



Kathryn Harrison  
Councilmember District 4

CONSENT CALENDAR  
May 16, 2017

To: Honorable Mayor and Members of the City Council  
From: Councilmember Harrison  
Subject: Changes in the Affordable Housing Mitigation Fee

RECOMMENDATION

Amend Ordinance 7.499-N.S by eliminating the discount in the affordable housing mitigation fee when it is paid at issuance of the building permit and clarifying that the 20% of inclusionary units for applicants who choose to provide inclusionary units in lieu of the fee is applied to total project units, not market rate units consistent with the 2015 Nexus Study. In addition, the amendments require that project applicants pay the Affordable Housing Mitigation Fee for projects with ten or fewer proposed market rate units (including density bonus market rate units) rather than have the option of building the affordable units on site. The proposed amendments clarify the fee process for Affordable Housing.

FINANCIAL IMPLICATIONS

Eliminating the discount in the Affordable Housing Mitigation Fee (AHMF) and requiring it to be adjusted by the Construction Cost Index (CCI) each year would result in additional fees being available in the Affordable Housing Fund.

BACKGROUND

The AHMF is an important source of local funds that assist affordable housing developers leverage additional, non-local funding. The current situation allows an applicant to elect to pay the fee at the Certificate of Occupancy at the amount recommended in the 2015 Nexus Study, but also allows an applicant to pay a discounted fee of \$30,000 per new unit of rental housing if the fee is paid on issuance of the building permit. The Housing Advisory Commission recommended that the AHMF be paid at the full \$34,000 amount adopted by the Council at building permit as is done in San Francisco. Instead, the City Council elected to provide two options, one a discounted \$30,000 fee per market rate unit if paid at the time the building permit is issued – an option not discussed in the Nexus Study – or a \$34,000 fee if paid when the certificate of occupancy is issued. The time period between building permit and certificate of occupancy is estimated at two to three years; for applicants who chose the option of paying the full amount at certificate of occupancy, the AHMF is without those earmarked funds during that period.



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The Nexus Study indicated that for every 100 market rate units, a need for 25 affordable units is created. Thus, in a 125 unit building, 20% of the *total* units (i.e., 25 units) would be affordable and 80% (i.e., 100) would be market rate if the applicant elects to build inclusionary units. This makes intuitive sense as applicants usually have a project size in mind before beginning. Instead, the current statute begins with *market rate* units and calculates the required number of affordable units on that basis. Thus, for 100 market rate units above results in only 20 affordable units in a 120 unit project, or 16.67% affordability. Not only does this reduce the number of affordable units, it changes the building envelope from 125 to 120 units.

In addition, the administration and monitoring required to ensure that property owners comply with affordable housing requirements for properties providing inclusionary units is time consuming. Requiring staff to do so for very small projects places an undue administrative burden and cost on the City. Thus, the ordinance requires that project applicants pay the Affordable Housing Mitigation Fee for projects with 10 or fewer proposed market rate units (including density bonus units) rather than providing these developments with the option of building the affordable units on site. State law does not allow local jurisdictions to require inclusionary units built on site to remain affordable in perpetuity, it does allow jurisdictions to provide only the option of paying housing mitigation fees.

#### ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated the action suggested in this report.

#### CONTACT PERSON

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#### Attachments:

1: Ordinance

ORDINANCE NO. 7,499-N.S.

AMENDING BERKELEY MUNICIPAL CODE SECTION 22.20.065 AFFORDABLE  
HOUSING MITIGATION FEE

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Section 22.20.065 is amended to read as follows:

**22.20.065 Affordable housing mitigation fee.**

A. Findings and purpose.

1. The State of California has established a Regional Housing Needs Allocation (RHNA) process under which it allocates a "fair share" of the regional housing need, updated periodically, to each local jurisdiction. The RHNA for the San Francisco Bay Area allocates to Berkeley a "fair share" that calls for adequate sites for 2,431 housing units for the period from 2007 to 2014, including sites for 164 extremely low income units, 164 very low income units, 424 lower income units, and 549 moderate income units. The City's Housing Element, adopted on October 19, 2010, complies with this RHNA.

