

**Below Market Rate (BMR) Housing Mitigation Program
Procedural Manual**



CUPERTINO

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1. Introduction

In accordance with the City of Cupertino's Housing Element, all new residential and/or non-residential developments are required to help mitigate project-related impacts on affordable housing needs.

As required by Section 19.172.030 of the Cupertino Municipal Code, this manual establishes procedures for implementing the affordable housing mitigation provisions of the City's Below Market Rate (BMR) Housing Mitigation Program.

A separate manual, the "Policy and Procedures Manual for Administering Deed Restricted Affordable Housing Units" establishes the procedures for the on-going administration of the inventory of BMR units created by the City's Residential Housing Mitigation Program. The City or its agent will administer the programs.

2 Housing Mitigation Program

2.1 Applicability

- A. The Non-residential and Residential Housing Mitigation Programs are applicable to all non-residential and/or residential projects that result in an increase of gross floor area (for fee-based program) and/or the number of net new units in a development (for unit-based program) with the following exemptions:
1. New gross floor area that is replacing demolished or destroyed gross floor area;
 2. Existing space that is being rehabilitated, but not enlarged;
 3. Governmental buildings;
 4. Institutional buildings;
 5. Demolition and rebuild of or additions to existing single family homes;
 6. Accessory dwelling units and
 7. Parking garages (this exemption does not apply to commercial paid-parking garages).

The program has two components; a fee-based program for certain types of development and a unit-based program for other types of development.

2.2 Affordable Housing Mitigation Fee

- A. Non-residential and residential affordable housing mitigation fee amounts are set by the City Council for developments as outlined in Chapters 3, 4 and 5.
- B. The Affordable Housing Mitigation Fee may not exceed the cost of mitigating the impact of the type of development on the need for affordable housing as supported by nexus studies that may be commissioned from time to time by the City Council.
- C. The fee shall be adjusted annually using the Consumer Price Index (all items index for the San Francisco Bay Area).
- D. The City will publish the most recently adopted housing mitigation fees annually in the fee schedule.

2.2.1 Payment

- A. Fees shall be based on the fee schedule in effect on the date that the construction permit is issued by the City and shall be due and payable on the date of issuance of construction permits, unless otherwise required by state law.
- B. In the event that the applicant is allowed to defer payment of fees and is issued construction permits, the fees shall be due and payable according to the fee schedule in effect on the date of fee payment, prior to first occupancy of the project, unless a negotiated Development Agreement allows otherwise.

- C. All fees shall be deposited into the City's Below Market Rate (BMR) Affordable Housing Fund (AHF).

2.2.2 Permitted Use of Fees

- A. Affordable housing mitigation fees deposited into the BMR AHF shall only be used for the provision of affordable housing in Cupertino.
- B. The options for use of the fee revenue include, but are not limited to the following:
 - 1. BMR Program Administration
 - 2. Land Acquisition
 - 3. New Construction
 - 4. Acquisition and/or rehabilitation of buildings for permanent affordability
 - 5. Preserving "at-risk" BMR Units
 - 6. Substantial Rehabilitation
 - 7. Rental Operating Subsidies
 - 8. Down Payment Assistance
 - 9. Direct gap financing
 - 10. Fair Housing
- C. A portion of the BMR AHF will be targeted to benefit the following groups, to the extent that these target populations are found, to be consistent with the needs identified in the nexus study:
 - 1. Extremely low-income households and
 - 2. Persons with special needs (such as the elderly, victims of domestic violence, and the disabled, including persons with developmental disabilities).

2.3 Affordable Housing Units

Affordable housing unit requirements are set by the City Council.

2.3.1 Minimum Affordability of Residential Units

- A. When a development provides Ownership Below-Market-Rate (BMR) units, the affordability requirements for units shall be as follows:
 - 1. Fifty percent (50%) of BMR units as median-income and fifty percent (50%) as moderate-income.
 - 2. If a single BMR unit is provided, it shall be designated for median income.
- B. When a development proposes to provide on-site Rental BMR units, the affordability requirements for units shall be as follows:

1. Sixty percent (60%) of BMR units as very low-income and forty percent (40%) as low-income.
 2. If a single BMR unit is provided, it shall be designated for very-low income.
- C. When the calculations in A or B (above) result in an odd number, the “extra unit” shall benefit the median-income group for Ownership BMR units and the very low-income group for on-site Rental BMR units.

