

**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.

June 13, 2022

**TABLE OF CONTENTS**

**1.0 INTRODUCTION..... 1**

1.1 Establishment and Purpose of Commercial Linkage Fee ..... 1

1.2 Purpose of Guidelines ..... 1

**2.0 COMMERCIAL LINKAGE FEE REQUIREMENT ..... 2**

2.1 Effective Date ..... 2

2.2 Minimum Project Size Subject to CLF (*SJMC 5.11.020 M*) ..... 2

2.3 CLF Rates (*SJMC 5.11.030* and Resolution)..... 2

2.4 Time of Payment Options (*SJMC 5.11.030* and Resolution)..... 3

2.5 CLF Satisfaction Plan Application ..... 4

2.6 Determination of Final CLF Amount, Collection and Payment ..... 5

2.7 Application of Project Size Thresholds..... 5

2.8 Projects with Multiple Uses ..... 6

2.9 Changes in Use ..... 6

2.10 Credits for Removal..... 9

2.11 Determination of Land Use Category ..... 9

2.12 Exemptions (*SJMC 5.11.050*)..... 10

**3.0 CREDITS FOR PROVIDING AFFORDABLE HOUSING..... 11**

3.1 Credit Amounts ..... 11

3.2 Example Credit Calculation ..... 12

3.3 Inclusionary Housing Ordinance Double Counting Not Permitted (*SJMC 5.11.055*)..... 12

3.4 How Credit Amounts are Calculated (*SJMC 5.11.055*)..... 13

3.5 Standards for Credit Units and Covenant Credit Units ..... 13

3.6 CLF Satisfaction Plan: Credit Unit and Covenant Credit Unit Information ..... 15

3.7 CLF Satisfaction Agreement..... 17

3.8 Standards for Inclusionary Units Apply..... 18

**4.0 MITIGATION FEE ACT REPORTING REQUIREMENTS..... 19**

4.1 Annual Report..... 19

4.2 Five-Year Findings ..... 19

**ATTACHMENT A –Land Use Categories ..... 21**

**ATTACHMENT B - Calculation of the CLF Credit for Providing Affordable Units ..... 23**

## **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](#) on September 22, 2020, as amended by [Ordinance No. 30744](#) on April 12, 2022 (collectively the “Ordinance”). 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). The City adopted Resolution No. [No. 80439](#) on March 29, 2022 (Resolution), which supersedes the original CLF fee resolution adopted in 2020, and establishes fee amounts and a schedule of credits that apply when affordable units are provided.

### **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 M*)

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 (*SJMC 5.11.030* and Resolution)

The CLF is determined based on the rate in effect at the time of building permit issuance as automatically adjusted through the date of payment in accordance with the index specified in the Ordinance. 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.

---

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

**2.4 Time of Payment Options (SJMC 5.11.030 and Resolution)**

Payment options under the Ordinance and Resolution are as follows:

1. **Pay in full at scheduling of final building inspection.** When payment is made in full prior to scheduling of final building inspection, the full fee specified in Section 1A of the Resolution is due.
2. **Pay 80% at building permit (Resolution 1D).** Projects that pay in full prior to issuance of any building permit are eligible for a reduced fee equal to 80% of the amount that would otherwise be due.
3. **Deferred Payment Agreement (Only Office or Industrial / R&D with 100,000 Sq.Ft.+)** *Terms are subject to City approval. Agreement must be executed prior to building permit.* (Resolution 1E). Office and Industrial / R&D projects of 100,000 square feet or more may enter into a deferred payment agreement prior to the issuance of the first building permit. The deferred payment agreement option allows for payment in five installments as shown in Table 1.

