



Office of the City Manager

46

PUBLIC HEARING

June 11, 2019

*(Continued from April 30, 2019)*

To: Honorable Mayor and Members of the City Council  
From: Dee Williams-Ridley, City Manager  
Submitted by: Timothy Burroughs, Director, Planning and Development Department  
Subject: Zoning Ordinance Amendments That Apply Inclusionary Housing Regulations to Contiguous Lots under Common Control or Ownership

RECOMMENDATION

Conduct a public hearing and, upon conclusion, adopt the first reading of Zoning Ordinance amendments that modify Inclusionary Housing Requirements (BMC Section 23C.12.020: Applicability of Regulations) to apply to new residential development projects on contiguous lots under common ownership or control.

FISCAL IMPACTS OF RECOMMENDATION

Adoption of the proposed ordinance may increase revenues to the Housing Trust Fund. Implementation of the proposed ordinance may increase staff time required to review application ownership history.

CURRENT SITUATION AND ITS EFFECTS

The City of Berkeley's Inclusionary Housing Requirements (BMC Chapter 23C.12) currently apply to housing development projects of five or more units, additions to properties with buildings constructed after August 14, 1986 that add units and produce a new unit count of five or more, and residential housing projects proposed on lots whose size and zoning designation allow construction of five or more units. When adjacent lots owned by one entity are developed in sequence, the overall unit count may in some cases exceed five. However, the present inclusionary housing requirements do not apply in those cases; each lot is regarded in isolation.

One of the City's housing goals is to increase the supply of affordable housing, which is implemented either by requiring developers to build affordable units or pay into the Housing Trust Fund (HTF). The HTF is used by the City to assist in the preservation and construction of affordable housing. Development on adjacent lots with common ownership may not be subject to these requirements in some cases. The proposed amendments (*see Attachment 1: Draft Zoning Ordinance Amendments*) explicitly state that Inclusionary Housing Requirements will consider residential development on contiguous lots under common ownership as a single project, regardless of the sequence of development.

## BACKGROUND

On February 19, 2019, the City Council referred to the Planning Commission a short-term referral to consider Zoning Ordinance amendments that modify Applicability of Regulations (BMC Section 23C.12.020) of the Inclusionary Housing Requirements. This referral requests four actions that modify the Affordable Housing Mitigation Fee (AHMF) structure and its application to residential projects. Only the first requested referral action is presented in this report. The proposed action would broaden the Inclusionary Housing Requirements to include residential projects built on contiguous lots under common ownership or control (*see Attachment 2: February 19, 2019 City Council Referral and Meeting Minutes*). The other three actions will be addressed in the second half of 2019 in conjunction with on-going work and related referrals (*see the "Related Work" section below*).

A subcommittee of the Planning Commission was formed and held a meeting on March 14, 2019 to discuss the Zoning Ordinance language proposed in the referral and to consider feedback from the public. The subcommittee heard testimony from several community members who are concerned about the phasing of developments to avoid the inclusionary housing / mitigation fee requirements and suggested several wording changes for the referral and identified additional issues with lot line adjustments. Based on that discussion and feedback, the subcommittee drafted language for the Planning Commission to consider.

On April 3, 2019, the Planning Commission held a public hearing to consider draft Zoning Ordinance amendments and considerations forwarded by the subcommittee. Members of the Planning Commission expressed a desire to discuss overall inclusionary housing policy and AHMF structure, but recognized that the referral direction focused on whether the proposed language achieved City Council's goal to "close a loophole" in the existing Inclusionary Housing Requirements.

Planning Commission acknowledged that the suggested amendments introduce implementation challenges and complexity into the project intake and review process. With this understanding, the Planning Commission voted to recommend draft language to City Council for approval. [*Motion/Second: Lacey/Wiblin. Vote: 7-2-0-2; Ayes: Beach, Fong, Kapla, Lacey, Martinot, Twu (Alternate for Schildt), Wrenn. Noes: Cutler (Alternate for Vincent), Wiblin. Abstain: None. Absent: Schildt, Vincent.*]

### **Implementation Challenges**

Implementation of the proposed Zoning Ordinance amendments will require a substantial amount of research on each project to determine for the subject lot, and adjacent lots, the potential existence of common ownership and/or control. Staff research / applicant submittal requirements could include:

- Title history
- Property easements

- LLC and other corporate parties with financial interests and controlling roles
- Property marketing materials
- Property designers
- Property financing mechanisms

Implementation may also require applying the ordinance to sequential development projects that may not have first been known to be related, requiring additional research to track the above information over time as properties are developed and/or change ownership.

Other concerns raised by the community at the public hearing include the following: draft language proposes that “common ownership and control will be interpreted broadly,” leaving open the exact meaning of undefined terms that could make it difficult to administer; builders or developers, although in control of development, may not be providing capital to support the development of projects on adjacent lots so it could be confusing to determine who is subject to the AHMF; and proposed amendments treat certain property owners differently than the vast majority of other property owners in the City, potentially limiting their property rights in ways that could create a legal risk for the City.

### **Related Work**

On March 21, 2019, City Council’s Policy Committee on Land Use, Housing & Economic Development discussed a related proposal that may come before City Council later (*see Attachment 3: March 21, 2019 City Council Policy Committee Proposal*). The new policy would focus on reforming the entire AHMF structure, including consideration of replacing the per-unit fee with a per-square-foot fee. While the proposal would focus on rental-housing projects, it could also apply to ownership projects. The Committee discussed how the new Policy Committee proposal and the February 19 Council referral aim to accomplish similar goals, and requested that the Planning Commission be made aware of the AHMF referral that is under consideration at the City Council Policy Committee. Staff shared this information with the Planning Commission at the April 3, 2019 meeting.