<i>Affordability of Units – Example</i>				
	<i>Ownership BMR Units</i>		<i>Rental BMR Units*</i>	
<i># of BMR Units Required*</i>	<i># of Median Income Units</i>	<i># of Moderate Income Units</i>	<i># of Very-Low Income Units</i>	<i># of Low Income Units</i>
1	1	0	1	0
4	2	2	2	2
9	5 **	4	5	4***

* See Chapter 7 for BMR rental units.

** See Section 2.3.1 for extra unit

*** See Section 2.3.2 for fractional units

2.3.2 Fractional Units

- A. When computations for the number of required BMR units result in fractional units, the developer’s obligations shall be as follows:
1. 0.00 - 0.49 of a unit: Pay an in-lieu fee for the fractional unit in compliance with Section 2.2.1.
 2. 0.50 - 0.99 of a unit: Round up and provide one additional BMR unit.
- B. Determination of the in-lieu fee for fractional units:
1. Determine the total Housing Mitigation Fee for the entire project (as though impact fees will be paid rather than on-site units provided.) The Housing Mitigation Fee for the project is calculated by multiplying the gross floor area of the project by the applicable affordable housing mitigation fee based on the fee schedule in effect.
 2. Determine the Housing Mitigation Fee per affordable unit by dividing the total Housing Mitigation Fee as calculated in B1 (see above) by the total number of required affordable units (even if fractional).
 3. Determine the in-lieu fee owed for the fractional unit by multiplying the Housing Mitigation Fee per affordable unit as calculated in B3 (see above) by the fractional amount.

Example

*Residential project: 42 units; BMR requirement = 8.4 units
Gross Floor Area/home = 3,000 sq. ft. (excluding exemptions)
On-site requirement = 8 BMR units; In-lieu fee requirement = 0.4 unit
Affordable housing mitigation fee = \$20/sq. ft (assumed)*

In-lieu fee calculated as follows:

Step 1: *Total Housing Mitigation Fee = 42 units x 3,000 sq. ft. x \$20/sq. ft. = \$2,520,000.*
Step 2: *Impact fee per affordable unit = \$2,520,000 ÷ 8.4 BMR units = \$300,000 per BMR unit.*
Step 3: *In-lieu fractional impact fee = \$300,000 x 0.4 = \$120,000.*

Note: The fee calculation and estimates above are examples only and may not reflect actual fees.

2.3.3 Affordable Housing Plan

- A. For projects that propose BMR units, the applicant shall submit an “Affordable Housing Plan,” describing how a development project will comply with the City's BMR requirements, with the application for the first approval of the project.
- B. The plan shall identify the BMR units or parcels in the development.
- C. If alternatives are proposed in compliance with Chapter 7, the plan shall identify how the proposal is equivalent to the BMR requirements of Chapter 4.
- D. An applicant may submit a request for a waiver or modification of the City's BMR requirements concurrently with the application for the first approval of the project, based upon a showing that applying the requirements would result in an unconstitutional taking of property or would result in any other unconstitutional result. The request must set forth in detail the factual and legal basis for the claim.

The request for the waiver or modification will be processed concurrently with the affordable housing plan and all other permits required for the project.
- E. The decision-making body with authority to approve the project shall review and may approve, conditionally approve, or deny the Affordable Housing Plan. However, the City Council shall review and may approve, conditionally approve, or deny an Affordable Housing Plan that proposes alternatives to the BMR requirements of Chapter 3, 4, and/or 5 or that requests a waiver or modification of the BMR requirements. The waiver or modification may be approved only to the extent necessary to avoid an unconstitutional result, based on the City Attorney's legal advice, after adoption of written findings based on legal analysis and substantial evidence. If a waiver or modification is granted, any change in the project will invalidate the waiver or modification, and a new application will be required for a waiver or modification.