**Table 1. Deferred Payment Option: Office & Industrial / R&D of 100,000+ Sq.Ft.**

<b>Payment</b>	<b>Time Due</b>	<b>Amount</b>
Payment 1	prior to building permit	20% x total due <sup>(1)</sup>
Payment 2	prior to scheduling of final building inspection	20% x total due <sup>(1)</sup>
Payment 3	One-year anniversary of scheduling of final building inspection.	20.600% x total due <sup>(1)</sup> including interest <sup>(2)</sup>
Payment 4	Two-year anniversary of scheduling of final building inspection.	21.218% x total due <sup>(1)</sup> , including interest <sup>(2)</sup>
Payment 5	Three-year anniversary of scheduling of final building inspection.	21.855% x total due <sup>(1)</sup> , including interest <sup>(2)</sup>

(1) Total due as calculated in accordance with Resolution Section 1A.

(2) Payment 3, 4 and 5 are subject to 3% annual interest on the portion of the CLF deferred until after scheduling of final building inspection. Percentage factors include this interest.

Payment 2 is indexed through the date of payment pursuant to SJMC 5.11.030D.

Payments 3, 4 and 5 are based upon rates in effect on the date of Payment 2 plus 3% annual interest that accrues from the scheduling of the final building inspection.

Projects selecting the deferred payment option will be required to enter into a deferred payment agreement on a standard form approved by the City Attorney. The deferred

payment agreement must be secured by a payment bond or irrevocable letter of credit on a standard form approved by the City Attorney, to ensure the payment of the installments occurring after the scheduling of final building inspection.

4. **Option to Provide Affordable Units** *Terms are subject to City approval. Agreement must be executed prior to building permit.* (SJMC 5.11.055 and Resolution 1C) - Projects have the option to provide affordable units for credit towards satisfaction of the CLF. For each affordable unit provided, a specified square footage credit toward satisfaction of the CLF is earned. The amount of credit varies according to the affordability level of the unit provided and whether the unit is newly constructed or a covenant placed on an existing unit. See Section 3 for more information about this option.

## **2.5 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.
- b. Floor area of existing buildings by use category as of the date of application.
- c. Estimate of the CLF due. A final determination of the CLF due will be made by the City.
- d. Selection of a time of payment option.
- e. Identification of any exemption that applies along with evidence to support eligibility.
- f. Identify whether affordable units are proposed to be provided for CLF credit along with the additional information specified in Section 3 for projects selecting this compliance option.

Applicants are 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.

## **2.6 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. Fees under the payment 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 L.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 amount due. 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 in full of the CLF is required prior to scheduling a final building inspection, except eligible projects with an executed deferred payment agreement. Payment of the full amount due must be confirmed by PBCE prior to scheduling of the final building inspection.

## **2.7 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.

## **2.8 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.

## **2.9 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 M). 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	\$15.00 (Downtown rate)	
Calculated Fee	\$1,000,000	\$3,000,000	\$2,000,000
<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 L.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 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 a final building inspection for the improvements, the CLF is due prior to the final building inspection. For changes in use that do not require a final building inspection, the CLF is due prior to issuance of the applicable Development Permit. Projects not requiring a final building inspection are ineligible for the deferred payment agreement option described in Section 2.4.

*Ground-up construction required to be eligible for reduced fee* – Projects with 5,000 square feet or more of new ground-up construction are eligible for reduced fees for payment in full at building permit under Resolution Section 1D, including the portion of the CLF due as a result of the change in use. Projects that include a change and use but less than 5,000 square feet of new ground-up construction are not eligible for reduced fees for payment at building permit.

## **2.10 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 1B). 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.

## **2.11 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 L. 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 scheduling of final building inspection.

## 2.12 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 CREDITS FOR PROVIDING AFFORDABLE HOUSING**

The CLF may be satisfied by providing affordable housing on or off the site of the Non-Residential Project (SJMC 5.11.055). Each unit provided results in credit toward the CLF for a specified square footage of floor area.

There are two categories of affordable units eligible for CLF credit:

- **Credit Units** are newly constructed affordable units; and
- **Covenant Credit Units** are units for which affordability restrictions have been placed on existing market rate rental units.

Credit Units and Covenant Credit Units must be affordable to Extremely Low, Very Low, Low, or Moderate Income households and meet the standards in Section 3.5 to be eligible for CLF credit.

