



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Planning Commission

**SUBJECT:** SEE BELOW

**DATE:** January 25, 2024

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**SUBJECT: C23-119 – AN ORDINANCE REPEALING THE APPLICATION OF THE AFFORDABLE HOUSING OVERLAY ON SIX SITES IN NORTH SAN JOSE, AMENDING THE ZONING DISTRICT MAP TO APPLY THE HOUSING ELEMENT RESIDENTIAL OVERLAY ON 12 SITES CITYWIDE, AND AMENDING CHAPTER 20.65.200 REQUIRING THE SIX NORTH SAN JOSE SITES TO ALLOW RESIDENTIAL USE BY RIGHT FOR HOUSING DEVELOPMENTS IN WHICH AT LEAST 20 PERCENT OF THE UNITS ARE AFFORDABLE TO LOWER INCOME HOUSEHOLDS**

## **RECOMMENDATION**

The Planning Commission voted (11-0-0) to recommend that the City Council adopt the following actions:

1. Consider the Determination of Consistency with the City of San José 2023-2031 Housing Element Update Supplemental Environmental Impact Report (Resolution No. RES2023-262), in accordance with the California Environmental Quality Act as amended; and
2. Approve an ordinance:
  - a. Repealing the application of the Affordable Housing Overlay on six sites in North San José from the Envision San José 2040 General Plan Land Use/Transportation Diagram and Zoning District Map; and
  - b. Amending the Zoning District Map to apply the Housing Element Residential Overlay on 12 sites citywide; and
  - c. Amending Section 20.65.200 (HERO Affordable Housing Development Requirements) of Chapter 20.65 of Title 20 of the San José Municipal Code requiring the six sites in North San José to allow residential use by right and to only allow residential uses on those sites where at least 20% of the units are affordable to lower income households.

## **SUMMARY AND OUTCOME**

Should the City Council approve the Ordinance, the General Plan amendments and rezoning applying the Affordable Housing Overlay (AHO) Zoning District to six sites in North San José would be repealed. The Zoning District Map would be amended to apply the Housing Element Residential Overlay (HERO) Zoning District on 12 sites citywide, including the six sites in North San José. These actions are associated with the adopted Housing Element (6<sup>th</sup> Cycle) and are legally required under state law. The six sites included in this action that previously were included in the Affordable Housing Overlay will be required to meet the 20% affordability requirement. The City Council approved an urgency ordinance on January 23, 2024, that enacted the same actions.

## **BACKGROUND**

Government Code section 65583.2 requires San José to rezone sites included in a previous Housing Element that were not approved for development and are identified to accommodate a portion of the need for lower-income housing in the current adopted Housing Element (6<sup>th</sup> cycle). The rezoning must allow a minimum density of 30 dwelling units per acre and allow residential uses by right for housing development in which at least 20% of the units are affordable to lower-income households, which establishes the income limits at 80% of the area median income.

On December 5, 2023, the City Council adopted ordinances creating the Housing Element Residential Overlay (HERO) Zoning District, applying the HERO Zoning District on seven sites that were previously included in the 2014-2023 Housing Element (5<sup>th</sup> cycle), and creating a Local Ministerial Approval Process.

Government Code Section 65583(f) requires all sites identified in the Housing Element to possess the necessary zoning that allows for housing. The applicable deadline for the City to complete this rezoning is January 31, 2024. All sites identified in the City's adopted Housing Element already allow for housing except for sites in North San José.

On December 5, 2023, the City Council adopted General Plan amendments and ordinances creating two new residential zoning overlay districts in North San José and applying the zoning overlay districts to specified sites in North San José identified in the adopted Housing Element. These actions established the Affordable Housing Overlay (AHO) Zoning District and the Mixed Income Housing Overlay (MIHO) Zoning District. Consistent with previous strategies approved by the City Council related to increasing affordable housing in North San José, the AHO Zoning District requires 100% affordable housing, and the MIHO Zoning District requires at least 25% of the units to be affordable.

On November 29, 2023, staff submitted a revised Housing Element to the California Department of Housing and Community Development (HCD). HCD has 60 days from this submission to review and respond to the City. This 60-day period ends on January 28, 2024. On December 22,

2023, staff received feedback from HCD that it was their opinion that some North San José overlay zones were not compliant with state law.

On January 23, 2024, the City Council adopted an urgency ordinance that enacted similar actions proposed in the above recommendation. Based on conversations with HCD, they indicated that the rezoning should be completed prior to the end of HCD's 60-day review period. Therefore, an urgency ordinance was needed to meet this deadline.

### **ANALYSIS**

A complete analysis of the proposed Ordinance Amendments is included in the attached Planning Commission staff report.

### **EVALUATION AND FOLLOW-UP**

The proposed ordinance will be effective 30 days after Council adoption at the second reading.

### **COORDINATION**

The preparation of this memorandum has been coordinated with the Housing Department and the City Attorney's Office.

### **PUBLIC OUTREACH**

Six of the 12 sites received the initial public hearing notice for January 10, 2024, Planning Commission and January 23, 2024, City Council, which was distributed to the owners and tenants located within 500 feet of the project site. Staff has reached out to the interested members of the public with an update on the project timeline and the updated agenda has been available on the City website. An updated notice of public hearing for the January 24, 2024, Planning Commission and January 30, 2024, City Council was distributed to the owners and tenants of all properties located within 500 feet of the project sites and posted on the City website. Staff has been available to respond to questions from the public.

### **COMMISSION RECOMMENDATION AND INPUT**

On January 24, 2024, the Planning Commission held a public hearing to consider the proposed Ordinances. Planning staff recommended approval to amend the following Zoning Ordinance:

- a. Repealing the application of the Affordable Housing Overlay on six sites in North San José from the Envision San José 2040 General Plan Land Use/Transportation Diagram and Zoning District Map; and

- b. Amending the Zoning District Map to apply the HERO Housing Element Residential Overlay Zoning District to allow housing development projects by-right where at least 20% of the units are affordable to lower-income households on 12 sites citywide pursuant to state law; and
- c. Amending Chapter 20.65.200 (HERO Affordable Housing Development Requirements) requiring six sites in North San José to meet the 20% affordability requirement under state law.

