



Office of the City Manager

May 28, 2019

To: Honorable Mayor and Members of the City Council

From: *DWR* Dee Williams-Ridley, City Manager

Subject: Condominium Development and Inclusionary Fee / Units – Past Practice

This memorandum is provided in response to information submitted to the City Council, dated April 26, 2019, by Rachel Doughty of Greenfire Law regarding “Protecting Berkeley’s Affordable Trust Fund” on behalf of Oceanview Neighborhood Council, Exhibit B, which asserts that the City has failed to properly analyze projects and collect mitigation fees or require inclusionary units for ownership projects over the past decade or more.

Staff has researched the history of how the Planning Department has implemented the inclusionary housing requirements for new ownership housing (condominium) projects over the past decade or more. The list provided by Greenfire Law includes 15 projects, ranging in size from 3 to 41 units. We have annotated their table (attached) with notes from our permit records and fee agreements.

The threshold questions appear to be:

1. Should the City have collected fees or required inclusionary units for more projects, and if so why didn’t it?
2. Is there another interpretation that should be applied to the inclusionary housing requirements so that the City collects more fees or requires more affordable units in the future?

These questions have been raised because the inclusionary/in-lieu fee program for condominiums (BMC 23C.12.020) requires projects to participate if:

1. The project includes construction of five or more dwelling units.
2. The project adds dwelling units to a property (developed after 1986) that brings the total to five or more.
3. Projects proposed on lots whose size and zoning designation allow construction of five or more dwelling units.

There are multiple ordinances in place in Berkeley that refer to inclusionary housing and in-lieu fees, including condominium development, condominium conversions, live/work projects, and development of rental units, as well as replacement of demolished units. Each has different

thresholds and requirements. This memorandum addresses only the past practice related to condominium development.

After reviewing the projects identified in the Greenfire Law letter, we can affirm the following conclusions regarding the implementation of the Inclusionary Housing Requirements for ownership units:

1. The City has assessed the fees / units on all projects that include five or more dwelling units.
2. The City has assessed the fees / units on projects that add to a property to bring the total number of units to five or more.
3. The City has assessed the fees / units on projects that are developed on adjacent lots at the same time (i.e., as one project) where the total project was five or more dwelling units.
4. The term dwelling unit does not include live/work units or commercial space, so some projects that may seem like they have more than five units were not subject to the inclusionary housing requirements.
5. Some lots are located in zoning districts that do not have density standards; therefore, the City assesses the fees / units based on the actual number of units proposed, not the potential number of units (which is impossible to determine in those cases).
6. Where lots are large enough to accommodate five or more units but a portion of the lot is developed with a non-residential use, the Planning Department has historically excluded the nonresidential portion of the lot when calculating the potential number of dwelling units allowed (if there is a density standard to apply).

In summary, the City has applied the inclusionary housing requirements consistently, while accounting for the wide range of project types and development standards to which the requirements can potentially apply.

Attachment 1: Planning Department's Annotated Analysis of information from Greenfire Law, dated April 26, 2019

cc: Paul Buddenhagen, Deputy City Manager
David White, Deputy City Manager
Farimah Brown, City Attorney
Mark Numainville, City Clerk
Jenny Wong, City Auditor
Timothy Burroughs, Director, Planning and Development Department
Matthai Chakko, Assistant to the City Manager

**PLANNING DEPARTMENT ANALYSIS OF
INFORMATION PROVIDED BY RACHEL DOUGHTY WITH GREENFIRE LAW**

The following table is a reproduction of the information submitted to the City Council, dated April 26, 2019, by Rachel Doughty regarding "Protecting Berkeley's Affordable Trust Fund" on behalf of Oceanview Neighborhood Council. Ms. Doughty asserts that the City has failed to properly analyze projects and collect mitigation fees or require inclusionary units for ownership projects over the past decade or more.

Staff has provided corrections to the Greenfire Law information in "redline/strikeout" and added a column of notes to explain how and why the ordinance requirements were met.

<i>Condominiums Completed in Berkeley 2007-2018¹</i>							
	Address	Year Sold	Dwelling Units	Lot Size	Affordable Units	In-Lieu Fee	CITY STAFF COMMENTS
1	2012-2018 6 th St ⁱ	2007	<u>42</u>	8,900	0	\$0	2-unit condo conversion at 2018 Sixth Street only.
2	1414-1418 Harmon	2007	7 <u>(6 new)</u>	11,200	<u>01 unit</u>	\$4,991	2 lots, zoned R-2A, 6 net new units. Regulatory Agreement for 1 unit plus partial fee.
3	1406 San Pablo ⁱⁱ	2007	<u>8-4 plus (incl. 4 live/work)</u> ⁱⁱⁱ	9,030	0	\$0	Fewer than 5 units; C-W zoning has no density standards.
4	2628 Telegraph	2007	15	6,910	<u>0 2 Mod, 1 VLI</u>	\$846,399	Fee paid.
5	1912-1916 7 th St	2008	7 <u>(6 new)</u>	10,000	1 unit	\$0 SHOULD BE FEE TO COVER OTHER 0.2 UNIT Fee required for 0.2 unit	Unit and partial fee required per use permit modification.