2.3.4 BMR Unit Design Requirements

- A. BMR units shall be comparable to market rate units in terms of unit type, number of bedrooms per unit, quality of exterior appearance and overall quality of construction.
- B. BMR unit size should be generally representative of the unit sizes within the market-rate portion of residential project.
- C. Interior features and finishes in affordable units shall be durable, of good quality and consistent with contemporary standards for new housing.
- D. The BMR units shall be dispersed throughout the residential project.

2.3.5 Initial Maximum Sales Prices and Rents of BMR Units

A. For Sale BMR Units

The maximum initial sales prices of BMR units will be determined by the City, or its agent, based on the maximum affordable housing cost provisions of Section 50052.5 of the California Health and Safety Code and the most recent published State Department of Housing and Community Development (HCD) income limits, as follows:

- 1. Determine the annual median income, based on HCD income tables for Santa Clara County, for a household size that is one person more than the number of bedrooms in the BMR unit.
- 2. Multiply the median income by the following:
 - a. 110% for a BMR moderate income unit; and
 - b. 90% for a BMR median income unit.
- 3. Obtain the maximum annual housing allowance by multiplying the annual income from Step 2 above by 0.35 (moderate-income) or 0.30 (median-income).
- 4. Obtain the maximum monthly housing allowance by dividing the annual housing allowance by 12.
- 5. Determine the maximum mortgage that can be financed:
 - a. The City's BMR ownership program requires a minimum borrower down payment of 5%; therefore, the first mortgage loan amount will be calculated at a 95% loan-to-value (LTV) ratio. In order to determine the primary mortgage interest rate at least two City BMR approved lenders will be contacted for a 30 year fully amortized fixed-rate primary home mortgage interest rate quote based on specific BMR sales price scenarios. Either use the average of the BMR lender interest rate quotes or 0.5% higher interest rate than interest rate quotes.

- b. Determine the maximum home mortgage that can be financed based on the principal and interest (P&I) mortgage payment as determined by the interest rate in Step 5a. The total monthly housing expense shall include the P&I mortgage payment, property taxes, mortgage insurance (if applicable), homeowner's insurance, and homeowner's association (HOA) fees.
- c. Determine the maximum initial BMR unit sales price by adding up the total monthly housing expense as described in Step 5b. The proposed total monthly housing expenses cannot exceed the maximum monthly housing allowance as described in step 4.

B. Rental BMR Units

1. The maximum initial rents for BMR units are set at a level affordable to low and very low-income households. The maximum initial rents for BMR units shall be determined based on:
 - a. Maximum housing allowance of 30% of gross income for a household size of one person more than the number of bedrooms in the rental BMR unit, and
 - b. For low income units, assume household income at 60% of median- income, and for very low-income units, assume household income at 50% of median-income.
2. The maximum rents for BMR units and maximum household income limits are revised annually following the annual publication of HCD income limits for Santa Clara County.
3. "Rent" includes monthly rent paid to the property owner, utilities, and all fees for parking and other housing services. A reasonable utility allowance, as determined by the tables published annually by the Santa Clara County Housing Authority, shall be deducted from the maximum monthly rents for those utilities paid by the tenant.
4. Where affordable housing units are developed with other state or federal housing program assistance, the rental price requirements of the state or federal housing program will supersede the price limitations of these Guidelines where they are more stringent.

2.3.6 Terms of Affordability

Affordable housing is subject to recorded covenants that require the units be occupied at prices/rents that are affordable to Low to Moderate-income households for a period of not less than 99 years from the date of first occupancy of the unit. These deed restrictions shall run with the land and will remain in effect for subsequent buyers and owners.

2.3.7 Agreement between Developer and City

- A. Prior to recordation of a final or parcel map or issuance of any building permit, whichever is earlier, an affordable housing agreement shall be recorded against the property. The affordable housing agreement shall include, but not be limited to, the following:
1. Total number of BMR units, type, location, square footage and number of bedrooms, and construction scheduling of market-rate and BMR units;
 2. Provisions to ensure concurrent construction and completion of BMR and market-rate units;
 3. Affordability levels for each BMR unit;
 4. Provisions for income certification and screening of potential occupants of BMR units;
 5. Resale control mechanisms;
 6. Financing of ongoing administrative and monitoring costs (City and private);
 7. If applicable, a relocation plan for tenants of rental BMR units upon sale of units or redevelopment of site; and
 8. Other reasonably required provisions to implement the Affordable Housing Plan.
- B. Agreements for projects that provide alternatives to BMR requirements shall additionally contain provisions to ensure that the alternative requirements are completed prior to occupancy of the market rate development.