#### **3.1 Credit Amounts**

The Resolution specifies the amount of square footage credit provided for each Credit Unit or Covenant Credit Unit, as summarized in Table 3. Credits are subtracted from the total floor area prior to determining the remaining amount of CLF due, if any. Credit amounts vary according to the income level applicable to the recorded affordability restriction.

For most uses, credits are applied to GFA. For uses for which the CLF applies to net floor area excluding Common Area, credits are applied to reduce the floor area excluding Common Area that is subject to the CLF.

Square footage credits applied to Office uses of 100,000 square feet or more in the Downtown and Nearby Subarea must be calculated in accordance with the applicable column in the Resolution (and Table 3).

No refund is provided if square footage credits exceed the floor area subject to the CLF.

For mixed use projects, credits may be applied toward the CLF of any use, and may be applied toward the highest fee use(s) before applying any credits toward uses with lower fees.

Credits may not reduce the fee for any individual use in a mixed-use project below zero.

<b>Table 3. Schedule of Credits toward Commercial Linkage Fee Payment for Projects Providing Affordable Units</b>					
Affordability Level of Provided Unit	Income Level Applicable to Affordable Rents	Square Feet of Floor Area <sup>(1)</sup> Credited for Commercial Linkage Fee Payment for Each Affordable Unit Provided			
		Per Credit Unit (newly built affordable units)		Per Covenant Credit Unit (affordability restrictions placed on existing units)	
		Office in Downtown and Nearby Subarea (≥100,000 sq. ft.)	Other Non-Residential	Office in Downtown and Nearby Subarea (≥100,000 sq. ft.)	Other Non-Residential
Extremely Low	30% of AMI	20,323 SF	60,971 SF	10,162 SF	30,486 SF
Very Low	50% of AMI	15,605 SF	46,817 SF	7,803 SF	23,409 SF
Low	60% of AMI	12,097 SF	36,292 SF	6,049 SF	18,146 SF
Moderate	100% of AMI	2,903 SF	8,710 SF	1,452 SF	4,355 SF

AMI = Area Median Income

(1) Commercial Linkage Fee payment shall be satisfied for the specified square footage of floor area for each Credit Unit or Covenant Credit Unit provided. For uses for which the Commercial Linkage Fee applies to gross floor area, credits are applied to reduce the gross floor area subject to the Commercial Linkage Fee. For uses for which the Commercial Linkage Fee applies to floor area excluding Common Area, credits are applied to reduce the floor area excluding Common Area that is subject to the Commercial Linkage Fee.

### 3.2 Example Credit Calculation

Table 4 is an example illustrating how credits for providing affordable units are applied. In the example, three Low Income affordable units are constructed (Credit Units) to meet the CLF requirement for a 120,000 SF office project in North San José. Based on the credit schedule in Table 3, the three units satisfy the CLF requirement for 108,876 square feet of GFA. A CLF fee is due on the remaining 11,124 square feet of GFA after applying this credit.

**Table 4. Example Credit Calculation for Office Project in North San José**

Use:	Office, North San José Subarea			
GFA:	120,000 SF			
<u>A.</u>	<u>B.</u>	<u>C.</u>	<u>D.</u>	
Credit Units Provided	Square Feet Credited Per Credit Unit	Total Square Fee Credited	Remaining GFA Subject to CLF after Credits	
		= A. X B.	= total GFA - C.	
3 at Low Income	36,292 SF	108,876 SF	11,124 SF	

### 3.3 Inclusionary Housing Ordinance Double Counting Not Permitted (SJMC 5.11.055)

Affordable units being used to satisfy separate requirements of the City’s Inclusionary Housing Ordinance (SJMC 5.08) are not eligible for credit toward the CLF requirement.

Affordable projects that receive a funding or land contribution from the City of San José and/or the County of Santa Clara may not be used as Credit Units or Covenant Credit Units.