### *Staff Presentation*

Staff gave a short presentation about the history of the project and the proposed changes.

### *Public Hearing*

Two members of the public spoke on the proposed project. Ryan Globus, a neighboring residence, commented on 845 Park Avenue stating that the property was recently rebuilt after fire damage and asked for an alternative site to be chosen for the HERO Zoning District. Paul Soto advocated for the affordability requirement to be raised to 30%.

### *Planning Commission Discussion*

Commissioner Cantrell asked if the project precludes the development of 100% affordable housing. Staff clarified that the 20% requirement is a minimum and that developers may choose to do 100% affordable housing. Commissioner Cantrell followed up asking if an in-lieu fee option is available. Principal Planner Jerad Ferguson clarified that affordable housing will be required to be built and that an in-lieu fee option is not available.

Commissioner Young asked why HCD felt that 100% affordability would be a constraint on housing. Principal Planner Jerad Ferguson responded that HCD's opinion is that we may exceed the 20%, however, going up to 100% would be a barrier to housing. Based on experience, staff disagrees with the opinion and interpretation. However, given the lateness of the response and opinion, staff didn't have sufficient time to provide additional analysis. Deputy Director Michael Brilliot added that HCD gave the City options to either apply the HERO Zoning District or provide an additional analysis showing that the 100% affordability requirement would not create a barrier. However, given the deadline of January 31, 2024, applying the HERO Zoning District was the most prudent approach.

Commissioner Cantrell followed up asking if a 30% affordability requirement was possible. Principal Planner Jerad Ferguson clarified that it could be a possibility considering that the 25% in the Mixed Income Overlay Zoning District wasn't an issue. However, staff did not have time to apply the Mixed Income Overlay or create a new zoning district with a 30% affordability requirement so staff is relying on the application of HERO to be compliant.

Chair Lardinois asked for clarification on why an urgency ordinance was passed and the need for the Planning Commission to consider this ordinance. Senior Deputy City Attorney Daniel Zazueta explained that the urgency ordinance was needed to meet the January 31, 2024 deadline

set by state law, and failure to meet the deadline would set in motion a series of potential consequences that posed an immediate threat to public peace, health, or safety. The urgency ordinance contained a declaration of facts constituting the urgency. This conventional ordinance is brought forward to the Planning Commission, as well as the City Council, as a safety precaution in the event the urgency ordinance is challenged, and the conventional ordinance provides for a minor amendment to the San José Municipal Code. Deputy Director Michael Brilliot and Principal Planner Jerad Ferguson clarified that this proposal adds a note to the zoning ordinance Chapter 20.65.200 to refer to the ordinance for the site-specific 20% affordability requirements that applies in North San José. Chair Lardinois followed up asking if staff is planning on revisiting the affordability requirement and if it is on the work plan. Principal Planner Jerad Ferguson responded that it may be a consideration in the future with affordability requirements that are consistent with the state law.

Commissioner Barocio added to the public comment made by Ryan Globus to see if it's possible to swap out the designated sites and if there are any pending sites that staff is looking to add to the HERO Zoning District. Principal Planner Jerad Ferguson added that the HERO Zoning District is specific to recycled sites in accordance with state law and we cannot choose to add or delete sites, however, the City will be working on a ministerial infill process that other sites may be eligible for and would be applied citywide.

Commissioner Tordillos commented that he believes HCD's opinion on the 100% affordable requirement may stem from other cities' approach requiring higher affordability requirements when such a project is not feasible, as a strategy to create barriers to housing.

Vice Chair Ornelas-Wise asked if there are any incentives that the City has for developers to provide affordable housing beyond the requirement. Principal Planner Jerad Ferguson responded that given the time constraint, staff was not able to make additional analysis to require higher affordability beyond the threshold. The Mixed-Income Overlay which requires 25% may be applied to these sites, however, it would require a General Plan Amendment. He said it is on the Department's work plan to further evaluate in the future.

Commissioner Bickford asked staff about the discussion the City Council had the night before on this topic. Principal Planner Jerad Ferguson summarized that the questions and concerns were similar and wanted to make sure the item stayed on the staff's work plan. The City Council shared the same remarks as Commissioner Young and understands how 100% affordable housing projects have been successful in the City. Deputy Director Michael Brilliot added that there was a discussion with Councilmember Batra, who said that market-rate developers have told him that integrating affordable housing into their projects makes their projects infeasible. Staff clarified that these are sites identified in the Housing Element site inventory for affordable housing and the staff's position is that the 20% requirement should be put in place.

Vice Chair Ornelas-Wise commented and encouraged staff to exercise good faith to encourage developers to exceed the 20% affordability requirement for more affordable housing.

Commissioner Oliverio made a motion to approve staff recommendations as a part of the public hearing calendar and Commissioner Casey seconded the motion.  
The motion passed 11-0-0.

The Planning Commission recommended that the City Council consider the Determination of Consistency in accordance with CEQA and approve the proposed Ordinance.

### **CEQA**

A Determination of Consistency with the City of San José 2023-2031 Housing Element Update Supplemental Environmental Impact Report (Resolution No. RES2023-262) (SCH# 2022110256), and Addenda thereto, has been prepared in accordance with the California Environmental Quality Act, as amended. The proposed Rezoning does not include any construction, demolition, or other activity that has the potential to negatively impact the environment. Pursuant to Section 15162 of the CEQA Guidelines, the City of San José has determined that this activity is within the scope of the approved 2023-2031 Housing Element Update, and SEIR for the City of San José 2023-2031 Housing Element Update, for which findings were adopted by City Council Resolution No. RES2023-263 and Resolution No. RES2023-262 respectively, that adequately describe the activity for the purposes of CEQA.