3 Mitigation Requirements of Non-Residential Developments

3.1 Requirements

- A. All non-residential projects that result in a net increase in gross floor area shall be required to pay the Affordable Housing Mitigation Fee in compliance with Section 2.2 of this manual.
- B. Projects may propose alternatives to the BMR requirement in A (see above) in compliance with Chapter 7 of this manual.

3.2 Non-Residential Fee Calculations

Non-residential affordable housing mitigation fees shall be calculated by multiplying the increase in gross square footage (SF) by the applicable non-residential affordable housing mitigation fee.

<i>Example Calculation of Non-Residential Affordable Housing Mitigation Fee</i>			
<i>Scenario</i>	<i>Applicable SF</i>	<i>Fee Amount per SF of Gross Floor Area †</i>	<i>Total Fee</i>
<i>Demolish and rebuild retail project: Existing Gross sq. ft. = 10,000 sq. ft.; New Gross sq. ft. = 15,000 sq. ft.</i>	<i>5,000 sq. ft.</i>	<i>\$10.00/sq. ft.</i>	<i>\$50,000</i>
<i>New construction: Commercial office = 50,000 sq. ft.; Police substation = 1,500 sq. ft.*; Parking garage = 48,000 sq. ft.*</i>	<i>50,000 sq. ft.</i>	<i>\$20.00/sq. ft.</i>	<i>\$1,000,000</i>

Note: * Exempt

† The fee amounts above are examples only and may not reflect actual fee amounts.

4 Mitigation Requirements of Ownership Residential Developments

4.1 Requirements

- A. An ownership residential development is any residential development that includes the approval of a subdivision map and creates one or more units that may be sold individually. It also includes a condominium conversion.
- B. All ownership projects that result in the net increase in units shall be required to provide BMR mitigations in compliance with Section 4.2 and 4.3.
- C. Projects that propose alternatives to the BMR requirement in A (see above) shall do so in compliance with Chapter 7 of this manual.

4.2 BMR Requirements for Developments with One (1) to Four (4) Units

New ownership projects adding one to four units may either pay the Affordable Housing Mitigation Fee in compliance with Section 2.2 or provide one BMR unit in compliance with Section 2.3.

<i>Example Calculation of Ownership Affordable Housing Mitigation Fee (1-6 units)</i>			
<i>Scenario</i>	<i>Applicable SF</i>	<i>Fee Amount per SF of Gross Floor Area †</i>	<i>Total Fee</i>
<i>New single family home or townhome: Gross sq. ft. = 3,025 sq. ft.; Garage = 425 sq. ft.*</i>	<i>2,600 sq. ft.</i>	<i>\$20.00/sq. ft.</i>	<i>\$52,000</i>
<i>New 4 unit multifamily ownership development: Gross sq. ft. = 10,000 sq. ft.; Garage = 4,000 sq. ft.*</i>	<i>6,000 sq. ft.</i>	<i>\$20.00/sq. ft.</i>	<i>\$120,000</i>

Note: * Exempt;

† The fee amounts above are examples only and may not reflect actual fee amounts.

4.3 BMR Requirements for Developments with Five (5) or more Units

New ownership projects with five or more units or lots shall provide at least 20% of the units or lots as BMR ownership units or lots per Section 2.3.

<i>Example Calculation of Ownership Affordable Housing Mitigation Fee (7+ units)</i>			
<i>Scenario</i>	<i>BMR requirement</i>	<i>BMR units</i>	<i>Fees</i>
<i>New 24-unit ownership townhome project</i>	<i>24 x 20% = 4.8 units</i>	<i>5 units*</i>	<i>N/A</i>
<i>New 46-unit condominium development</i>	<i>46 x 20% = 9.2 units</i>	<i>9 units</i>	<i>Pay fee for 0.2 unit per Section 2.3.2</i>

Note: * Additional unit if over 0.49 per Section 2.3.2;

† The fee amounts above are examples only and may not reflect actual fee amounts.

