economy pushes three more out the door.”

Changes to the Ellis Act Ordinance’s re-control requirements that would incentivize more development of market-rate housing and the demolition of naturally-occurring affordable housing will only make these trends worse. As the Housing Department has previously pointed out, production of market rate units does not contribute to increased availability of affordable housing in any immediate way because it can take up to 15 years for units produced for median income earners to become affordable “to people at 80% of the median income and closer to 50 years for households earning 50% of the median income.”

Thus, the City’s own investigation, as well as its own numbers on its progress towards its RHNA goals, shows that the proposed changes to the Ellis Act Ordinance’s re-control requirements are not necessary to serve the production interest stated in the Mayor and Vice Mayor’s February 1 memorandum.

Moreover, the purpose of the Ellis Act Ordinance itself is to “mitigate any adverse impact on persons displaced” through the withdrawal of rent-stabilized buildings from the rental market and “to provide tenants with the maximum protections under the Ellis Act and to support the City’s Apartment Rent Ordinance.” Considering this underlying purpose of the Ordinance – and the lack of factual support for the City’s stated interest in the proposed changes – it is difficult to see the proposed changes as anything but “artificial, arbitrary, and unnecessary barriers” to the preservation of naturally-occurring affordable housing and fair housing choice.

The notion that a policy change that will make it more profitable for developers to flip rent-stabilized buildings will somehow create a net benefit for low-income renters sometime after the actual occupants of those buildings are displaced is totally backwards. This logic shows a callous disregard for the history of oppression that San José’s people of color have suffered due to decades of deliberate housing policy, and it promises to reproduce the existing segregation that such policy created.

2. Conclusion

Strong measures to preserve San José’s naturally-occurring affordable housing stock are urgently needed. As the Housing Element explains, while the City considers policy changes that influence market forces to make redevelopment more favorable, “public policies must also

33 Supplemental Memorandum from San José Housing Department to City Council RE: Ellis Act Ordinance Re-control Provisions, at 13 (Apr. 19, 2019).
34 San José Mun. Code § 17.23.1110(A).
accompany this vision in order to mitigate the negative impacts that may result from these same market forces, such as displacement, overcrowding, and lack of housing opportunities across incomes. Making it less costly for developers to demolish rent-stabilized buildings directly contradicts this charge to mitigate the negative impacts of development and San José will reproduce a long history of discriminatory housing policy if it chooses to do so.

Therefore, we urge you to adopt Councilmember Esparza’s memorandum and refrain from further rolling back the Ellis Act Ordinance a second time. We would be happy to meet with you to discuss this matter further. You can reach us at michael.trujillo@lawfoundation.org and (408) 280-2454.

Sincerely,

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Michael Trujillo, Staff Attorney
The Law Foundation of Silicon Valley

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