



# SAN FRANCISCO PLANNING DEPARTMENT

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## Letter of Determination

January 29, 2009

David Silverman, Attorney  
Reuben and Junius, LLP  
One Bush Street, Suite 600  
San Francisco, CA 94104

RE: **BMR *in lieu* fee Determination**  
**231 Franklin Street (Block 816, Lots 2, 17 and 22)**  
**(Your) File No.: 8420.19**

Dear Mr. Silverman:

This letter is in response to your request for a zoning letter of determination for the above-referenced property. In your request, you seek a determination, for the calculation of *in lieu* fees as an alternative to providing Below Market Rate (hereinafter "BMR") units in new-construction housing projects. In your letter, you point out the disparity between the provision of whole numbers of BMR units when the option of off-site construction is chosen versus the fractional amount generated (as an *in lieu* fee) when the appropriate percentage is calculated based on the number of dwelling units to be constructed.

Section 315.6(b) of the Code says "(t)he amount of fee which may be paid by the project applicant subject to the Ordinance in lieu of developing and providing housing required by Section 315.4 shall be determined by Mayor's Office of Housing ("MOH") utilizing the following factors:"

Code Section 315.6(b)(1) states "(t)he number of units required by Section 315.5 if the project applicant were to elect to meet the requirements of this section by off-site housing development. For the purposes of this section, the City shall calculate the fee by using the direct fractional result of the total number of units multiplied by the percentage of off-site housing required, rather than rounding up the resulting figure as required by Section 315.5(a)."

Clearly, MOH has the responsibility for determining the actual *in lieu* fee. The formula described in Code Section 315.6(b)(1) above was followed by MOH in its calculation of the applicable fees. The *in lieu* fee determination is based on the fractional result of 17 percent of each unit type. Code Section 315.6(b)(1) states that the *in lieu* fee is based on "the direct fractional result of the total number of units multiplied by the percentage of off-site housing required" (emphasis added). You state in your letter that "the intent of the Code is clear that the *in lieu* fee should not be greater than the off-site construction requirement." I disagree with you that "the intent is clear", as the Code is silent on this issue. You also state that the "Code does not provide any authority for the Mayor's Office of Housing to exceed the 5-unit requirement for the purpose of

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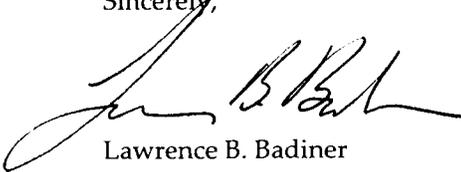
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calculating the in lieu fee." (There would be five required off-site units in the subject case). The Code does not say or imply that MOH may not exceed this figure if the sum of the "direct fractional result" exceeds the whole number of off-site units that would be required. What the Code does state is that the *in lieu* fee "shall be determined by MOH." Accordingly, MOH has some leeway in establishing the actual fee charged, subject to the limitations for such calculations established in Code Section 315.6.

In your letter, you posit two methods of calculating the *in lieu* fee. One is to round the numbers of units to whole numbers and then apply the "*in lieu* fee by unit size" using those whole numbers as multipliers. The second of these two methods involves adjusted off-site requirements, reduced proportionally to total as nearly as possible to 5.0 units, multiplied by the "*in lieu* fee by unit size". Neither of these methods is recognized or set forth by the Code as the formula for producing such calculations. Accordingly, they are not supported by a literal reading of the Code. The Code does not provide for your substitution of judgment as to the manner of fee calculation.

If you believe this determination represents an error in interpretation of the Planning Code or abuse in discretion by the Zoning administrator, an appeal may be filed with the Board of Appeals within 15 days of the date of this letter. For information regarding the appeals process, please contact the Board of Appeals located at 1660 Mission Street, Room 3036, San Francisco, or call (415) 575-6880.

Sincerely,



Lawrence B. Badiner  
Zoning Administrator

cc: Jim Miller, Planner  
Chandra Egan, MOH

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