2. In 1990, the City established the Housing Trust Fund to pool available funding for affordable housing development. The majority of resources in the Housing Trust Fund have been from federal sources, although state and local sources have been significant as well. Since 1990, the City has provided Housing Trust Funds to affordable housing developments throughout the City, and has revised the Housing Trust Fund Guidelines a number of times, most recently in 2009, to reflect changing market conditions and City priorities.

3. While Housing Trust Funds are a significant source of support for affordable housing developments within the City, Housing Trust Funds alone are not sufficient to cover the costs of providing affordable housing today. Each development must leverage multiple federal and state sources of funding to be financially feasible. Even then, the housing produced is not sufficient to meet local needs for housing for lower income households, as documented in the Housing Element, the Everyone Home Plan adopted in 2006, and the 2010 Consolidated Plan.

4. In 1986 the City adopted an Inclusionary Housing Ordinance, which required, among other things, that a percentage of all new residential rental units in projects of 5 or more units be provided at below market rates for the life of the project. The City of Berkeley's Inclusionary Housing Ordinance has been an important tool in creating affordable housing in the City since its adoption.

5. In 1993, the City established an affordable housing linkage fee on commercial development, designed to mitigate the need for affordable housing it creates.

Income from this linkage fee has been administered through the Housing Trust Fund, mitigating some impact of commercial development.

6. Even in combination with other funding sources, the City's linkage fee and its Inclusionary Housing Ordinance have not been sufficient to fully address local housing needs.

7. A 2009 decision of the California Court of Appeal (*Palmer/Sixth Street Properties v. City of Los Angeles* (2009) 175 Cal. App. 4th 1396) has further impaired the City's ability to provide for needed - and state-allocated - affordable housing. Palmer holds that the City may not require rents to be limited in rental projects unless it provides assistance to the rental project, thus invalidating the City's Inclusionary Housing Ordinance requirements as to rental projects.

8. Accordingly, the only remaining feasible and practicable option to meet the City's RHNA for below market rate units is to impose an affordable housing mitigation fee on new market-rate rental units, to mitigate the impacts of those new units on the need for affordable housing.

9. New market-rate rental housing, including Density Bonus Units, contributes to the demand for goods and services in the City, increasing local service employment at wage levels which often do not permit employees to afford housing in the City. The "Affordable Housing Fee Nexus Study," dated June 2010 (the "Nexus Study"), prepared by Bay Area Economics, quantifies the impacts of new market-rate rental units on the need for affordable housing in the City.

**10.** The study estimated the additional spending attributable to each new housing unit in the City, then translated this spending into jobs at a range of income levels. The study estimated the number of households the job-holders would make up, and their household incomes. The City relied on this study to set a fee of \$28,000 in **2012**.

11. A new Nexus Study, dated March 25, 2015, prepared by Bay Area Economics, and presented to Council supported a maximum fee at \$84,400.

#### B. Definitions.

1. "Density Bonus Project" means a Development project that receives a density bonus pursuant to Government Code Section 65915.

2. "Density Bonus Units" means additional units to which an applicant for a Density Bonus Project is entitled and constructs pursuant to Government Code Section 65915.

3. "Income" means combined annual gross income from all sources.

4. "Low-income Household" shall mean a household whose income is no more than 80% of AMI.

5. "Low-income Unit" means any dwelling unit that is rented, for the life of the Development project in which it is located, at a price affordable to a Low-Income Household of an appropriate size for the dwelling unit, and restricted to households with an income not exceeding 80% of AMI.

6. "Qualifying Units" means those below market-rate units in a Density Bonus Project that entitle the applicant to a density bonus pursuant to Government Code Section 65915.

7. "Very Low-Income Household" shall mean a household whose income shall be no more than 50% of AMI.

8. "Very Low-Income Unit" means any dwelling unit that is rented, for the life of the Development project in which it is located, at a price affordable to a Very Low Income Household of an appropriate size for the dwelling unit, and restricted to households with an income not exceeding 50% of AMI.