### **3.4 How Credit Amounts are Calculated (SJMC 5.11.055)**

Credit amounts are derived from the in-lieu fee for Strong Market areas under the City's Inclusionary Housing Ordinance established pursuant to SJMC Section 5.08. Credit amounts for Low income are calculated as the in-lieu fee for Strong Market areas expressed as an equivalent amount per required affordable unit, and divided by the per square foot Commercial Linkage Fee rate for office uses over 100,000 square feet. Credits for units in other income categories are calculated based on a proportionate adjustment to the credit for Low Income units using the Affordability Gaps determined pursuant to the Inclusionary Housing Ordinance. A separate schedule of credits is calculated for office projects of 100,000 square feet or more within the Downtown and Nearby subarea to maintain a proportional relationship between credits and the higher CLF rate that applies. Attachment B provides the supporting calculations.

### **3.5 Standards for Credit Units and Covenant Credit Units**

The following standards apply to Credit Units and Covenant Credit Units:

- (1) Rental** – units must be available for-rent to Extremely Low, Very Low, Low or Moderate Income Households. For-sale units are not permitted.
- (2) Affordable Rents** – Affordable rents shall be set at an Affordable Housing Cost to households earning no more than 30% of Area Median Income (AMI) for Extremely Low Income units, 50% of AMI for Very Low units, 60% of AMI for Low Income units, and 100% AMI for Moderate Income units, adjusted for family size, as defined in California Health & Safety Code and as amended from time to time. The City of San José annually posts income levels and affordable rents on its website.
- (3) May Not Precede Satisfaction Plan Approval** - No building permit shall have been issued for proposed Credit Units prior to approval of the CLF Satisfaction Plan. Covenants for proposed Covenant Credit Units shall not have been recorded prior to approval of the CLF Satisfaction Plan.
- (4) Time of Completion** – Units must be provided prior to the deadline for payment of the fee, as follows:
  - a. Credit Units must be completed and a City affordability restriction recorded on the property where the units are located prior to scheduling of final building

inspection for the Non-Residential Project for which credit is requested. Completion is defined as having received a certificate of occupancy or temporary certificate of occupancy.

- b. Covenant Credit Units must have a City affordability restriction recorded, and any improvements needed to meet the condition and code compliance standards described herein must be complete, prior to scheduling of final building inspection for the Non-Residential Project for which credit is requested.

With a multi-building or multi-phase Non-Residential Project, timing requirements apply relative to each individual building or phase for which CLF credit is sought. For example, Credit Units that satisfy the CLF for subsequent phases are not required to be completed with the first Non-Residential Project phase.

If the preceding timing of completion conditions are not met prior to scheduling of final building inspection:

- The CLF must be paid in full and calculated on the basis of no Credit Units or Covenant Credit Units having been provided, or
- Projects proposing at least 30 Credit Units or Covenant Credit Units may enter into a deferred payment agreement with the City on a standard form approved by the City Attorney to provide for payment of the CLF amounts corresponding to the credits. The deferred payment agreement must be secured by a payment bond or irrevocable letter of credit on a standard form approved by the City Attorney to ensure collection of the CLF if Credit Units or Covenant Credit Units are not completed and affordability restrictions not recorded within three years of final building inspection for the Non-Residential Project.

**(5) Unit Mix** –units must have an average of 1.3 bedrooms per unit or greater<sup>2</sup>.

**(6) Term of Affordability** – The standards in SJMC 5.08.600 B requiring a 99-year term of affordability, unless otherwise prescribed in the Inclusionary Housing Guidelines, shall apply to units provided in satisfaction of the CLF.

**(7) Site for Credit Units**– The site proposed for construction of the Credit Units must have a General Plan designation allowing residential uses, and environmental review shall have been completed with hazards mitigated to the satisfaction of the City prior to approval of the CLF Satisfaction Plan. The site must be zoned for residential development at a density that will accommodate at least the number of units proposed to be provided no later than the approval of the Development Permit for the Non-Residential Project.

---

<sup>2</sup> This is the average bedroom size for affordable units used to establish mitigation costs in the Nexus Study.



Completion of entitlements and documentation of ownership or control of the site must occur consistent with the construction schedule in the CLF Satisfaction Plan.

