



Office of the City Manager

SUPPLEMENTAL AGENDA MATERIAL

Meeting Date: June 27, 2017

Item Number: 41

Item Description: Changes in the Affordable Housing Mitigation Fee

Submitted by: Zach Cowan, City Attorney

On June 13, 2017, the Council held a public hearing and continued this item to June 27, 2017. The attached supplemental report includes the proposed ordinance amendments and revised resolution that were the subject of the public hearing, with minor changes shown in tracking, and one addition of text that was inadvertently omitted from the original item.



Office of the City Manager

ACTION CALENDAR

June 27, 2017

To: Honorable Mayor and Members of the City Council
From: Dee Williams-Ridley, City Manager
Submitted by: Zach Cowan, City Attorney
Subject: Supplemental Report: Changes to Affordable Housing Mitigation Fee;
Amending Berkeley Municipal Code Section 22.20.065

RECOMMENDATION

1. Adopt first reading of an Ordinance amending BMC Section 22.20.065 as shown in Attachment 2; and
2. Adopt a Resolution revising the Affordable Housing Mitigation Fee by eliminating the discount in the fee when it is paid at issuance of the certificate of occupancy pursuant to Berkeley Municipal Code Section 22.20.065 and adjusting the fee each two years for inflation by reference to the California Construction Cost Index (CCI), and rescinding Resolution Nos. 65,920-N.S. and 67,614-N.S., with changes proposed by staff, as shown in Attachment 3.

FISCAL IMPACTS OF RECOMMENDATION

Possible additional funds for Housing Trust Fund.

CURRENT SITUATION AND ITS EFFECTS

The City currently imposes a \$34,000 affordable housing mitigation fee (AHMF) on new market rate rental units developed in Berkeley.

BACKGROUND

On May 16, 2017, the Council set this matter for public hearing on June 13, 2017, and directed staff to make specified changes to the ordinance amendments as proposed by Council member Harrison, as well as amendments to Resolution No. 67,614-N.S. which sets the amount of the AHMF. The Council held the hearing on June 13, 2017, and continued the matter to June 27, 2017.

In the interim, staff have noted certain non-substantive and organizational changes that need to be made, and Council member Harrison has suggested that language recommended by the Housing Advisory Commission also be added to the proposed ordinance amendments. These changes are shown in the attachments.

Attachment 1 is an ordinance repealing and reenacting Section 22.20.065, with changes made since June 13, 2017 redlined. The only substantive changes are as follows.

- Language requiring that a percentage of BMR units be reserved for Section 8 and Shelter + Care voucher holders that had been inadvertently omitted from the original item is restored in Section 22.20.065.C.2.
- New language recommended by the Housing Advisory Commission has been added to Section 22.20.065C.2, to require that project developers make a binding election as to whether they will pay the affordable housing mitigation fee or provide units in lieu of doing so no later than the time the first building permit for the project is issued.

Attachment 2 is a clean version of that same ordinance.

Attachment 3 is the resolution setting the affordable housing mitigation fee, with changes since June 13, 2017 redlined.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the subject of this report.

RATIONALE FOR RECOMMENDATION

See preceding discussion.

ALTERNATIVE ACTIONS CONSIDERED

None.

CONTACT PERSON

Zach Cowan, City Attorney (510) 981-6950

Attachments:

- 1: Ordinance Repealing and Reenacting Berkeley Municipal Code Section 22.20.065 (with changes since June 13, 2017 in track changes)
- 2: Ordinance Repealing and Reenacting Berkeley Municipal Code Section 22.20.065 Affordable Housing Mitigation Fee (with changes since June 13, 2017 accepted)
- 3: Resolution Changing the Affordable Housing Mitigation Fee Pursuant to Berkeley Municipal Code Section 22.20.065; and Rescinding Resolution Nos. 65,920-N.S. and 67,614-N.S. (with changes since June 13, 2017 in track changes)

ORDINANCE NO. #,###-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 repealed and reenacted 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.
10. An "Affordable Housing Fee Nexus Study," dated June 2010 (the "Nexus Study"), prepared by BAE Urban Economics, quantifies the impacts of new market-rate rental units on the need for affordable housing in the City.
11. That 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 (53) the job-holders (93) would make up, and their household incomes. The City relied on this study to set a fee of \$34,000 in 2015.
12. A new Nexus Study, dated March 25, 2015, prepared by BAE Urban Economics, using the same methodology, 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 (19.40.010.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, at the issuance of a Certificate of Occupancy, except as set forth in this subdivision or in the City Council Resolution that adopts the Fee.
2. No later than the date the first building permit is issued for a Development project that is subject to the Fee, the An applicant for a Development project 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 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 22.20.065.D. Subject to administrative regulations promulgated pursuant to subdivision H, 40% of the Very Low-Income units in Development projects that have not obtained final approval under Title 23 as of September 20, 2016, shall be reserved for holders of Berkeley Housing Authority Section 8 vouchers and 40% shall be reserved for holders of City of Berkeley Shelter + Care certificates. 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.
3. In making its election under the preceding paragraph, aAn applicant for a Development project subject to this Section may provide less than 20% of the total market rate units in the project 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 total ~~rate~~ units in the project.

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:

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

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 the AHMF and in lieu unit options by areas of the city and/or zoning districts, subject to preparing an appropriate nexus analysis to support any increase in the AHMF.

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 provided 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.

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3. In making its election under the preceding paragraph, an applicant for a Development project subject to this Section may provide less than 20% of the total units in the project as Low-Income and Very Low-Income Units and pay a proportionately reduced Fee as calculated in Section 22.20.065.D.
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 total units in the project.