### **PUBLIC SUBSIDY REPORTING**

This item does not include a public subsidy as defined in section 53083 or 53083.1 of the California Government Code or the City's Open Government Resolution.

/s/  
Chris Burton  
Secretary, Planning Commission

The principal author of this memorandum is Kenneth Chou, Planner II. For questions, please contact Jerad Ferguson, Principal Planner, [jerad.ferguson@sanjoseca.gov](mailto:jerad.ferguson@sanjoseca.gov) or (669) 223-1160.

**ATTACHMENT:**  
Planning Commission Staff Report



# Memorandum

**TO:** PLANNING COMMISSION

**FROM:** Christopher Burton

**SUBJECT:** C23-119

**DATE:** January 12, 2024

**COUNCIL DISTRICT:** Citywide

<b>Project</b>	Ordinance to repeal Affordable Housing Overlay on six sites in North San José; amendment to the Zoning District Map to apply the HERO Housing Element Residential Overlay Zoning District on 12 sites; and amendment to Chapter 20.65 (Overlay Districts).
<b>Project Description</b>	An ordinance repealing the application of the Affordable Housing Overlay on six sites in North San José from the Envision San José 2040 General Plan Land Use/Transportation Diagram and Zoning District Map; amending the Zoning District Map to apply the HERO Housing Element Residential Overlay Zoning District on 12 sites citywide to allow a local ministerial approval process for housing development projects where at least 20% of the units are affordable to lower income households pursuant to Government Section Code 65583.2; and amending Chapter 20.65.200 (HERO Affordable Housing Development Requirements) to require six sites in North San José to meet the 20% affordability requirement under state law.
<b>CEQA Clearance</b>	Determination of Consistency with the City of San Jose 2023-2031 Housing Element Update Supplemental Environmental Impact Report (Resolution No. RES2023-262) (SCH# 2022110256) and Addenda thereto, in accordance with the California Environmental Quality Act.
<b>Project Planner</b>	Kenneth Chou

## RECOMMENDATION

Staff recommends that the Planning Commission recommend that the City Council take all of the following actions:

1. Consider the Determination of Consistency with the City of San Jose 2023-2031 Housing Element Update Supplemental Environmental Impact Report (Resolution No. RES2023-262) (SCH# 2022110256) and Addenda thereto, in accordance with the California Environmental Quality Act; and
2. Approve an ordinance:
  - a. Repealing the application of the Affordable Housing Overlay on six sites in North San José from the Envision San José 2040 General Plan Land Use/Transportation Diagram and Zoning District Map; and
  - b. Amending the Zoning District Map to apply the HERO Housing Element Residential Overlay Zoning District to allow housing development projects by-right where at least 20% of the units are affordable to lower-income households on 12 sites citywide pursuant to state law; and

- c. Amending Chapter 20.65.200 (HERO Affordable Housing Development Requirements) requiring six sites in North San José to meet the 20% affordability requirement under state law.

## PROJECT BACKGROUND

Government Code section 65583.2 requires San José to rezone sites included in a previous Housing Element that were not approved for development and are identified to accommodate a portion of the need for lower income housing in the current adopted Housing Element (6th cycle). The rezoning must allow a minimum density of 30 dwelling units per acre and allow residential uses by right for housing development in which at least 20% of the units are affordable to lower income households, which establishes the income limits at 80% of area median income. The applicable deadline for the City to complete the rezoning is January 31, 2024.

On November 15, 2023, the Planning Commission considered the ordinances creating the Housing Element Residential Overlay (HERO) Zoning District, applying the HERO Zoning District on seven sites that were previously included in the 2014-2023 Housing Element (5th cycle), and creating a Local Ministerial Approval Process, and on December 5, 2023, City Council adopted these ordinances.

On December 5, 2023, City Council adopted General Plan amendments and ordinances creating two new residential zoning overlay districts in North San José and applying the zoning overlay districts to specified sites in North San José identified in the adopted Housing Element. These actions established the Affordable Housing Overlay (AHO) Zoning District and the Mixed Income Housing Overlay (MIHO) Zoning District. Consistent with previous strategies approved by City Council related to increasing affordable housing in North San José, the AHO Zoning District requires 100% affordable housing, and the MIHO Zoning District requires at least 25% of the units to be affordable.

On November 29, 2023, staff submitted a revised Housing Element to the California Department of Housing and Community Development (HCD). HCD has 60 days from this submission to review and respond to the City. This 60-day period ends on January 28, 2024.

Upon further review of the City's site inventory, six additional recycled sites needed to be rezoned to the HERO Zoning District. Staff had originally scheduled to bring this item to the January 10, 2024, Planning Commission meeting. However, on December 22, 2023, staff received feedback from HCD that it was their opinion that some North San José overlay zones requiring 100% affordable housing would act as a constraint to housing. Therefore, staff scheduled the item to the January 24, 2024, Planning Commission meeting to accommodate the six additional North San José recycled sites that needed to be rezoned to the HERO Zoning District.

On January 23, 2023, City Council considered an urgency ordinance that enacted similar actions contemplated by the proposed actions contained in this recommendation.

## ANALYSIS

### Rezoning additional sites to HERO Zoning District

Upon further review of the City's site inventory, six additional sites included in previous Housing Elements must be rezoned to the HERO Zoning District. These sites were not included in the rezonings on December 5, 2023.

Exhibit A includes a map identifying the six additional sites proposed to be rezoned to HERO Zoning District. For these sites, the rezoning will allow housing development projects to proceed with a ministerial permitting process as long as at least 20% of the units are affordable to lower income households. These sites already allow for housing so development proposals could be processed under a discretionary review process if they do not include the 20% affordable units. The six sites include one with the Mixed Use Commercial General Plan land use designation (Up to 50 DU/AC), three with the Mixed Use Neighborhood



General Plan land use designation (Up to 30 DU/AC), one with the Urban Residential General Plan land use designation (30-90 DU/AC), and one with the Urban Village General Plan land use designation (Up to 250 DU/AC).