- (8) **Affordable Housing Siting Policy Applies** – Credit Units and Covenant Credit Units to be located on a different site from the Non-Residential Project must comply with the City's Affordable Housing Siting Policy.
- (9) **Available to General Public** - Units must be available to the general public and not a condition of employment (e.g., not employee housing).

The following additional standards apply to Covenant Credit Units:

- (1) **Moderate Income Covenant Credit Units** – Credit for Moderate Income Covenant Credit Units will only be granted if market rate rents for comparable units exceed 30% of 120% of area median income. Compliance with this standard must be supported by a market analysis evaluating rents for comparable units. Comparable units shall be of a similar square footage size, number of bedrooms and bathrooms, physical condition, have comparable on-site amenities, and be located near the proposed Covenant Credit Units (preferably within one mile). If current market rents for proposed Covenant Credit Units are available, such rents may be used or included in the market analysis.
- (2) **Condition** - The Covenant Credit Units and the building where they are located must have been built or substantially rehabilitated within the last five years or otherwise demonstrate a remaining life of 55 years. A physical needs and code compliance assessment to the satisfaction of the City shall be performed if proposed Covenant Credit Units were not built or substantially rehabilitated within the five years preceding the Satisfaction Plan application. Items identified in the assessment needing repair, replacement or maintenance in the next three years shall be completed prior to acceptance for purposes of CLF credit.
- (3) **Compliance with Codes** - Covenant Credit Units shall be in compliance with all current Building and Housing Codes and shall not constitute a nonconforming use.
- (4) **New Restriction** – Covenant Credit Units must place affordability restrictions on existing market rate units. Rents must not already be restricted.
- (5) **No Displacement** – Covenant Credit Units must be vacant or occupied by a household that is income eligible. No tenant shall have been removed to create a vacancy.

### **3.6 CLF Satisfaction Plan: Credit Unit and Covenant Credit Unit Information**

The following additional information must be attached to the CLF Satisfaction Plan for any projects proposing to provide Credit Units or Covenant Credit Units.

1. Detailed information about the proposed Credit Units or Covenant Credit Units, including the following:
  - a. Specify whether the units are Credit Units or Covenant Credit Units.
  - b. Location including address, APN, and location map.
  - c. Name and contact information for property owner.
  - d. Number of units by income level and identification of units for which CLF credit is requested.
  - e. Unit type (e.g., multi-family, townhouse, etc.) and confirmation units are rental.
  - f. Number of bedrooms and bathrooms in each unit.
  - g. Parcel map(s)
  - h. Site plan(s) indicating the proposed location and square footage of each unit.
  - i. General Plan designation.
  - j. Current phase I environmental review and, if called for, phase II and evidence of completed hazard mitigation.
  - k. Construction and completion schedule that shows ownership or control of the site and that it will be zoned for development of the affordable units at an adequate density no later than the date of approval of the Development Permit for the Non-Residential Project and timing of construction of affordable units, or the recording of covenants in the case of Covenant Credit Units, in relation to construction of the Non-Residential Development.
  - l. Confirmation that the units are not being used to satisfy the City's Inclusionary Housing Ordinance.
2. Evidence of consent to record a CLF Satisfaction Agreement on the affordable housing site.
3. Title report.
4. If units are not located on the same site as the Non-Residential development, a letter stating that the site conforms to the City's adopted Affordable Housing Siting Policy. Staff will provide information on how to determine whether the proposed site conforms to the City's Affordable Housing Siting Policy.
5. Proposed financing:
  - a. Identification of anticipated construction and permanent sources and uses of funds for development of the affordable units.
  - b. Identify any public funding anticipated in connection with the project (units receiving a funding or land contribution from the City of San Jose or County of Santa Clara are not eligible).
  - c. A reliable financing mechanism for ongoing administration and monitoring of the units.

