

## **ATTACHMENT 3. UTILIZING THE IN LIEU FEE OPTION**

### **I. Introduction (SJMC Sections 5.08.500, 5.08.520)**

This attachment to the Guidelines provides more information on how Developers may satisfy their inclusionary housing obligation by paying an In Lieu Fee rather than building the requisite number of Inclusionary Units. Definitions for capitalized terms may be found in the Revised Guidelines and the IHO.

### **II. For-Sale In Lieu Calculation (SJMC Section 5.08.520)**

The In Lieu fee obligation will be calculated by the City at the time the Developer provides payment based on the adopted In Lieu fee Schedule in place at that time. For each Residential Development the total In Lieu fee will be calculated by multiplying the project size (measured in net residential square feet) by the appropriate In Lieu fee rate. To account for inflation in affordable housing development costs the In Lieu fee shall be increased on July 1 of each year by the Engineering News Record (“ENR”) Construction Cost Index for the San Francisco area published by McGraw Hill on or about January 1 of that year, or its successor publication, for the preceding twelve (12) months until such time that a new In Lieu fee is determined pursuant to this Section.

#### **A. Applicable Square Footage**

The In Lieu fee for each For-Sale Residential Development shall be determined based on the net square footage of the For-Sale Residential Development as calculated by the City.

The In Lieu fee for each Rental Residential Development shall be determined based on the rentable square footage of the Rental Residential Development as calculated by the City as described below.

In each case, measurement shall be from the outside surface of the exterior stud walls and will include all finished living space. The measurement will not include the following (exclusions):

1. Vehicular (automobile, motorcycle, bicycle) parking areas, whether assigned or not, that are separate areas from the unit,
2. Common hallways that access the front doors of two or more units,
3. Common rooms/lounges together with supporting facilities such as kitchens and restrooms,
4. Building lobbies,
5. Balconies, whether private or open to all residents,
6. Common stairwells that serve two or more units,
7. Elevator shafts,
8. Utility shafts,
9. Custodial or janitorial closets,
10. Common recreation areas – such as fitness centers, community rooms, and roof spaces,

11. Storage lockers not located within residential units, and
12. Other qualifying areas that are not associated with residential units, upon approval of the Director of Housing.

With respect to developments designed or permitted based on shared common facilities (e.g., co-living, single room occupancy, suite-style student or senior housing) the square footage to be assessed shall be determined in a manner that reasonably reflects the design of a project for separate rental of bedrooms or suites with shared common facilities. For those developments, the exclusions to square footage assessment will not include community rooms, common rooms/lounges together with supporting facilities such as kitchens and restrooms and other heated interior residential areas associated with the dwelling units or suites.

#### B. The In Lieu Fee Rate

The current In Lieu Fee Schedule is available online at [Fees & Charges](#) page 102.

The In Lieu fees shall be included as part of the annual “Schedule of Fees and Charges” adopted by Council during the annual budget process, or by virtue of adoption by another resolution of the City Council. The In Lieu fee schedule includes separate rates for For-Sale and Rental Developments.

#### C. For-Sale Developments

Residential Developments with attached units are presumed to be rental developments. To qualify as a For-Sale Residential Development for purposes of calculating the In Lieu fee, a project must provide evidence of compliance with the Subdivided Lands Act prior to the issuance of a Certificate of Occupancy, including:

1. recordation of the covenants, conditions, and restrictions,
2. the formation of a Homeowner’s Association including executed governing documents and completed incorporation,
3. California Bureau of Real Estate approval of a final subdivision report, and
4. evidence of marketing of the Residential Development as a For-Sale Development.

#### D. Strong vs Moderate Market Areas

The Fee Schedule includes per square foot In Lieu fee rates for rental developments in both Strong Market Areas and Moderate Market Areas. These Market Areas have been designated by City Council resolution based on residential building activity levels for market rate housing. Resolution 79904, adopted March 9, 2021 identified the West Valley Market Area and the Central Market Area as Strong Market Areas and all other Market Areas as Moderate Market Areas. Council may revise these Market Area Designations in the future based on changing market conditions.