5 Mitigation Requirements of Rental Residential Developments

5.1 Requirements

- A. A rental residential development is any residential development that creates new dwelling units that cannot be sold individually.
- B. All rental projects that result in the net increase in units shall be required to provide BMR mitigations in compliance with Section 5.2 and 5.3.
- C. Projects that propose alternatives to the BMR requirement in A (see above) shall do so in compliance with Chapter 7 of this manual.

5.2 BMR Requirements for Developments with One (1) to Four (4) Units

New rental projects adding one to four units may either pay the Affordable Housing Mitigation Fee in compliance with Section 2.2 or provide one BMR unit in compliance with Section 2.3.

<i>Example Calculation of Residential Affordable Housing Impact Fee (Rental Projects)</i>		
<i>Scenario</i>	<i>Fee Amount per SF of Gross Floor Area †</i>	<i>Total Fee</i>
<i>New 4 unit multifamily rental development: Gross livable sq. ft. = 5,000 sq. ft.;</i>	<i>\$20.00/sq. ft.</i>	<i>\$100,000</i>

Note: † The fee amounts above are examples only and may not reflect actual fee amounts

5.3 BMR Requirements for Developments with Five (5) or more Units

New rental projects with five or more units shall provide at least 15% of the units or lots as BMR ownership units or lots per Section 2.3.

<i>Example Calculation of Rental Affordable Housing Mitigation Fee (7+ units)</i>			
<i>Scenario</i>	<i>BMR requirement</i>	<i>BMR units</i>	<i>Fees</i>
<i>New 25-unit rental project</i>	<i>25 x 15% = 3.75 units</i>	<i>4 units*</i>	<i>NA</i>
<i>New 45-unit rental project</i>	<i>45 x 15% = 8.25 units</i>	<i>8 units</i>	<i>Pay fee for 0.25 unit per Section 2.3.2</i>

Note: * Additional unit if over 0.49 per Section 2.3.2;

† The fee amounts above are examples only and may not reflect actual fee amounts.

6 Mitigation Requirements for Mixed-Use Projects

6.1 Requirements

- A. All new and redeveloped mixed-use developments shall comply with requirements in:
1. Chapter 3 for non-residential components; and/or
 2. Chapter 4 for residential ownership components; and/or
 3. Chapter 5 for residential rental components.
- B. Projects that propose alternatives to the BMR requirements in A (see above) shall do so in compliance with Chapter 7 of this manual.

6.2 Mixed-Use Mitigation Fee Calculations

<i>Example Calculation of Residential Affordable Housing Mitigation Fee</i>			
<i>Scenario</i>	<i>Applicable SF</i>	<i>Fee Amount per SF of Gross Floor Area †</i>	<i>Total Mitigation</i>
<i>New mixed-use project:</i> <i>Res. condos (2 units) = 3,000 sq. ft.;</i> <i>Office = 5,000 sq. ft.;</i> <i>Parking Garage = 850 sq. ft.*</i>	<i>Res. = 3,000 sq. ft.</i> <i>Off. = 5,000 sq. ft.</i>	<i>Residential Ownership fee =</i> <i>\$20.00/sq. ft.</i>	<i>\$160,000</i>
<i>New mixed-use project:</i> <i>Res. Apartments (4 units) = 3,200 sq. ft.;</i> <i>Retail = 3,500 sq. ft.</i> <i>Parking Garage = 0 sq. ft.</i>	<i>Res. = 3,200 sq. ft.</i> <i>Retail = 3,500 sq. ft.</i>		<i>Residential Rental fee =</i> <i>\$25.00/sq. ft.</i>
<i>New mixed-use project:</i> <i>Res. rental (120 units) = 110,000 sq. ft.;</i> <i>Retail space = 50,000 sq. ft.;</i> <i>Hotel (160 rooms) = 50,000 sq. ft.;</i> <i>Parking Garage = 150,000 sq. ft.*</i>	<i>Res. = 120 units.</i> <i>Retail = 50,000 sq. ft.</i> <i>Hotel = 50,000 sq. ft.</i>	<i>Residential Rental BMR Units = 15%</i> <i>Residential Ownership BMR units = 20%</i>	<i>18 units plus \$1,000,000</i>
<i>New mixed-use project:</i> <i>Res. Condos (120 units) = 110,000 sq. ft.;</i> <i>Retail space = 10,000 sq. ft.;</i> <i>Office = 25,000 sq. ft.;</i> <i>Parking Garage = 60,000 sq. ft.*</i>	<i>Res. = 120 units</i> <i>Retail = 10,000 sq. ft.</i> <i>Office = 25,000 sq. ft.</i>		<i>Office fee = \$20.00/sq. ft.</i> <i>Retail & Hotel fee = \$10/sq. ft.</i>

