

**DRAFT FOR PUBLIC REVIEW**

**Guidelines for Implementation of the  
Commercial Linkage Fee Ordinance of the City of San José,**  
Chapter 5.11 of the San José Municipal Code.

October 1, 2021

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## **1.0 INTRODUCTION**

### **1.1 Establishment and Purpose of Commercial Linkage Fee**

The San José City Council established its Commercial Linkage Fee (CLF) through adoption of [Ordinance No. 30475](#) (Ordinance) on September 22, 2020. The CLF is a one-time impact fee that applies to new Non-Residential Projects in the City of San José. CLF funds are used to facilitate development of Affordable Housing for Extremely Low, Very Low, Low and Moderate Income households within the City of San José by supplementing other public funding sources. The Ordinance is codified in Chapter 5.11 of the San José Municipal Code (SJMC). Concurrent with adoption of the Ordinance, the City adopted [Resolution No. 79705](#) (Resolution) establishing fee amounts as provided in SJMC 5.11.030.

### **1.2 Purpose of Guidelines**

These Guidelines summarize the provisions of the Ordinance and Resolution and establish procedures regarding their implementation. Adoption of Guidelines is provided for in SJMC Section 5.11.110. In the event of a conflict between the Guidelines and the Ordinance or Resolution, the Ordinance and Resolution shall prevail. Undefined capitalized terms in the Guidelines are defined in the Ordinance and Resolution.

## 2.0 COMMERCIAL LINKAGE FEE REQUIREMENT

This section provides a summary of the CLF requirement and provides guidelines for implementation.

### 2.1 Effective Date

The CLF became **effective November 21, 2020**<sup>1</sup>. The CLF applies to Non-Residential Projects for which a Development Permit is approved or an application for a change in use is made after the effective date, and to projects for which the Development Permit includes a condition of approval requiring payment of the CLF (*SJMC 5.11.040*).

### 2.2 Minimum Project Size Subject to CLF (*SJMC 5.11.020 K*)

Non-Residential Projects **adding 5,000 square feet or more** of new or additional Gross Floor Area are subject to the CLF. Gross Floor Area (GFA) is defined in *SJMC 17.84.108* and excludes area used exclusively for parking. Certain use categories have higher square footage thresholds before fees apply, as indicated in the Resolution and fee schedule posted on the [City's website](#).

### 2.3 CLF Rates and Time of Payment (*SJMC 5.11.030* and Resolution)

The CLF is determined based on the rate in effect at the time of building permit issuance. Current rates are posted on the [City's website](#).

Commercial linkage fee rates vary by geographic subarea. [Follow this link for a map of the geographic subareas applicable to the Commercial Linkage Fee rates.](#)

The CLF rates are established in the Resolution and are increased by the Engineering News Record (ENR) Construction Cost Index for the San Francisco Urban area published by McGraw Hill in January of each year, based on the percentage increase for the preceding twelve (12) months. Increases go into effect on July 1 of each year. The initial adjustment will be effective as of July 1, 2022.

Office and Industrial / Research and Development uses adding more than 100,000 square feet have the option to pay in full at Final Inspection of Building Shell or to pay in phases, with a

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<sup>1</sup> The date that is 60 days from final adoption on September 22, 2020 pursuant to Section 2 of the Ordinance.

portion due at Final Inspection of Building Shell and a portion due at Certificate of Occupancy (CO) for each tenant improvement or completed portion of interior building finishes (see Section 2.6). For all other uses, payment is due prior to issuance of the first CO for the building or any component thereof. Payments must be made before the applicable inspection will be scheduled by the City Building Division.

As defined in the Ordinance, Certificates of Occupancy means the permit issued by the City Building Division authorizing the initial occupancy of one or more buildings and includes final inspections and temporary certificate of occupancy permits. Follow these links for a description of the City's procedures for issuance of [Certificates of Occupancy](#) and [Temporary Certificates of Occupancy](#).