### **North San José Overlay sites**

Several sites in North San José were included in a previous housing element and are required to be rezoned pursuant to state law. As described previously, this rezoning requires a minimum density of 30 dwelling units per acre and requires residential uses by right for housing development in which at least 20% of the units are affordable to lower income households. Staff interpreted this law to mean that a rezoning could exceed the 20% threshold, and therefore considered the AHO Zoning District to be a compliant rezoning on these sites since it exceeded the minimum density and required 100% affordable housing, i.e., at least 20%.

At the November 15, 2023, Planning Commission meeting, where the new overlay zoning districts were considered, Planning Commissioner Tordillos questioned staff's interpretation of this state law in regards to the proposed affordability requirements. Following Planning Commission, staff also received questions from housing advocates. Some of these advocates said that they interpreted the requirement that 20% of the units be affordable meant that the rezoning should allow projects with a minimum of 20% affordable units by right. In the advocates' opinion, the City was not allowed to exceed the 20% threshold, and the 100% affordability requirement was inconsistent with the requirements.

On November 29, 2023, the City received an inquiry from staff at HCD reviewing the City's revised Housing Element regarding the affordability requirements of the newly created overlay zoning districts in North San José. Staff responded and clarified the City's approach to the zoning overlays. Staff also explained that City Council would be considering the zoning overlays the following Tuesday, December 5, 2023, and that it would be helpful to receive any feedback prior to that meeting. HCD staff indicated they would look into the matter and get back to the City as soon as possible. On Monday, December 11, 2023, staff followed up again with HCD letting them know that City Council had approved the rezonings on December 5th and that if any further changes were needed the City would need time to bring back other actions to City Council before January 31, 2024. The concept of the North San José overlays has been incorporated in all drafts of the Housing Element as Program P-3: North San José Affordable Housing Overlay Zones, but it was not until December 2023 that HCD raised an issue with requiring 100% affordability on sites that were included in previous housing element.

HCD responded to the City on December 22, 2023, with their position that the 100% affordability requirement of the AHO Zoning District could act as a potential constraint on housing development. Their interpretation of the state law is that it allows some flexibility in the minimum affordability requirements, but that 100% is too high above that 20% threshold.

Even though staff do not agree with this HCD's interpretation, given the legally required deadline of January 31st, it is in the best interest of the City to revise its approach and apply the HERO Zoning District to sites in North San José. It is Staff's understanding from correspondence from HCD that this is likely the last remaining issue holding up certification from HCD of the City's Housing Element. Based on conversations with HCD, they indicated that this action should be completed prior to the end of HCD's 60-day review period, which concludes on January 28th. Therefore, staff brought forward an urgency ordinance to the January 23, 2024, City Council meeting to meet this deadline.

There are six sites shown in Exhibit B in North San José proposed for rezoning to the HERO Zoning District, three have the Urban Village General Plan land use designation (Up to 250 DU/AC), and three have the Industrial Park General Plan land use designation (75 to 250 DU/AC). All six sites were rezoned on December 5, 2023, to have the AHO General Plan land use designation and the AHO Zoning District. The proposed action repeals the action from December 5th applying the General Plan land use and zoning amendments to these six sites.

**Amendment to Chapter 20.65.200 “HERO Affordable Housing Development Requirements”**

Consistent with the direction from City Council to increase affordability in North San José, staff is proposing to require any proposed residential development on the six North San José sites that were formerly AHO to include at least 20% low-income units. This differs from the other HERO sites where applicants may propose a housing development project and choose to provide 20% low-income units for a local ministerial approval process or a housing development project with lower affordability for a discretionary review process. Under this proposed amendment, residential use would only be permitted on these North San Jose sites if the project meets the 20% affordability requirement. Chapter 20.65.200 (HERO Affordable Housing Development Requirements) would be amended with references to Ordinance 2080507 to make sure any proposed residential development on these six North San José sites must meet the 20% affordable requirements. A non-residential project may still be permitted through the underlying zoning district, where applicable. Staff consulted with HCD on this approach and was told that establishing such an affordable housing requirement on these six sites in North San Jose was allowed under state law.

**CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

A Determination of Consistency with the City of San Jose 2023-2031 Housing Element Update Supplemental Environmental Impact Report (Resolution No. RES2023-262) (SCH# 2022110256), and Addenda thereto, has been prepared in accordance with the California Environmental Quality Act, as amended. The proposed Rezoning does not include any construction, demolition, or other activity that has the potential to negatively impact the environment. Pursuant to Section 15162 of the CEQA Guidelines, the City of San José has determined that this activity is within the scope of the approved 2023-2031 Housing Element Update, and SEIR for the City of San José 2023-2031 Housing Element Update, for which findings were adopted by City Council Resolution No. RES2023-263 and Resolution No. RES2023-262 respectively, that adequately describe the activity for the purposes of CEQA.

**PUBLIC OUTREACH**

Staff followed Council Policy 6-30: Public Outreach Policy in order to inform the public of the proposed project. A notice of the public hearing was distributed to the owners and tenants of all properties located within 500 feet of the project site and posted on the City website. The staff report is also posted on the City’s website. Staff has been available to respond to questions from the public.