Note: * Exempt

† The fee amounts above are examples only and may not reflect actual fee amounts.

7 Alternatives to BMR Requirements

The Council may, at its discretion, approve other alternatives to Chapters 3, 4, 5 and 6. The alternatives proposed shall be equivalent to the applicable BMR requirements for the project.

7.1 Options for Alternatives

- A. Options for Alternatives to BMR Requirements may include, but are not limited to the following:
 - 1. On-site BMR rental units where ownership units or a fee is required.
 - 2. Purchase of off-site units to be dedicated and/or rehabilitated as for-sale or rental BMR units per Section 2.3.
 - 3. Development of off-site units to be dedicated as for-sale or rental BMR units per Section 2.3.
 - 4. Land for development of affordable housing.
- B. The Council may approve, conditionally approve, or deny a proposal to provide alternatives to BMR requirements.

7.2 Housing Plan for Alternative BMR Requirements

- A. If alternatives to BMR requirements are proposed, an Affordable Housing Plan shall, in addition to the requirements of Section 2.3.3:
 - 1. Demonstrate equivalency of the alternative to BMR requirements
 - 2. Rental BMR units shall be affordable as shown in Section 2.3.1.
 - 3. If off-site development of BMR units is proposed:
 - a. Identify the proposed site and demonstrate site control;
 - b. Identify the developer for the proposed off-site BMR project;
 - c. If not appropriately zoned, demonstrate compatibility of the proposed project with adjacent uses;
 - d. Provide a financial pro forma identifying all financing sources to fully fund an affordable project; and
 - e. Provide a plan for completion of the off-site BMR development, prior to approval of the market-rate project. The Affordable Housing Plan shall additionally include, but not be limited to, the following items prior to any parcel or final map or issuance of building permits for the market-rate project, whichever is earlier:
 - i. Transfer of property to BMR developer;

- ii. Recordation of a city-approved deed restriction against the property;
 - iii. Discretionary approvals from the City for the proposed BMR development;
 - iv. Committed financing for the project in an escrow account or an account approved by the City with joint signatory authority with the City and firm commitments from lenders or other sources of financing for the project; and
 - v. A contingency plan, including a schedule of timing and agreement to provide the required on-site BMR mitigation, in the event the off-site BMR units are not completed prior to completion of the market rate development.
- B. The City may retain a consultant, at the developer's expense, to review the reasonableness of the proposal and the submitted pro-forma.

8 City Incentives

8.1 Density Bonus

To maximize housing opportunity and partially assist the developer by reducing or eliminating the development cost for the affordable units, a density bonus consistent with Chapter 19.56 of the Cupertino Municipal Code, Density Bonus, will be permitted.

8.2 Financial Assistance

If the project qualifies, the City may choose to utilize BMR AHF monies to create a greater percentage of affordable units at greater affordability than otherwise required (very low and low income in for-sale developments; extremely low and very low in rental developments).

8.3 Fee Waivers

The City may consider waiving park dedication and construction tax fees for affordable units.

8.4 Priority Processing

The City shall, wherever possible, consider expediting the processing of developments with affordable units.

8.5 City Certification of Buyer and Tenant Eligibility

The City or its agent shall certify the eligibility of all proposed buyers and renters of BMR units.