## **2.4 CLF Satisfaction Plan Application**

All Non-residential Projects adding 5,000 square feet or more of new or additional GFA are required to submit a signed CLF Satisfaction Plan application to the Housing Department and pay the applicable application processing fee as part of the application for first approval of a Development Permit. The CLF Satisfaction Plan application form will be available on the [City's website](#). Compliance with the CLF Satisfaction Plan will be included in the conditions of approval for the Development Permit.

The following information must be provided as part of the CLF Satisfaction Plan application:

- a. Estimated floor area upon completion by use category. For Office and Industrial / R&D projects selecting the option to pay in phases, a more detailed breakdown of floor area by building and floor, including an identification of the portion of floor area that constitutes Common Area must be included.
- b. Floor area of existing buildings on the project site by use category as of the date of application and an estimate of fee credits corresponding to the existing buildings.
- c. An estimate of the CLF due. A final determination of the CLF due will be made by the City.
- d. For Office and Industrial/Research & Development projects with at least 100,000 square feet, selection of a timing of payment option.
- e. Identification of any exemption from the CLF that applies along with evidence to support eligibility.

Applicants are also responsible for identifying existing and proposed floor area by use, as required under a. and b. above, on the Project's building plans submitted for City approval.

The City may waive the requirement to complete a CLF Satisfaction Plan Application for projects adding less than 50,000 square feet of Non-Residential floor area which do not result in a change of use or removal of an existing building, subject to completion of an automated worksheet to calculate the CLF amount due and payment in full prior to building permit issuance.

Amendments to a CLF Satisfaction Plan will incur an additional application processing fee.

### **2.5 Determination of Final CLF Amount, Collection and Payment**

The Housing Department will be responsible for calculation of the CLF amount and invoicing the applicant based on rates in effect at the time of building permit issuance, as indexed through the date of payment. For land use categories with multiple payment options, fees under the option selected in the CLF Satisfaction Plan will be identified in the invoice. The Department of Planning, Building and Code Enforcement (PBCE) shall be responsible for the determination of the applicable land use category (*SJMC 5.11.020 J.8*).

As part of the building permit process, prior to issuance of any building or foundation permit, the developer must provide updated information that will allow the Housing Department to confirm satisfaction of any exemption claims and prepare a final calculation of the CLF fee. Building plans submitted as part of the building permit process shall include information to confirm existing and new building square footage areas for determination of the fee, completed and stamped by a licensed architect or engineer.

Payment of the CLF is required prior to scheduling a Building Division final inspection when that inspection corresponds to a CLF payment milestone, such as Final Inspection of Building Shell or the final inspection preceding a CO. Payment in full of the amount due must be confirmed by PBCE prior to scheduling of the applicable inspection or issuance of the applicable CO or Temporary Certificate of Occupancy (TCO) that corresponds to a CLF payment milestone.

### **2.6 Phased Payment Option for Office and Industrial/Research & Development**

Office and Industrial/Research & Development projects with at least 100,000 square feet of GFA have two options regarding timing of CLF fee payment, as provided in the Resolution.

- Payment in full at Final Inspection of Building Shell; or
- Phased payment with a partial payment at Final Inspection of Building Shell and the balance paid at issuance of each CO for individual tenant improvements or completed portion of building interior finishes. For office uses in the Downtown subarea, a higher CLF rate applies with phased payment.

With phased payments, the initial installment at Final Inspection of Building Shell is assessed based on GFA of the entire building. Remaining payments are assessed prior to each CO for individual tenant improvements or completed portion of building interior finishes.

For purposes of assessing the payment due prior to CO for individual tenant improvements or completed portion of building interior finishes, the applicable GFA to be assessed shall be determined as follows:

- (1) Where the CO for tenant improvements or interior finishes is for an entire building or that portion of an entire building that is not Common Area, the applicable GFA is that of the entire building.
- (2) Where the CO for tenant improvement or interior finishes is for a portion of a multi-story building with two or more floors, the applicable GFA equals the GFA of the building floor or floors applicable to the completed tenant improvements or interior finishes. In addition, when the CO is for the first tenant improvement or interior finish in the building, the GFA for the ground floor and any other building floors that exclusively contain Common Area are included as part of GFA for purposes of the CLF due at that time. Concurrent with issuance of the CO for the final floor within a building, any CLF that remains outstanding is due and payable. Piecemealing of CLF payment for portions of a building floor within a multi-story building is not allowed.
- (3) Where the CO for tenant improvement or interior finishes is for a portion of a single-story building, the applicable GFA is determined based on the square footage of the demised premises applicable to the tenant improvement or interior finish (generally the useable space). In addition, when the CO is for the first tenant improvement or interior finish in the building, GFA for Common Area within the building is included for purposes of the CLF due at that time. Concurrent with issuance of the CO for the final tenant space or interior finish within a building, any CLF that remains outstanding is due and payable.