**Project Manager:** Kenneth Chou

**Approved by:** /s/ Michael Brilliot, Deputy Director for Christopher Burton, Planning Director

**ATTACHMENTS:**

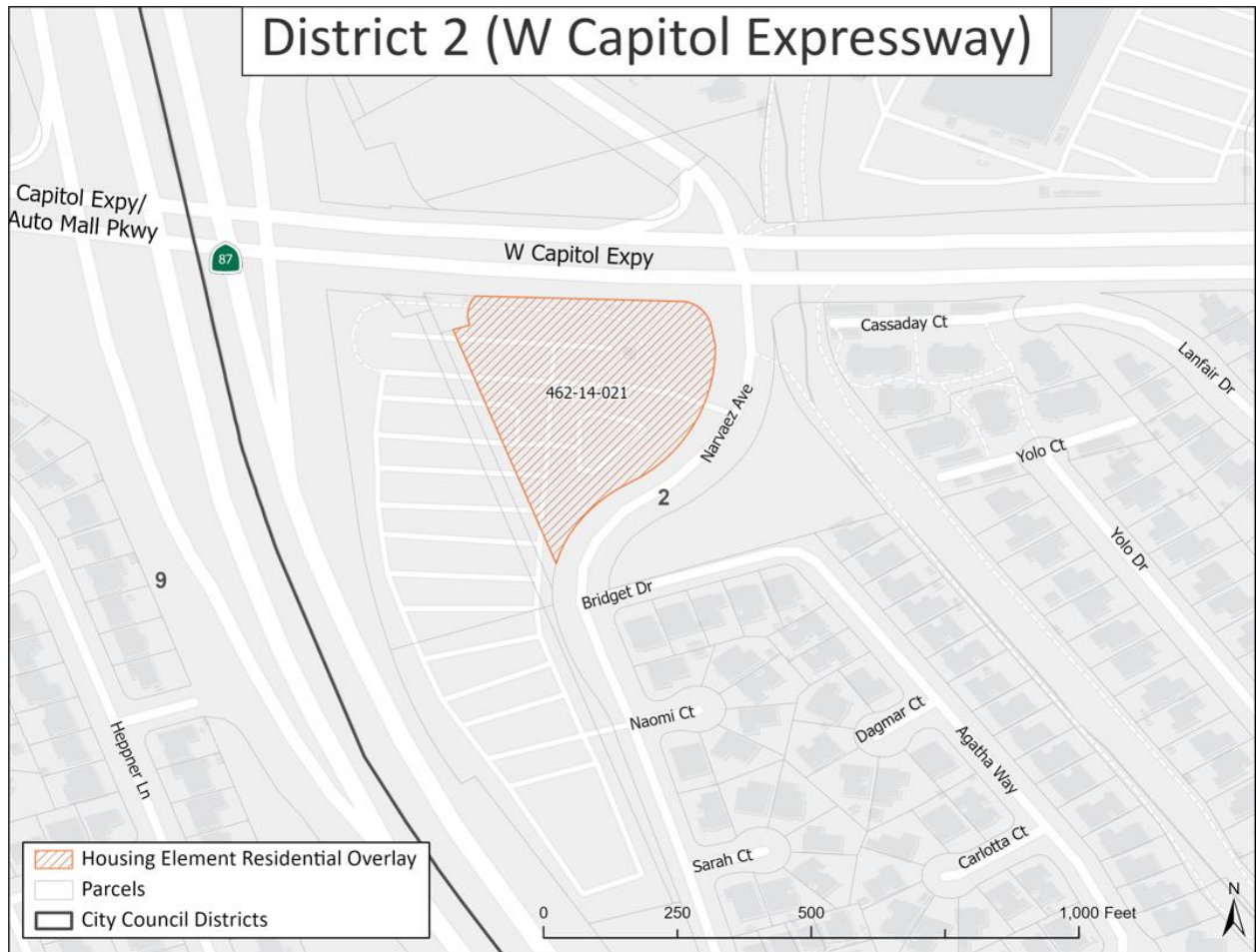
Exhibit A: Locations Of Additional Housing Element Residential Overlay (HERO) Sites

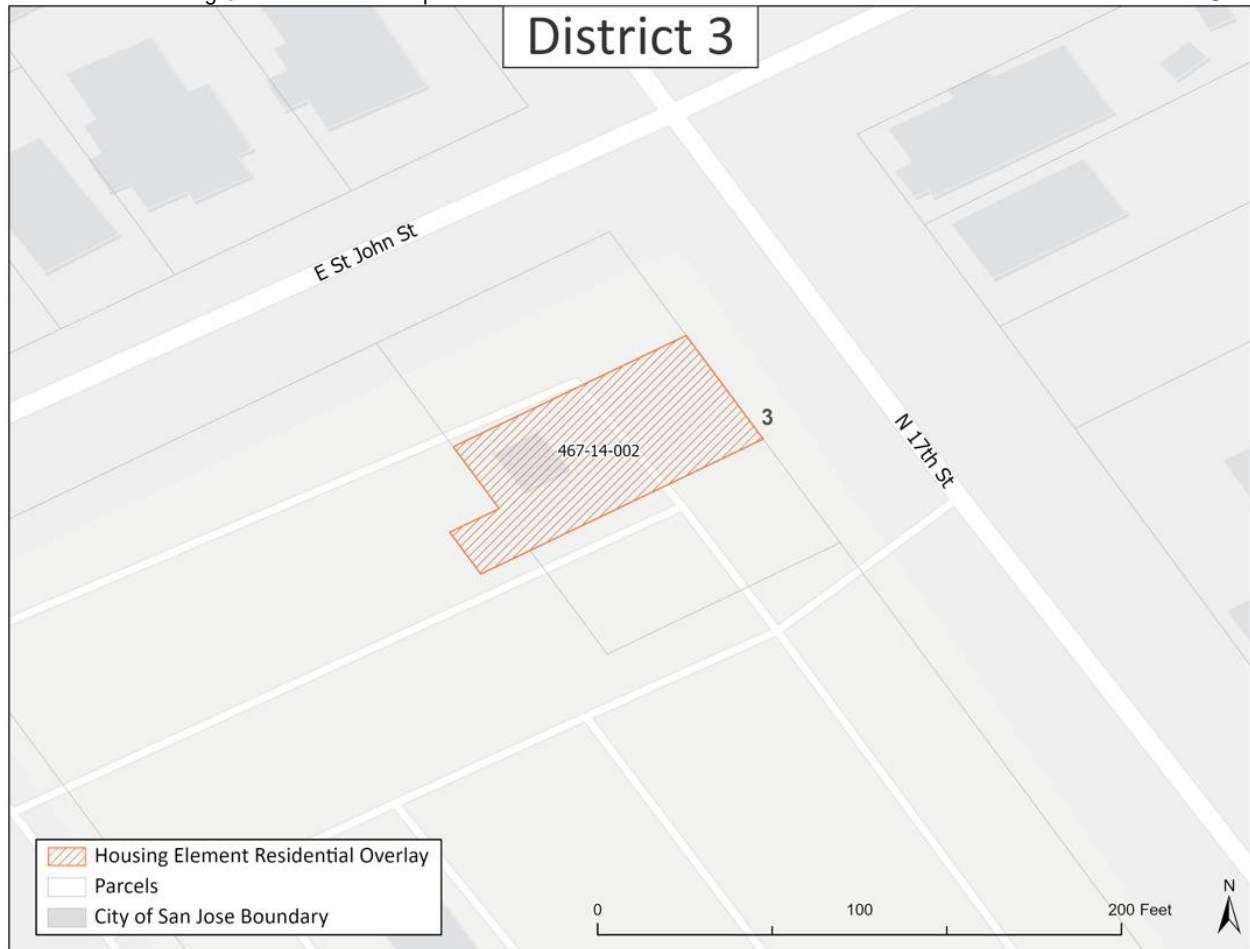
Exhibit B: Locations Of North San José Overlay Sites