A map and detailed descriptions of the Market Area boundaries is available on the Housing Department web site [IHO Market map](#).

E. Small Project Reduction

The In Lieu fee for Residential Developments with up to nineteen (19) dwelling units that provide ninety percent (90%) or more of the maximum residential density permitted for the site by the San Jose General Plan shall be half the amount otherwise due.

The City’s Department of Planning Building and Code Enforcement will calculate the allowable density on a site based on net developable acreage that would exclude Right-of-Ways, internal private streets or drives and riparian areas setbacks.

F. Qualifying High Rise Rental Residential Development Fee Reduction Program

The City may, by City Council resolution or policy, adopt reduced In Lieu Fees for Residential Developments of ten (10) or more floors or stories in height (not including any non-residential uses) in a specified area of the City. The reduction of the Fees shall only apply to all such development and not to individual High Rise Residential Developments.

The In Lieu fees for qualifying Downtown High Rise Developments that obtain all Certificates of Occupancy on or prior to June 30, 2025 shall be as follows:

Building permit by June 30, 2021	\$0/Square Foot
Building permit by June 30, 2022	\$0/Square Foot
Building permit by June 30, 2023	\$0/Square Foot
Building permit by June 30, 2024	\$13/Square Foot
Building permit by June 30, 2025	\$23/Square Foot

**III. Affordable Housing Compliance Plan Application**

(SJMC Sections 5.08.120, 5.08.155, 5.08.320.H, 5.08.420,5.08.520, 5.08.610)

Developers who elect the In Lieu Fee Compliance Option must provide the information required by Section 4 of the Revised Guidelines, as well as the following additional requirements:

- A. Net Residential Square footage of the project.
- B. Whether the project is claiming eligibility for the Small Project or Highrise fees rather than the generally applicable In Lieu Fee.
- C. The Market Area within which the project is located.

**IV. Inclusionary Housing Agreement**  
(SJMC Sections 5.08.195, 5.08.420, 5.08.460, 5.08.600, 5.08.610, 5.08.710)

See the requirements of Section 6 of the Revised Guidelines. The Inclusionary Housing Agreement shall incorporate and include the approved Affordable Housing Compliance Plan, containing all information relating to the In Lieu Fee obligation.

A Residential Development's estimated In Lieu Fee obligation will be calculated at the time when the Inclusionary Housing Agreement is recorded based on the per square foot In Lieu Fee adopted by the City. This per square foot In Lieu-Fee will apply to the Residential Development until a new In Lieu Fee is adopted by the City. The Developer may pay the In Lieu Fee at any time after the Inclusionary Housing Agreement has been recorded, but prior to the City issuing any Certificate(s) of Occupancy for the Residential Development. The final In Lieu Fee will be calculated at the time when the Developer provides payment, based on the adopted In Lieu fee Schedule in place at that time. The City will not issue a certificate of occupancy for any market rate unit in the Residential Development prior to the payment in full of all In Lieu Fees to the City.

The Inclusionary Housing Agreement will state the total estimated In Lieu Fee amount based on the adopted fees at the time of execution, and that the actual fee due will be based on the adopted fees as of date of payment, which must be prior to the issuance of any Certificate of Occupancy. Additionally, if the Residential Development is modified so that residential square footage increases, the tenure type changes or a permit expires and must be reprocessed, the City may require the In Lieu Fee obligation to be recalculated.

Once the Developer has paid the In Lieu Fee in full for the Residential Development, the City will remove the recorded Inclusionary Housing Agreement from the property.

The Developer shall provide both notice by recorded document against the Residential Development and, additionally, for each For-Sale Dwelling Unit therein, the Developer shall provide specific written notice to any purchaser of any Dwelling Unit prior to the acceptance of any offer to purchase, and shall obtain executed acknowledgement of the receipt of such notice, that purchaser shall not have any right to occupy the Dwelling Unit until such time as all In Lieu fees owing for the Residential Development are paid to the City.