Table 1 provides an illustration of the phased payment option for an office building located in West San José.

**Table 1. Phased Fee Payment Example for a New Office Building in West San José**

<b>Example Office Building</b>			<u>GFA (SF)</u>	<u>Demised for Tenants</u>	<u>Occupancy</u>
Floor 7	Tenant 1		25,000	22,000	Tenant 1
Floor 6			25,000	22,000	Tenant 1
Floor 5			25,000	22,000	Tenant 1
Floor 4	Tenant 2		25,000	22,000	Tenant 2
Floor 3			25,000	22,000	Tenant 2
Floor 2	Tenant 3	Tenant 4	25,000	22,000	Tenant 3 & 4
Floor 1	Lobby: 10,000 SF	Retail: 15,000 SF	<u>25,000</u>	<u>15,000</u>	Lobby, Retail
			175,000	147,000 SF	
Common Area (= GFA - Demised Space)				28,000 SF	
<b>Allocation of GFA by Use</b>					
	<u>A. Demised Space (SF)</u>	<u>%</u>	<u>B. Common Area Allocation (SF)</u>	<u>GFA (A.+ B.)</u>	
Retail	15,000	10.2%	2,857	17,857	
Office	<u>132,000</u>	<u>89.8%</u>	<u>25,143</u>	<u>157,143</u>	
	147,000	100.0%	28,000	175,000	
Portion Floor 1 GFA Allocable to Office				7,143	= Floor 1 GFA-Retail GFA
<b>Due at Final Inspection of Shell</b>					
			<u>GFA</u>	<u>Rate/SF</u>	<u>Due at FIBS</u>
Office			157,143	\$2.00	\$314,286
Retail			<u>17,857</u>	\$0.00	<u>\$0</u>
Total			175,000		<b>\$314,286</b>
<b>Due at CO for Each TI</b>					
<u>CO Issued for</u>	<u>GFA Basis</u>		<u>GFA</u>	<u>Rate/SF</u>	<u>Due at CO of TIs</u>
Tenant 1	Floors 5-7 + Floor 1 Office		82,143	\$3.00	\$246,429
Tenant 1	Floor 1 Retail		17,857	\$0.00	\$0
Tenant 2	Floors 3 and 4		50,000	\$3.00	\$150,000
Tenant 3	Floor 2		25,000	\$3.00	\$75,000
Tenant 4	already paid with Tenant 3		<u>0</u>	\$3.00	<u>\$0</u>
			175,000		<b>\$471,429</b> <i>balance due</i>
<b>Total Payment</b>					<b>\$785,715</b>

FIBS = Final Inspection of Building Shell; CO = Certificate of Occupancy; TI = Tenant Improvement



## **2.7 CLF Satisfaction Agreement for Projects Selecting Phased Payment**

For a Non-Residential Project eligible for and selecting the option to pay the CLF in phases, as described in Section 2.6, a CLF Satisfaction Agreement may be required to memorialize the project's CLF obligation and CLF Satisfaction Plan. The CLF Satisfaction Agreement is a covenant by the Developer for the benefit of the City of San José governing how the project's CLF obligation will be satisfied. The CLF Satisfaction Agreement will be recorded against the development and any property included as part of the CLF Satisfaction Plan. The City may require the approved CLF Satisfaction Plan be attached to the CLF Satisfaction Agreement.