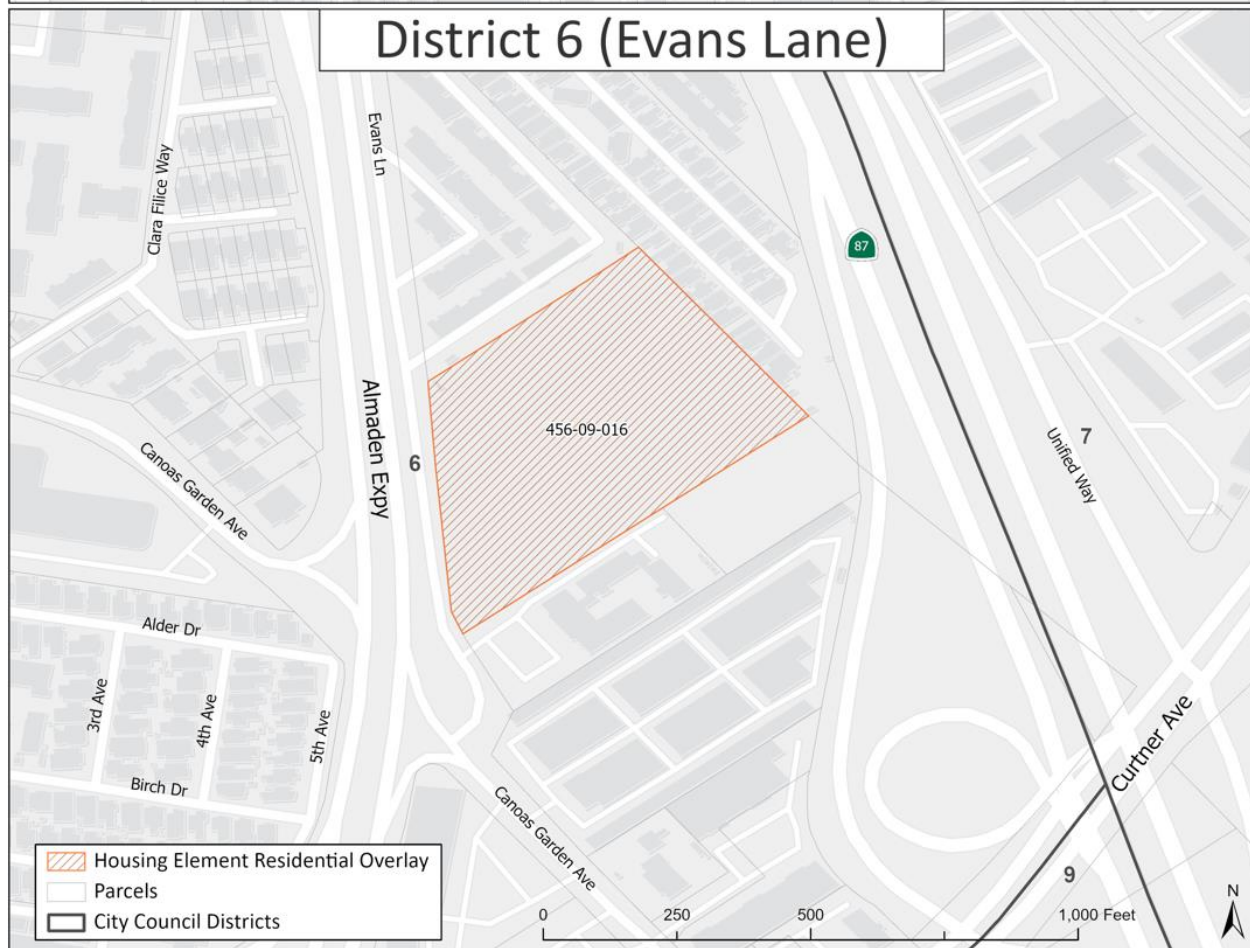
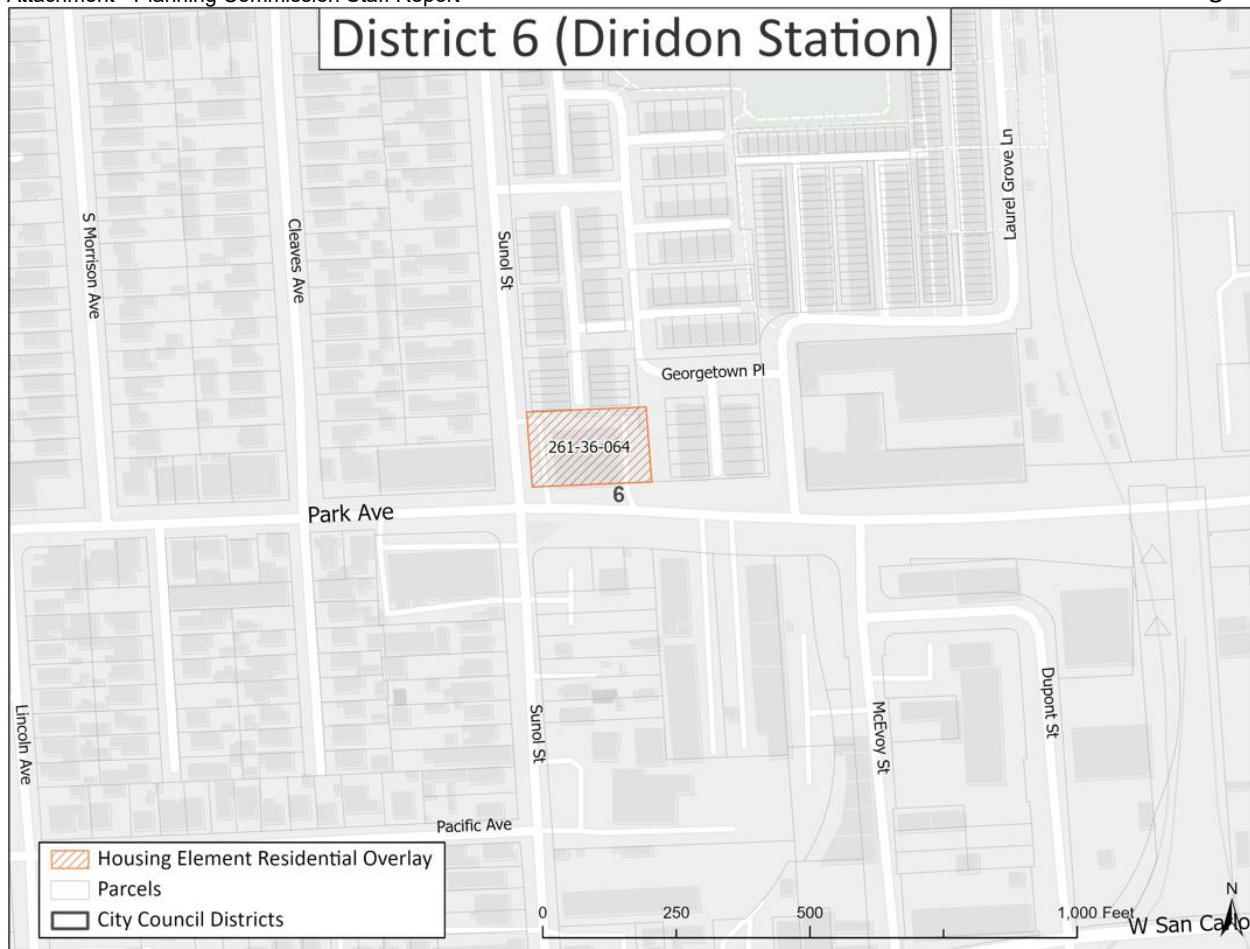
Exhibit C: Draft Ordinance repealing AHO GP and Zoning; applying HERO; and amending Chapter 20.65.200

