



Kate Harrison  
Councilmember District 4

## **REVISED AGENDA MATERIAL for Supplemental Packet 2**

**Meeting Date:** February 19, 2019

**Item Number:** 21

**Item Description:** Refer to the Planning Commission an amendment to BMC Chapter 23C.12.020 (Inclusionary Housing Requirements – Applicability of Regulations) and the Affordable Housing Mitigation Fee Resolution to Close a Loophole for Avoiding the Mitigation Fee through Property Line Manipulation

**Submitted by:** Councilmember Harrison

Added a referral to the Housing Advisory Commission to consider changing the fee structure for owner-occupied developments to a fixed per-unit rate.



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ACTION CALENDAR  
February 19<sup>th</sup>, 2019

To: Honorable Mayor and Members of the City Council

From: Councilmembers Kate Harrison, Rigel Robinson, and Sophie Hahn

Subject: Refer on a Short Term Basis to the Planning Commission an amendment to BMC Chapter 23C.12.020 (Inclusionary Housing Requirements - Applicability of Regulations) and the Affordable Housing Mitigation Fee Resolution to Close a Loophole for Avoiding the Mitigation Fee through Property Line Manipulation; Refer to the Housing Advisory Commission to Assess the Rate of a Fixed Per-Unit Fee for Owner-Occupied Developments.

RECOMMENDATION

1. Refer to the Planning Commission an amendment to BMC Section 23C.12.020 (Inclusionary Housing Requirements - Applicability of Regulations) and BMC Section 22.20.065 (Affordable Housing Mitigation Fee) to close a loophole allowing prospective project applicants to avoid inclusionary affordable housing requirements for ~~owner-occupied~~ projects by modifying property lines so that no lot is large enough to construct five or more units; the Commission should return to Council with a report by March 31<sup>st</sup>, 2019.
2. Refer to the Housing Advisory Commission to assess the appropriateness of the fee level as suggested in the proposed amendments to BMC 23C.12.

BACKGROUND

A key strategy in Berkeley's effort to develop affordable housing requires that new housing construction include a portion of below market rate units, or be assessed an in-lieu affording housing fee. This requirement can be found in BMC Chapter 23C.12 (Inclusionary Housing Requirements) and BMC Section 22.20.065 (the Affordable Housing Mitigation Fee, or AHMF, Ordinance). The Inclusionary Housing Requirements section covers owner-occupied housing, while the AHMF Ordinance covers rental led housing. The AHMF Ordinance for rental housing also provides for the Council to enact an enabling resolution to set the level of the fee and "additional limitations" on the application of the fee.

Under the AHMF, rental housing development is assessed a fixed, per-unit fee, currently \$37,000. Meanwhile, owner occupied housing (such as condominiums) are not assessed fees at a fixed rate. If a developer opts to pay the in-lieu fee rather than provide inclusionary affordable housing units, the fee is calculated as 62.5% of the difference between the actual final sales price of a unit and the price the unit would

have been sold for had it been provided as inclusionary affordable housing. This complicated formula provides a high degree of uncertainty to developers.

In San Francisco, both rental and owner-occupied developments are assessed a fixed fee, and the in-lieu fee is higher for owner-occupied developments than for rentals in an effort to encourage rental housing.

This referral requests that the Housing Advisory Commission propose a fixed per-rate in-lieu fee that is higher than rental units, encouraging the development of needed rental units in Berkeley without unduly burdening the development of owner-occupied units.

The Inclusionary Housing Requirements section mandates inclusionary affordable housing in owner-occupied projects if they either 1) result in the construction of five or more new dwelling units, 2) result in the construction of fewer than five new units if they are added to an existing one- to four-unit property developed after August 14, 1986, and increase the total number of units to more than five, or 3) are built on lots whose size and zoning designation would allow construction of five or more dwelling units. Developers have exploited the ability to modify lot lines on contiguous properties they own so that no lot is big enough to include five or more units, thus avoiding any affordability requirement under condition 3.

The AHMF Enabling Resolution, meanwhile, covers only those projects that result in the construction of 5 or more new units of rental housing, regardless of whether the lot could fit more units or if the project is adding units to an existing building.

This item:

- Amends the Inclusionary Housing Requirements section to cover owner-occupied projects built on any part of a contiguous property under common ownership and control whose size and zoning designation is such to allow construction of five or more Dwelling Units, regardless of how the property is divided.
- Amends the Inclusionary Housing Requirements to set a fixed per-unit in lieu fee, rather than the previous calculation of 62.5% of the difference between the permitted sale price for inclusionary units and the amounts for which those units are actually sold by the applicant.
- Amends the AHMF Enabling Resolution for rental housing to mirror the provisions of the Inclusionary Housing Requirements section regarding projects that add units to existing projects or are on property that could accommodate more than five units, including the amended language discussed above.
- These changes regarding lot line manipulations should be referred to the Planning Commission on a short term basis. Further, the new fee level should be

referred to the Housing Advisory Commission so that they may assess the appropriateness of the fee level.

FISCAL IMPACTS OF RECOMMENDATION

May increase revenues to the Housing Trust Fund.

ENVIRONMENTAL SUSTAINABILITY

Increasing the supply of affordable housing in Berkeley may limit commute times and thus greenhouse gas emissions, in line with Berkeley's environmental goals.

CONTACT PERSON

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Attachments:

- 1: Ordinance
- 2: Resolution
- 3: Track Changes from Resolution No. 68,074-N.S

ORDINANCE NO. –N.S.

CLOSING MODIFIED PROPERTY LINE LOOPHOLE IN INCLUSIONARY HOUSING  
REQUIREMENTS

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

Section 1. That the Berkeley Municipal Code Section 23C.12 is amended to read as follows:

**23C.12.020 Applicability of Regulations**

A. The following types of projects must comply with the inclusionary housing requirements of this chapter:

1. Residential housing projects for the construction of five or more Dwelling Units;
2. Residential housing projects for the construction of one to four new Dwelling Units, when such Units are added to an existing one to four unit property, which has been developed after August 14, 1986, and the resulting number of units totals five or more. All Units in such a property are subject to the requirements of this chapter;
3. Residential housing projects proposed on ~~lots~~ any part of a single property or two or more contiguous properties under common ownership and control whose size and zoning designation is such to allow construction of five or more Dwelling Units. For the purposes of this section, “common ownership and control” shall be interpreted broadly.

B. This chapter does not apply to Dormitories, Fraternity and Sorority Houses, Boarding Houses, Residential Hotels or Live/Work Units, which are not considered Dwelling Units. Live/Work Units are subject to low income inclusionary provisions set forth in Section [23E.20.080](#).

C. This chapter sets forth specific inclusionary housing requirements for the Avenues Plan Area, which prevails over any inconsistent requirements set forth elsewhere in this chapter. (Ord. 6478-NS § 4 (part), 1999).

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.