## **2.8 Application of Project Size Thresholds**

For purposes of applying the project size thresholds in the CLF fee schedule, the following criteria apply:

1. *Phased projects* – All buildings in a phased project are considered in combination for purposes of project size thresholds.
2. *Expansion of existing properties* – Total floor area upon completion, inclusive of any existing buildings on the same parcel and contiguous parcels under common ownership or control, is considered for purposes of project size thresholds.
3. *Overall size* - Total GFA is considered for purposes of the project size thresholds, not that of individual tenant improvements.
4. *Multiple uses* – Where there are multiple land use categories within a Non-Residential Project, the square footage of all land use categories is considered in the aggregate for purposes of the project size thresholds. For example, a project with 170,000 square feet that includes 90,000 square feet of industrial and 80,000 square feet of office space is subject to the applicable CLF rates for projects greater than 100,000 square feet for each land use category.

## **2.9 Projects with Multiple Uses**

For Non-Residential Projects with multiple uses, the CLF rate for each individual use is applied, except where a Primary Use is established based on the criteria below. Shared Common Area is allocated proportionately to each land use category and included as part of GFA for that land use, except Hotel and Residential Care for which Common Area is not subject to the CLF.

A Primary Use is the land use category most applicable to a Non-Residential Project that is predominately of one land use category and is used or intended for use by a single business or

tenant as one premises. Where a Primary Use is established, the CLF rate for the Primary Use is applied to all applicable GFA. In Non-Residential buildings for which at least 90% of GFA is within a single land use category, that land use category will be considered the Primary Use if any additional land use categories within the same building are designed or intended for use by the same business or tenant. For example, in a warehouse building that includes office space for use by the business that operates the warehouse, warehouse is considered the Primary Use if at least 90% of the GFA is warehouse. As a separate example, an office building that includes ground floor retail intended for lease to a separate tenant from the office space, Primary Use *does not apply*, rather CLF rates would be applied to the individual land use categories.

## 2.10 Changes in Use

Development Permits approving a change in use from one Non-Residential land use category to another are subject to the CLF when a higher CLF rate applies to the new use and the change in use applies to 5,000 square feet or more of GFA (SJMC 5.11.040 and 5.11.020 K). With a change in use, the CLF is calculated based on the incremental difference in the CLF applicable to the new use and the existing use, both applied based on rates then in effect. If there is a mix of existing uses in the building, then the fee applicable to all uses is calculated and compared to the new use(s). No fee is due when the change in use is to a land use category with a CLF fee equal or less than the existing use(s).

**Table 2. Illustration of Commercial Linkage Fee Calculation with Change in Use**

	A. Existing Use	B. New Use	C. Net CLF Due = B. – A. (positive amounts)
<b>Example 1: Convert Existing Warehouse to Office</b>			
Use	Warehouse	Office	
GFA	200,000	200,000	
Applicable CLF Rate	\$5.00	\$12.00 (downtown rate)	
Calculated Fee	\$1,000,000	\$2,400,000	\$1,400,000
<b>Example 2: Convert Existing Warehouse to Retail</b>			
Use	Warehouse	Retail	
GFA	200,000	200,000	
Applicable CLF Rate	\$5.00	\$0.00	
Calculated Fee	\$1,000,000	\$0	No fee due

*Vacant buildings* – If the existing building is vacant, the last approved use is used to determine the applicable rate for the existing use. If the last approved use cannot be determined, the Director of Planning Building and Code Enforcement will determine the applicable land use category (SJMC 5.11.020 J.8.).

*Credit for existing use regardless of prior payment* – Credit for the existing use applies regardless of whether a CLF was previously paid with respect to the existing use. For example, if the existing warehouse building in the example presented in Table 2 had not previously been subject to the CLF, credit for removal of the existing use would still apply in the same amount as is illustrated.

*Changes in use in new development* – For changes in use in a newly constructed building, the CLF is reassessed at the rate applicable to the new use less a credit for any prior payments made. For example, if a CLF payment is made for one land use category at Final Inspection of Building Shell and a building permit for tenant improvements for a different land use category is being issued, the CLF is reassessed at the rate for the new use identified in the tenant improvement building permit and prior payments are credited toward the amount due. For changes in use from an exempt to a non-exempt land use category, the full rate applicable to the non-exempt land use category applies. Credits for an existing use, as described in the preceding paragraph, do not apply to newly constructed space that undergoes a change in use; however, prior fee payments are credited.