Exhibit D: Determination of Consistency with the City of San Jose 2023-2031 Housing Element Update Supplemental Environmental Impact Report

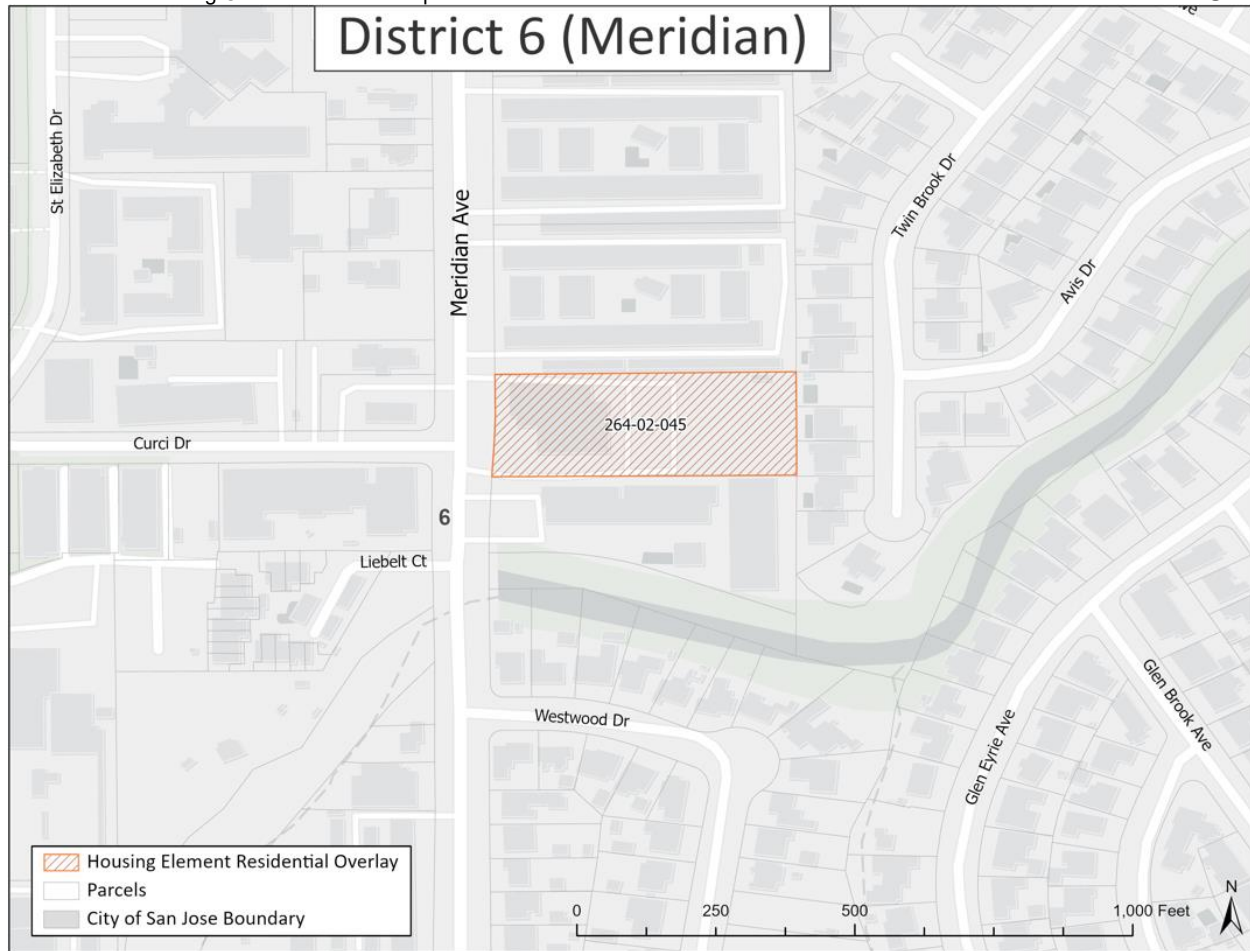
## EXHIBIT A: LOCATIONS OF ADDITIONAL HOUSING ELEMENT RESIDENTIAL OVERLAY (HERO) SITES