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:

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

Where:

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

E. The City Council may by resolution opt to vary the AHMF and in lieu unit options by areas of the city and/or zoning districts, subject to preparing an appropriate nexus analysis to support any increase in the AHMF.

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 provided 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.

RESOLUTION NO. XX,XXX–N.S.

CHANGING THE AFFORDABLE HOUSING MITIGATION FEE PURSUANT TO BERKELEY MUNICIPAL CODE SECTION 22.20.065; AND RESCINDING RESOLUTION NOS. 65,920-N.S. AND 67,614-N.S.

WHEREAS, on June 28, 2011, the City adopted the Affordable Housing Mitigation Fee Ordinance No. 7,192-N.S., adopting Berkeley Municipal Code Section 22.20.065, which would require developers of market rate housing to pay an mitigation fee to address the resulting need for below market rate housing, and offered the alternative to provide units in lieu of the fee; and

WHEREAS, Berkeley Municipal Code Section 22.20.065 did not establish the fee, but authorized the City Council to adopt such fee by resolution; and

WHEREAS, Berkeley Municipal Code Section 22.20.065 authorizes the City Council to specify by resolution additional limitations not inconsistent with section 22.20.065; and

WHEREAS, on October 16, 2012, the City adopted Resolution No. 65,920-N.S. setting the fee at \$28,000 per market rate unit at the issuance of a certificate of occupancy and establishing criteria for applying the fee; and

WHEREAS, the City adopted a Resolution No. 66,015-N.S. discounting the fee for certain projects, and Resolution No. 66,809-N.S. extending that discount, and that discount has now expired; and

WHEREAS, the City retained Bay Area Economics to complete an updated nexus study for the Affordable Housing Mitigation Fee, and that study, dated March 25, 2015 and reviewed by the Council at a special meeting on July 14, 2015, found a nexus supporting maximum possible fee of \$84,400 per market rate unit; and

WHEREAS, on July 12, 2016, the City adopted Resolution No. 67,614-N.S. amending Resolution No. 65,920-N.S. to raise the fee to \$34,000 per new unit of rental housing, payable prior to the issuance of a temporary or final Certificate of Occupancy and amending the criteria for applying the fee; and

WHEREAS, the Housing Advisory Commission recommended charging the fee when the building permit is issued as is done in San Francisco to insure funds are available to be leveraged as soon as projects receive their financing, rather than on certificate of occupancy, two to three years later; and

WHEREAS, the Resolution No. 67,614-N.S. adopted on July 12, 2016 further allowed for a discounted fee of \$30,000 if the fee was paid on issuance of building permit; and

WHEREAS, a subsequent study conducted by Strategic Economics found that a fee of \$44,000 was supportable without unduly impacting the financial feasibility of for-profit housing projects; and

WHEREAS, the adequacy of a fee is eroded by housing inflation because of the five year time period between nexus studies being conducted and possible longer time before a new fee is adopted; and

WHEREAS, on June 13, 2017, the City Council conducted a public hearing to consider changing the Affordable Housing Mitigation Fee pursuant to Berkeley Municipal Code Section 22.20.065.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley as follows:

1. The Affordable Housing Mitigation Fee authorized and provided for by Section 22.20.065 shall be \$37,000 per new unit of rental housing, payable at the issuance of Certificate of Occupancy, but shall be subject to a \$3,000 discount if paid in its entirety no later than issuance of the building permit for the project on which the fee is due. The Affordable Housing Mitigation Fee shall only apply to market rate units.
2. The Affordable Housing Mitigation Fee will be automatically adjusted by the annual percentage shown in the California Construction Cost Index published by the California Department of General Services, every other year beginning in 2018, on July 1. The automatic adjustment tied to the California Construction Cost Index shall not cause the fee to exceed the maximum fee established by the most recent Nexus study, and shall apply to all projects that have not received final approval by the City of Berkeley prior to the date of the automatic adjustment.
3. For purposes of this resolution, “new rental housing” includes group living accommodations, except for those categories that are currently exempt pursuant to BMC Section 23C.12.020.B, at an equivalency rate of one new rental unit per two bedrooms in a group living accommodation, such that one-half the fee adopted by this resolution shall be imposed on each bedroom.
4. For purposes of this resolution, “new rental housing” shall not include developments of four units or fewer units.
5. For the purposes of this resolution, “new rental housing” shall not include cooperative student housing developed by the Berkeley Student Cooperative.
6. The definition of “new rental housing” excludes units which are offered at no cost to support nonprofit public benefit activities.
7. No fee shall be assessed under the following circumstances.
 - a. No fee shall be assessed when new rental housing is built to replace rental units that have been destroyed through no fault of the owner of those units, as long as the applicant files a complete permit application within two years after destruction of the pre-existing units. Staff shall determine on a case by case basis both whether rental units have been “destroyed” and whether such destruction was through the fault of the owner. The issuance of a permit to demolish all or part of a building containing rental units shall not

be determinative. However fees shall be assessed on rental units in a replacement project in excess of the number destroyed.

- b. No fee shall be assessed on rental units that have been expanded, renovated, or rehabilitated unless the units were vacant for more than two years before the applicant filed a complete permit application for such expansion, renovation or rehabilitation.
8. Notwithstanding anything to the contrary, staff may waive all or part of the fee adopted by this resolution pursuant to Sections 22.20.070 and 22.20.080.
9. Except as set forth in section 2, this and future increases in the Affordable Housing Mitigation Fee shall apply only to projects whose applications for the required discretionary entitlements are not complete as of the effective date of the fee.

BE IT FURTHER RESOLVED that Resolution Nos. 65,920-N.S. and 67,614-N.S. are hereby rescinded.