




Office of the City Manager

INFORMATION CALENDAR

October 16, 2012

To: Honorable Mayor and Members of the City Council
From:  Christine Daniel, City Manager
Submitted by: Michael J. Caplan, Economic Development Manager
Subject: Nexus Studies for Revision of Commercial Development Housing and Child Care Mitigation Fees

INTRODUCTION

On May 3, 2011, the City Council adopted Resolution No. 65,255-N.S. that directed “staff to conduct studies to update the fees and other relevant aspects” of the Resolutions that in 1993 imposed housing and child care mitigation requirements on commercial developments in Berkeley. Primarily, this has meant updating the two nexus studies that had been issued in 1988 to document the relationship between construction of new commercial space and the need for housing and child care affordable to low and moderate income employees.¹ Along with background information on the affordable housing and child care mitigation programs, this report transmits the updated nexus studies along with the original versions. In the near future, staff will return to Council with recommendations for new Housing and Child Care Fee Resolutions. Tonight’s Council workshop on development fees provides the general context for Council decisions on these and all related fees.

CURRENT SITUATION AND ITS EFFECTS

Court decisions and California *Government Code* Section 66000 require local agencies to establish a “nexus” or “link” between the needs created by a project and “mitigation” fees exacted. In particular, the U.S. Supreme Court has held (*Dolan v. City of Tigard* (1994) 114S.Ct. 2309, that there must be a “rough proportionality” between project impacts and mitigation fees proposed. In line with this requirement, the updated Nexus studies calculate the maximum fees that would be legally justifiable to charge developers of each major type of commercial property to mitigate the impact of their projects.

The studies and this report do not, however, propose the actual fees to be included in the two new fee Resolutions which staff will prepare and present to Council in the near

¹ *Documentation of Linkage between Commercial and Industrial Development in Berkeley and the Need for Low and Very-Low Income Housing in Berkeley*, prepared by Bill Lambert and Dave Fogarty, City of Berkeley Office of Economic Development, December, 1988, and *Documentation of Linkage between Commercial and Industrial Development in Berkeley and the Need for Affordable Child Care in Berkeley*, prepared by Bill Lambert and Dave Fogarty, December, 1988.

future. A recommendation for actual fee levels should take into account the burden of other existing and proposed fees on commercial development in Berkeley as well as market and real estate factors that determine the feasibility of building projects here. The City derives sustained revenue benefits from commercial developments, such as increased property and sales tax revenue, that exceed the one-time revenue from development fees.

BACKGROUND

In the early 1980s, some large cities such as Boston and San Francisco created jobs/housing linkage programs that imposed fees on new industrial, commercial and office developments to offset the impact of new employment on housing needs. The principle that local government could require residential developers to offset the school or park/recreational impacts of their developments through “impact fees” was well-established. The new linkage fees extended this idea to require developers of new commercial space to offset or “mitigate” the affordable housing or child care needs created by the new employees working in the newly-constructed workspace.

Court decisions required that local governments conduct an analysis, usually called a “nexus study”, to demonstrate the need for any new developer fee and determine an appropriate amount to be charged that is reasonably proportional to the development’s impact. The City of Berkeley completed its nexus studies for the housing and childcare mitigation fees in 1988 but it was not until April 20, 1993, that the City Council approved Ordinance No. 6,179-N.S. enabling mitigation fees and the two Resolutions that established the fees themselves.

The Affordable Housing Mitigation Program was established by Resolution No. 56,912-N.S. approved on April 20, 1993.² It imposed fees on “office, retail, industrial and/or other commercial new construction in which the net additional, newly constructed gross floor area is over 7,500 square feet.” For new construction of office and retail space, the fees were \$4.00 per square foot of new floor area; for new construction of industrial space the fee was \$2.00 per square foot of new floor area. Fees were also applied to any “office, retail/and/or other non-industrial commercial change of use where the net gross floor area undergoing a change of use is over 7,500 square feet”. The business owner was only required to pay when the change represented an “intensification of use”: i.e., increased the number of employees on the site. For such intensifications, the applicant was required to pay a fee for each new employee. Finally, fees were also imposed on the reoccupation of buildings that had been vacant for more than 3 years on the same basis as for “intensifications of use”: i.e., a fee per net additional employee.