*No credit for existing residential use* – Where the change in use is from a residential to a non-residential use, no credit for the existing residential use will apply for purposes of determination of the CLF that is due.

*Time of payment with change in use* - For changes in use that will require issuance of a CO for improvements, the CLF is due prior to issuance of any CO. For changes in use that do not require issuance of a CO, the CLF is due prior to issuance of the applicable Development Permit.

*No phased option with change in use* – For uses with a phased payment option, the rate applicable to payment in full at Final Inspection of Building Shell is applied in determining the incremental CLF due with a change in use and the provisions of the preceding paragraph apply regarding time of payment.

## **2.11 Credits for Removal**

The amount of legally permitted Non-Residential square footage to be demolished or removed in an existing building or structure in connection with a Non-Residential Project shall be applied as a credit in calculating the amount of the CLF due (per Resolution Section 2B). Credit is based on the CLF rate for the land use category applicable to the existing use(s) to be removed. Credit is provided up to the full amount of the CLF due for the Non-Residential Project. No refunds are issued. Credit is provided for floor area removed after the date an application is submitted for a Development Permit. Credits for removal do not apply to sites that are vacant as of the date an application for first approval of a Development Permit is submitted. Credit is provided for existing GFA removed from the same site as the Non-Residential Project and is not transferrable between sites. No credit is provided for removal of existing residential uses.

## **2.12 Determination of Land Use Category**

Fee levels vary by land use category. Attachment A cross references use categories referenced in the Zoning Ordinance (Title 20) with the corresponding land use categories, as provided in the SJMC 5.11.020 J. For uses not in one of the categories identified in Attachment A, the Director of PBCE shall determine whether one of the land use categories subject to the CLF applies or if the use is exempt. If there is insufficient information to determine the applicable land use category at the time of building permit issuance, the most likely land use category shall be used for the fee calculation prepared prior to building permit issuance and shall be subject to reassessment prior to issuance of any CO.

### 2.13 Exemptions (SJMC 5.11.050)

The following uses are exempt from the CLF pursuant to the Ordinance. Buildings or portions thereof built exclusively for use or occupancy by one of the listed facilities are exempt:

Shelter/hotel supportive housing	Commercial vehicle storage	Parking
Agriculture	Data center	Peaking power plant
Aquaculture aquaponics and hydroponics	Day Care	Public and quasi-public
Stadiums, arenas, performing arts venues, and rehearsal space	Education and training	Public storage/mini-storage
Cemetery	Energy generation facility	Power generation
Certified farmer's market	Mineral extraction	Utility facilities
Neighborhood agriculture	Museums, libraries, parks, playgrounds, community centers	Wireless communication antenna
Assembly uses	Outdoor vending	

In addition, the following exemptions apply:

1. A project or portion thereof required to comply with the Inclusionary Housing Ordinance (Chapter 5.08) or the Housing Impact Fee Resolution (Resolution No. 77218 as amended);
2. Any resident-serving Non-Residential portion of a multi-family rental housing project (including child care, employment, social, and counselling services, and the like) developed by a nonprofit housing provider if the Applicant is receiving financial assistance through a public agency, so long as the multi-family rental housing project is an Affordable Housing project meeting the requirements of state or local law and the project's Affordable Housing obligations are secured by a recorded regulatory agreement, recorded memorandum of agreement, or recorded covenant with a public agency for a minimum period of fifty-five (55) years; and
3. Re-occupancy of square footage in an existing building or structure if there is no change of use.

### **3.0 MITIGATION FEE ACT REPORTING REQUIREMENTS**

The Ordinance specifies that the Commercial Linkage Fee Fund is subject to the provisions of California Government Code section 66000 et seq (SJMC 5.11.080 E.), referred to as the Mitigation Fee Act (MFA). Accordingly, the Commercial Linkage Fee Fund shall be administered and accounted for consistent with the MFA. The City shall prepare the annual reports and make the required Five-Year findings, in accordance with the MFA, as summarized below.