- d. A description of the manner by which a capital reserve for repair, replacement and maintenance shall be maintained for the term of the affordability restriction, with provision for sufficient initial capitalization and periodic contributions to the capital reserve.
6. For any proposed Covenant Credit Units:
  - a. Year units were built.
  - b. For units older than five years, a discussion of the condition of the units and documentation of any substantial renovation occurring within the preceding five years, or planned prior to approval of the Covenant Credit Units for CLF credit.
  - c. A physical needs and code compliance assessment to the satisfaction of the City for any units not built or substantially rehabilitated in the five years preceding the application. Include a plan to remedy identified repair or replacement needs and code compliance deficiencies such that proposed Covenant Credit Units will be brought into compliance and demonstrate a useful life of at least 55 years.
  - d. Confirmation that units do not have a current affordability restriction.
  - e. Confirmation units are vacant or occupied by income eligible household(s) and that no tenant has been or will be removed to create a vacancy.
  - f. For any Moderate Covenant Credit Units proposed, a market survey to provide evidence that market rents for comparable units located within one mile of the proposed Moderate Covenant Credit Units do not exceed 30% of 120% of Area Median Income.
7. Any other information, including a detailed narrative that facilitates the Housing Department's ability to evaluate compliance with the commercial linkage fee ordinance and guidelines.

Projects proposing Credit Units or Covenant Credit Units will be required to execute a CLF Satisfaction Agreement with the City. The CLF Satisfaction Agreement will be recorded against the Non-Residential project and the site applicable to the affordable units.

### **3.7 CLF Satisfaction Agreement**

The Developer of any Non-Residential Project subject to the Ordinance that has selected the option to provide Credit Units or Covenant Credit Units in the CLF Satisfaction Plan application, will be required to execute an CLF Satisfaction Agreement with the City. The CLF Satisfaction Agreement will then be recorded against the entire Non-Residential project and the site of the proposed affordable units.

### 3.8 Standards for Inclusionary Units Apply

Credit Units and Covenant Credit Units shall comply with the requirements and standards of the City's [Inclusionary Housing Ordinance Guidelines](#), standards for off-site Inclusionary Units, including the following provisions, as updated from time to time, unless otherwise specified in these Guidelines:

- Inclusionary Renter Household Income Limits
- Affordable Rental Rates
- Occupancy Conditions
- Minimum Household Size
- Annual Rent Adjustments
- Ongoing Compliance with Affordability Restrictions
- Annual Tenant Income Certification (TIC)
- Terms of Tenancy
- Availability of New Units for Lease
- Marketing /Leasing of Units
- Owner/Manager Certification
- Terms of Affordability Covenants

Where Credit Units or Covenant Credit Units are provided on the same site as the Non-Residential Development as part of a mixed-use development that also includes market-rate units, the City's [Inclusionary Housing Ordinance Guidelines](#), standards for on-site Inclusionary Units shall apply, including each of the above-referenced provisions. In addition, standards for on-site Inclusionary Units identified in the following Inclusionary Housing Ordinance Guidelines sections shall also apply:

- Timing of Construction of Rental Inclusionary Units
- Standards for Rental Inclusionary Units.

## **4.0 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.

### **4.1 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).

### **4.2 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).



## ATTACHMENT B - Calculation of the CLF Credit for Providing Affordable Units

Credit toward the City's Commercial Linkage Fee (CLF) is available to commercial projects that provide affordable units. Commercial projects receive a credit for satisfying the CLF for an identified amount of floor area for each affordable unit provided. This summary shows how the adopted credits are derived. The relationship between fee dollars and affordable units reflected in the City's inclusionary in-lieu fee is used as the basis for determining the credit, using the following steps.

### Step 1: Identify Cost Per Affordable Unit to Calculate Credit

Identify a cost per affordable unit to translate from fee dollars to units. The in-lieu fee for the inclusionary program is used as the basis for relating fee dollars and affordable units.