Resolution no. 56,913-N.S., also approved on April 20, 1993, established the Affordable Child Care Mitigation Program. This program also imposed fees on new construction, changes of use and reoccupation of vacant buildings using the same size standards as

² The full text of this Resolution is included as Attachment 3 to the Council report of May 3, 2011, *Status of Housing and Child Care Mitigation Fees*.

the affordable housing mitigation Resolution.³ These fees were to be used for implementation of services, not construction of new child care space. The rates per square foot for new construction and the rates per net additional employee for intensifications of use and reoccupation of vacant buildings were one quarter of those for affordable housing.

Since 1993, the affordable housing mitigation program has yielded a total of \$1,876,722 including payments pending. The affordable child care program yielded \$743,793 including payments pending.⁴ The fees have made, and continue to make, important contributions to the Housing Trust Fund and to subsidizing affordable child care.

Housing and child care mitigation fees are leveraged with other state and federal development and supportive services funding sources as they become available.

Section 6 of Resolution No. 56,912-N.S. required that it be “completely reviewed and updated two (2) years from adoption...and then every five years to keep pace with changing market, socio-economic, and funding conditions.” Unfortunately, this was never done and it was therefore long overdue when Council accepted staff’s recommendation of May 3, 2011 (Resolution No. 65,255-N.S.) that the nexus studies be revised and updated. Now that these nexus studies are complete, staff can recommend new fee Resolutions, with the proposed fee levels reflecting both the conclusions of these studies and information on the feasibility of new commercial and industrial development in Berkeley including the burden of other existing and planned development fees.

The introduction and text of the two revised nexus studies describe the steps staff has taken to update them, the sources used, and changes in methodology. Due to revisions to the Zoning Ordinance from the West Berkeley Project, staff has added Research and Development as a new category of commercial property that would be assessed mitigation fees. The 1988 versions are attached for purposes of comparison.

POSSIBLE FUTURE ACTION

Staff will present revised fee Resolutions for the housing and child care mitigation programs as soon possible after evaluation of the overall burden affecting development in Berkeley and market feasibility.

FISCAL IMPACTS OF POSSIBLE FUTURE ACTION

Housing mitigation fees are deposited into the Housing Trust Fund (budget code 250-8004-431.81). Child care mitigation fees go to the Child Care Mitigation Operating

³ The text of this Resolution is included as Attachment 4 to the Council Report of May 3, 2011, *Status of Housing and Child Care Mitigation Fees*.

⁴ For details on payments, see the same Council Report of May 3, 2011, Attachment 2: Mitigation Summary. The figures for payment totals cited above have been update to reflect mitigation payments from the Weatherford BMW expansion at 735 Ashby/750 Potter and location of Annie’s Naturals at 1608 4th Street.

Subsidy Fund (budget code 251-7902-463). The revenue streams for both mitigation programs will depend on the future volume of commercial development in Berkeley and on the fee rates set by Council.

CONTACT PERSON

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Attachments:

1. Documentation of Linkage Between Commercial and Industrial Development in Berkeley and Need for Low and Very-Low Income Housing in Berkeley. Updated, October 2012.
2. Documentation of Linkage Between Commercial and Industrial Development in Berkeley and Need for Affordable Child Care in Berkeley. Updated, October 2012.
3. Documentation of Linkage Between Commercial and Industrial Development in Berkeley and Need for Low and Very-Low Income Housing in Berkeley-1988
4. Documentation of Linkage Between Commercial and Industrial Development in Berkeley and Need for Affordable Child Care in Berkeley - 1988