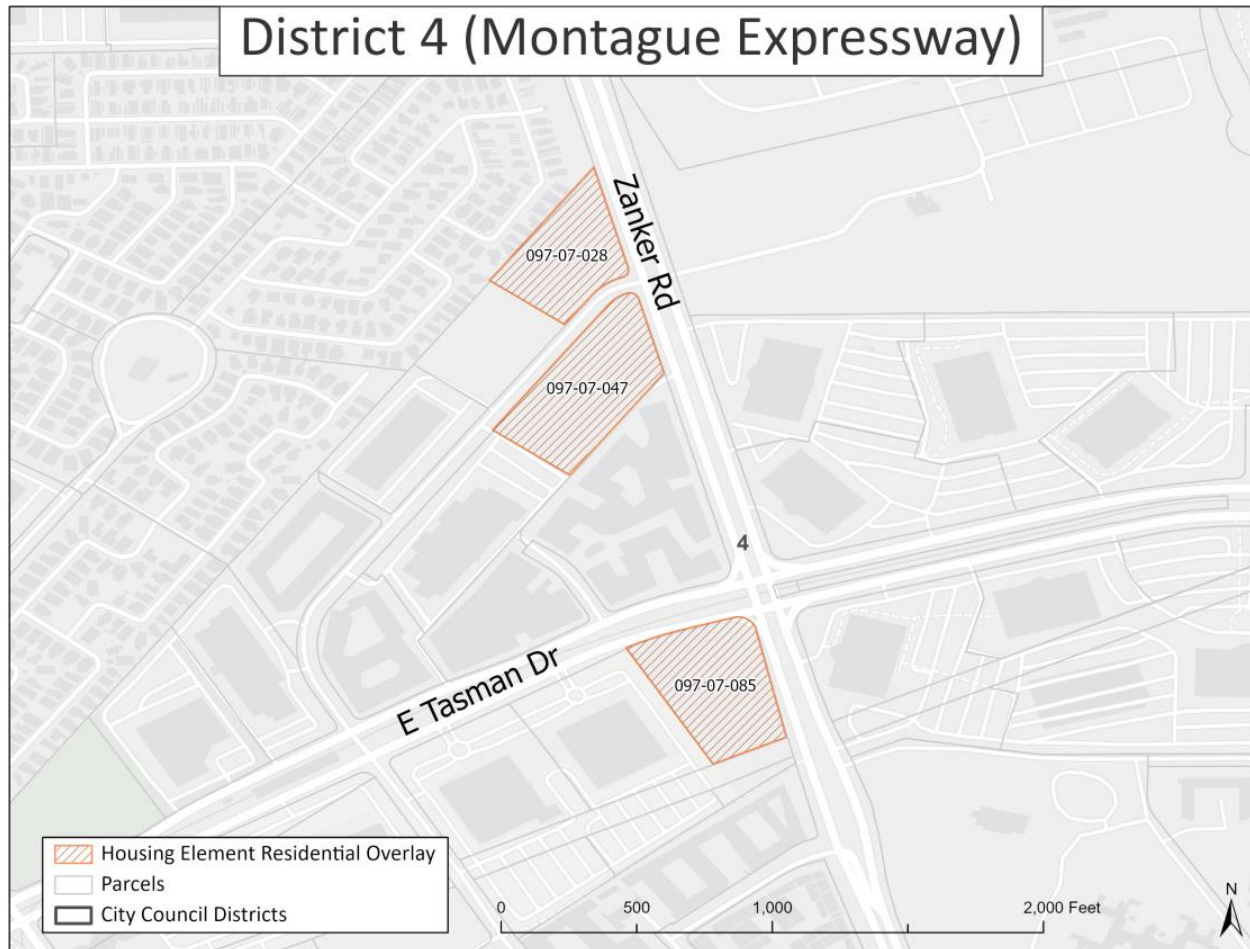








## EXHIBIT B: LOCATIONS OF NORTH SAN JOSÉ OVERLAY SITES







## C23-119

### Links to Attachment C - D

Click on the title to view document.

<a href="#"><u>Exhibit C: Draft Ordinance repealing AHO GP and Zoning; applying HERO; and amending Chapter 20.65.200</u></a>
<a href="#"><u>Exhibit D: Determination of Consistency with the City of San Jose 2023-2031 Housing Element Update Supplemental Environmental Impact Report.</u></a>