A. Adopted in-lieu fee for rentals in strong market areas <sup>(1)</sup>		<b>\$43 /SF</b>
B. Average market rate unit size for in-lieu fee calculation <sup>(2)</sup>		844 SF
C. Inclusionary percentage applicable to in-lieu fee (off-site percentage applies)		20%
D. In-lieu fee, effective rate per required affordable unit	= A. X B. / C.	<b>\$181,460</b>

<sup>(1)</sup> In-lieu fee without adjustments for on-site units or moderate market areas is applied as the purpose is to reflect the full gap.

<sup>(2)</sup> From Step 1 of the [calculation used to determine the rental in-lieu fee](#).

### Step 2: Determine Credit for Low Income Units

Credits are expressed as the amount of floor area for which the CLF is satisfied for each affordable unit provided. Credits are calculated based on representative fee levels for office, rather than create a more complex schedule of credits for each use and geographic area. The effective in-lieu fee rate per affordable unit of \$181,460 is used to determine the credit for each Low Income unit because inclusionary units have an average AMI level that falls within the Low Income category.

	<i>Downtown Office</i>	<i>All Other Uses</i>
A. Commercial Linkage Fee rate for credit calculation	\$15 /SF	\$5 /SF
B. Effective in-lieu fee rate per affordable unit (Step 1)	\$181,460	\$181,460
<b>C. Floor Area credited for each Low Income unit</b>	<b>12,097 SF</b>	<b>36,292 SF</b>

### Step 3: Identify Credits for Other Income Levels

A set of ratios are applied to translate the credit for Low Income units from Step 2 into credits for Extremely Low, Very Low and Moderate. Ratios represent the relative cost of providing units by income category based on factors used in the determination of the City's in-lieu fees.

	A.	B.	C. D.	
	Affordability Percentages from In-Lieu Fee Calculation	Ratios based on gap by Income Category	Floor Area Credited for CLF Payment for each Credit Unit Provided	
	(% of gap by income level) <sup>(1)</sup>	=A. / A. for Low	<i>Downtown Office</i>	<i>All Other Uses</i>
			= B X Credit for Low Income from Step 2	
Extremely Low	N/A <sup>(2)</sup>	1.68 <sup>(2)</sup>	<b>20,323 SF</b>	<b>60,971 SF</b>
Very Low	51.16%	1.29	<b>15,605 SF</b>	<b>46,817 SF</b>
Low	39.53%	1.00	<b>12,097 SF</b>	<b>36,292 SF</b>
Moderate	9.30%	0.24	<b>2,903 SF</b>	<b>8,710 SF</b>

<sup>(1)</sup> Figures are from [Step 5 of the in-lieu fee calculation used to identify Adjusted In-Lieu Fees](#) for projects providing at least 5% inclusionary units on-site. Percentages reflect the estimated share of the affordability gap applicable to each income category.

<sup>(2)</sup> For Extremely Low, no comparable affordability percentage was determined in calculating in-lieu fees. Instead, factors from Appendix Table H-1 of the [CLF Feasibility Study](#) are used. The ratio of 1.68 is calculated by dividing the office 2,781 SF credit per unit for Extremely Low by the 1,656 SF office credit per unit for Low Income.

**Step 4: Calculate Square Footage Credits for Covenant Credit Units**

To calculate the square footage credits that apply to Covenant Credit Units, figures for Credit Units from Step 3 are divided by two because Covenant Credit Units are eligible for half the amount of square footage credit as Credit Units pursuant to SJMC 5.11.055 B.

	<b>A. Floor Area Credited for CLF Payment for each Credit Unit Provided</b>		<b>C. Floor Area Credited for CLF Payment for each Covenant Credit Unit Provided</b>	
	<i>Downtown Office</i>	<i>All Other Uses</i>	<i>Downtown Office</i>	<i>All Other Uses</i>
	Amounts from Step 3		= A. / 2	B. / 2
Extremely Low	20,323 SF	60,971 SF	10,162 SF	30,486 SF
Very Low	15,605 SF	46,817 SF	7,803 SF	23,409 SF
Low	12,097 SF	36,292 SF	6,049 SF	18,146 SF
Moderate	2,903 SF	8,710 SF	1,452 SF	4,355 SF