#### **3.1 Annual Report**

Annual reports must be made available to the public within 180 days after the last day of each fiscal year. The City Council must review the information at the next regularly scheduled public meeting held at least 15 days after the information is made available to the public, and notice must be given at least 15 days before the meeting to any party that has requested it.

Annual Reports must contain the following information:

- (A) A brief description of the type of fee in the account or fund;
- (B) The amount of the fee;
- (C) The beginning and ending balance of the Commercial Linkage Fee Fund;
- (D) The amount of the fees collected and the interest earned;
- (E) An identification of each expenditure from the account, including a brief description of the expenditure and the percentage of the total cost of the expenditure funded by the fees;
- (F) Once the City determines it has adequate funds to assist one or more affordable housing developments with the CLF Fund, an approximate date when construction will begin on the affordable housing developments to be funded with the CLF Fund;
- (G) A description of any interfund transfer or loan made from the CLF Fund; and
- (H) The amount of refunds to property owners from the CLF Fund pursuant to MFA Section 66001, subdivision (e), and any allocations pursuant to MFA Section 66001, subdivision (f).

### **3.2 Five-Year Findings**

At the public meeting for the fifth fiscal year following the first deposit into the CLF Fund, and every five years thereafter, the City Council must make specific findings to continue its collection of the fees if any unexpended funds remain in the account.

Findings must:

- (A) Identify the purpose of imposing the CLF;
- (B) Demonstrate a reasonable relationship between the CLF and the purpose for which it is charged;
- (C) Identify all sources and amounts of funding anticipated to complete financing any incomplete improvements that were identified when enacting the fee; and
- (D) Identify the approximate dates when the anticipated funds listed in paragraph (C) are expected to be received.

Findings are made concurrent with the public review and approval of the annual report described in the prior section. If five-year findings are not made, the City is required to refund moneys in the CLF fund to property owners consistent with MFA Section 66001, subdivision (e).

## ATTACHMENT A –Land Use Categories

The following table provides a cross reference between the use categories referenced in the Zoning Ordinance (Title 20) and the corresponding land use categories provided in the Ordinance.

<i>Use</i>	CLF Land Use Category					
	<i>Office</i>	<i>Retail</i>	<i>Hotel</i>	<i>Industrial / R&amp;D</i>	<i>Warehouse</i>	<i>Residential Care</i>
Social Services Agencies	X					
Health and Veterinary Services	X					
Health Services	X					
Offices and Financial Services	X					
Television/radio studios	X					
Animal Boarding					X	
Recreation, commercial indoor		X				
Cannabis sales		X				
Poolroom/billiards, arcade, amusement games, card room		X				
Alcohol Sales		X				
Pawn shop/broker		X				
Bail Bond establishment		X				
Dining Facilities		X				
Drinking Establishment		X				
Drive-Through Uses		X				
Food Services		X				
Fuel Service Station		X				
General Retail		X				
General Services		X				
Health Recreation		X				
Public Eating Establishment		X				
Selling or leasing of vehicles		X				
Photo Processing, Printing and Publishing in retail structures		X				
Photo Processing, Printing, Publishing - industrial facilities				X		
Hotel/Inn			X			
Recycling Uses				X		
Cleaning Establishment				X		
Industry				X		
Installation or selling of vehicle accessories or services				X		
Manufacturing & Industrial Services				X		



<i>Use</i>	<i>CLF Land Use Category</i>					
	<i>Office</i>	<i>Retail</i>	<i>Hotel</i>	<i>Industrial / R&amp;D</i>	<i>Warehouse</i>	<i>Residential Care</i>
R&D, Lab, Processing				X		
Stockyard, Warehouse, & Wholesale					X	
Waste/ Hazardous material storage					X	
Common Carrier Depot					X	
Construction/ corporation yard					X	
Residential care/service facility						X

Residential Care includes facilities licensed by the State of California consistent with SJMC Section 20.200.1010 and excludes facilities or portions thereof that are exempt from the CLF pursuant to SJMC 5.11.050 for reason of a requirement to comply with the Inclusionary Housing Ordinance (SJMC 5.08).