9. For purposes of this Section, affordable rents shall be determined in accordance with the provisions of Health and Safety Code section 50105, 50052.5(b)(2), and 50052.5(h), and California Code of Regulations Chapter 25 Section 6918.

10. Tenant-paid utility costs will be deducted from gross rent to determine the rent paid by the tenant. Utility costs will be based on the Berkeley Housing Authority Section 8 utility allowance, or future equivalent standard.

11. Minimum bedroom size will be 70 square feet, consistent with Berkeley's Housing Code (19.40.01O.A, Uniform Housing Code Chapter 5, Section 503.2).

C. The City Council may by resolution adopt an affordable housing impact fee ("Fee"), which shall be imposed on the development of new rental housing in Berkeley, subject to limitations set forth in this Chapter and any additional limitations set forth in the Resolution. All such Fees shall be managed consistent with Government Code Sections 66000 et seq. Up to 10 percent of Fees may be used to pay for administration of the Fee or the Housing Trust Fund or any successor fund with the same purpose, and the remainder shall be deposited in the City's Housing Trust Fund or any successor fund with the same purpose.

1. All Fees shall be paid ~~prior to issuance of a certificate of occupancy~~ at the issuance of a building permit, except as set forth in this subdivision or in the City Council Resolution that adopts the Fee.

2. An applicant for a Development project with 10 or more dwelling units that is subject to the Fee may elect to avoid the Fee by providing, for the life of the project, a number of units equal to 20% of the ~~market rate~~ total units in the project at rental rates affordable to Low-Income and Very Low-Income Households and pay a proportionately reduced Fee as calculated in Section 22.20.065D.

3. An applicant for a Development project subject to this Section may provide less than 20% of market rate units as Low-Income and Very Low-Income Units and pay a proportionately reduced Fee as calculated in Section 22.20.065.D. In all such

cases the applicant shall execute a written agreement with the City indicating the number, type, location, approximate size and construction schedule of all such dwelling units and other information as required for determining compliance with this Section. All such units shall be reasonably dispersed throughout the project, be of the same size and contain, on average, the same number of bedrooms as the market rate units in the project; and be comparable with the design or use of market rate units in terms of appearance, materials and finish quality. The owner of any units produced under this option must report to the City annually on the occupancy and rents charged for the units.

4. In projects providing more than one below market rate unit (meaning the combination of Low-income Units and Very Low-Income Units), at least 50% of the units shall be affordable to Very Low-income Households. When there is an uneven number of units provided under this ordinance, the majority of the below market rate units shall be Very Low-Income units.

5. Units that meet the criteria established for affordable housing rents in the City's Housing Trust Fund guidelines, as amended shall be exempt from the Fee.

D. Projects that include Low-income and Very Low-Income Units, including Qualifying Units, will qualify to pay a discounted fee if providing fewer than the number of units equal to 20% of the market rate units in the project.

1. The following equation calculates the proportional discount to the fee based on the portion of units in the project that are provided at Low-Income and Very Low Income rents. The total fee payable for such projects shall be:

$$[(A-B-C) \times \text{Fee}] - [(B+C)/((A-B-C) \times 20\%)] \times ((A-B-C) \times \text{Fee})$$

Where:

A = Total number of units in the project

B = Number of Very-Low Income Units provided in the project. C =

Number of Low-Income Units provided in the project.

E. The City Council may by resolution opt to vary fees and inclusionary requirements by areas of the city and/or zoning districts.

F. The City Council may by resolution establish fees for the administration of the program established by this Section.

G. Compliance with this Section shall be a condition of approval of all Development projects subject to this Section, whether or not such a condition is expressly included in the Use Permit.

H. Consistent with Government Code 66000, this Section will be revisited every 5 years to confirm whether the purpose, the nexus, and the amount of the fee are still valid.

I. Administrative Regulations. The City Manager or his/her designee shall promulgate rules and regulations pertaining to this chapter, including but not limited to setting and administering gross rents, requiring guarantees, entering into and recording agreements with applicants and taking other appropriate steps necessary to assure that the required Low

Income and Very Low Income Units are ~~Page 7 of 7~~ and occupied by Very Low Income and Low Income Households.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