Address		Year Sold	Dwelling Units	Lot Size	Affordable Units	In-Lieu Fee	CITY STAFF COMMENTS
6	2831-2843 7 th St ^{iv}	2010	4	9,450	0	\$0	3 comm. and 4 resid. C-W zoning has no density standards.
7	1419 Ashby ^v	2012	4	5,618	0	\$0	Fewer than 5 units; R-3 zoning has no density standards.
8	2010 9 th St ^{vi}	2017	3	6,500	0	\$0	Fewer than 5 units; R-3 zoning has no density standards.
9	812 Page ^{vii}	2018	4	6,500	0	\$0	1 comm. unit and 4 resid. Net lot area = 4,732.
10	3046 Telegraph ^{viii}	2018	3	7,684	0	\$0	Fewer than 5 units. C-T zoning has no density standards.
11	2817 8 th St ^{ix}	2018	4	7,786	0	\$189,570	Fewer than 5 units. Fee paid due to lot size = partial unit.
12	1446 5 th St ^{xxi}	2018	4	5,744 (orig. 6,251)	0	\$0	Fewer than 5 units; small lot size.
13	1444 5 th St ^{xii}	Unfinished	4	5,744 (orig. 6,251)	0	\$0	Fewer than 5 units; small lot size.
14	2747 San Pablo ^{xiii}	unfinished	4 <u>139 plus-inc. 2 live/work</u>	10,000+	6 units dedicated (2017)	\$0	Units provided as part of regulatory agreement.

Address		Year Sold	Dwelling Units	Lot Size	Affordable Units	In-Lieu Fee	CITY STAFF COMMENTS
15	1035-1043 Pardee ^{xiv}	Not yet sold	4 <u>plus one live/work</u>	5,3 <u>3550</u>	0	Committed to fee for 0.8 unit	Fee to be paid prior to occupancy.
Total Projects: 15		Total Units: <u>116108</u>			Identified Affordable Units: <u>711</u> (<u>610%</u>)	Identified In-Lieu Fees: \$1,140,960	

¹ Unit Information per MLS Search unless otherwise noted; Affordable Unit and Fee Information from City Staff

ⁱ MU-R zone requires 5,751sf for 5 units (BMC § 23E.84.070(B)).

ⁱⁱ Source: Berkeley City Staff.

ⁱⁱⁱ Source of unit configuration: Agenda Packet, ZAB Appeal 1406 San Pablo, Attachment 2, p.5 (Dec. 22, 2006).

^{iv} MU-R zone requires 5,751sf for 5 units (BMC § 23E.84.070(B)).

^v R-3 zone does not set an explicit units/lot square footage and is zoned for “relatively high-density” (BMC Chap. 23F.36)

Source: <https://www.berkeleyside.com/2019/05/02/3-new-berkeley-homes-at-center-of-a-nimby-vs-yimby-battle-come-to-market>.

^{vi} 6,500sf lot can accommodate 5 units in R-3 zone, which does not set an explicit units/lot square footage and is zoned for “relatively high-density” (BMC Chap. 23F.36). Project originally approved for 9 units (see ZAB, Action Minutes, item 5 (Oct. 11, 2012)). (Source of project: <https://www.berkeleyside.com/2019/05/02/3-new-berkeley-homes-at-center-of-a-nimby-vs-yimby-battle-come-to-market>).

^{vii} MU-R zone requires 5,751sf for 5 units (BMC § 23E.84.070(B)) (Source: project zoning application).

^{viii} Dwelling Units in C-1 zone subject to R-3 requirements (Table 23E.36.030).

^{ix} See City Council Reso. No. 63,638 (March 27, 2007) (denial of request for variance to avoid fee).

^x MU-R zone requires 5,751sf required for 5 units (BMC § 23E.84.070(B)).

^{xi} Project lot size reduced and parking amenities combined with neighboring parcel to down-zone development potential to circumvent inclusionary Ordinance. Lot Line Adjustment, Alameda County Recorder Instrument No. 2019144173 (recorded July 23, 2018); Staff Report to the Zoning Adjustments Board, 1446 Fifth Street p.3 (April 12, 2018).

^{xii} MU-R zone requires 5,751sf required for 5 units (BMC § 23E.84.070(B)). Project lot size reduced and parking amenities combined with neighboring parcel to down-zone development potential to circumvent inclusionary Ordinance. Lot Line Adjustment, Alameda County Recorder Instrument No. 2019144173 (recorded July 23, 2018); Staff Report to the Zoning Adjustments Board, 1444 Fifth Street, (Jan. 24, 2019).

^{xiii} Source: <https://www.berkeleyside.com/2019/03/22/berkeleys-changing-landscape-the-2019-housing-and-development-round-up> and ZAB Staff Report for Board Action Oct. 8, 2015, 2747 San Pablo Avenue, available at https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_ZAB/2015-10-08_ZAB_Staff%20Report_2747%20San%20Pablo.pdf.

^{xiv} Source: Staff Report to Zoning Adjustments Board, 1037 Pardee Street, Use Permit 06-10000138, Table 2 (Feb. 28, 2018).