### **ENVIRONMENTAL SUSTAINABILITY**

Increasing the supply of affordable housing in the City of Berkeley may help address the job-housing imbalance (e.g. housing residents near jobs, shortening commutes) and therefore reducing vehicle miles traveled and greenhouse gas emissions.

### **RATIONALE FOR RECOMMENDATION**

Close a loophole in the Zoning Ordinance that allows residential projects on adjacent lots under common ownership to bypass Inclusionary Housing Requirements when the lots are sized to accommodate less than five units each.

ALTERNATIVE ACTIONS CONSIDERED

None.

CONTACT PERSON

Alene Pearson, Principal Planner, Land Use Planning Division, 510-981-7489

Attachments:

- 1: Ordinance
- 2: City Council Referral
- 3: City Council Policy Committee Proposal
- 4: Public Hearing Notice

ORDINANCE NO. -N.S.

MODIFYING INCLUSIONARY HOUSING REQUIREMENTS (BMC SECTION 23C.12.020: APPLICABILITY OF REGULATIONS) TO APPLY TO NEW RESIDENTIAL DEVELOPMENT PROJECTS ON CONTIGUOUS LOTS UNDER COMMON OWNERSHIP OR CONTROL

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

Section 1. That Berkeley Municipal Code Section 23C.12.020 is amended to read as follows:

**Section 23C.12.020 Applicability of Regulations**

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

1. Residential ~~H~~housing ~~P~~projects for the construction of five or more Dwelling Units;
2. Residential ~~H~~housing ~~P~~projects proposed on any part of a single lot or on a grouping of contiguous lots under common ownership and/or control, design, marketing, or financing, whose collective size, including the area of any surface easements and zoning designation is such to allow 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 ~~H~~housing ~~P~~projects proposed on ~~lots~~any part of a single lot or on a grouping of contiguous lots under common ownership and/or control, design, marketing, or financing -whose collective size, including the area of any surface easement, and zoning designation is such to allow construction of five or more Dwelling Units, regardless of whether those units are all built simultaneously.

B. For the purposes of this Section, “common ownership and/or control” shall be interpreted broadly.

BC. For purposes of this Section, “Residential Housing Project” means a project involving the construction of at least one Dwelling Unit. 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, provided however that. Live/Work Units are subject to low income inclusionary provisions set forth in Section 23E.20.080.

CD. 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.

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 the Maudelle Shirek Building, 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.

**ANNOTATED AGENDA  
BERKELEY CITY COUNCIL MEETING  
Tuesday, February 19, 2019  
6:00 PM**

SCHOOL DISTRICT BOARD ROOM - 1231 ADDISON STREET, BERKELEY, CA 94702

JESSE ARREGUIN, MAYOR

Councilmembers:

DISTRICT 1 – RASHI KESARWANI  
DISTRICT 2 – CHERYL DAVILA  
DISTRICT 3 – BEN BARTLETT  
DISTRICT 4 – KATE HARRISON

DISTRICT 5 – SOPHIE HAHN  
DISTRICT 6 – SUSAN WENGRAF  
DISTRICT 7 – RIGEL ROBINSON  
DISTRICT 8 – LORI DROSTE

**Preliminary Matters**

**Roll Call:** 6:13 p.m.

**Present:** Bartlett, Davila, Droste, Hahn, Harrison, Kesarwani, Robinson, Wengraf, Arreguin

**Absent:** None

**Ceremonial Matters:**

- 1. Adjourned in memory of Jim Samuels, Berkeley Commissioner.

**City Manager Comments:** None

**City Auditor Comments:**

The City Auditor discussed the importance taking operational cost information and tradeoffs into consideration in the decision making process for the delivery of services. The City Auditor also noted her that her upcoming Audit Plan will include a focus on payments leaving the City.

**Public Comment on Non-Agenda Matters:** 7 speakers.

**Consent Calendar**

**Public Comment on Consent Calendar and Information Items Only:** 15 speakers.

**Action:** M/S/C (Wengraf/Hahn) to adopt the Consent Calendar in one motion except as indicated.

**Vote:** All Ayes.

## Council Action Items

21. **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**  
**From: Councilmembers Harrison, Robinson, and Hahn**

**Recommendation:** Refer to the Planning Commission an amendment to BMC Section 23C.12.020 (Inclusionary Housing Requirements - Applicability of Regulations) 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. Adopt an updated resolution pursuant to BMC 22.20.065 (Affordable Housing Mitigation Fee) addressing the same issue for rental projects.

**Financial Implications:** See report

Contact: Kate Harrison, Councilmember, District 4, 981-7140

**Action:** M/S/C (Harrison/Davila) to accept revised material from Councilmember Harrison on Item 21.

**Vote:** Ayes – Kesarwani, Davila, Bartlett, Harrison, Hahn, Robinson, Arreguin; Noes – Wengraf; Abstain – Droste.

**Action:** 3 speakers. M/S/Failed (Droste/Wengraf) to adopt the revised material submitted by Councilmember Harrison revised to read as follows:

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 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.
2. Refer to the Planning Commission to consider modifying the structure of in-lieu fees for owner-occupied developments to a flat per-unit fee, as with rental developments, or a per square foot fee; the Commission should return to Council with a report.
3. Refer to the Housing Advisory Commission to assess the appropriateness of the fee level as suggested in the proposed amendments to BMC 23C.12.
4. The Planning Commission is to consider the following language from the item submitted at the meeting: *It is possible that the new fee structure will be adopted prior to the Housing Advisory Commission approving the level of the fee. In this instance, those projects that opt to pay the in-lieu fee and are permitted after the new fee structure is adopted but before the new fee level is adopted shall be given the choice of paying the current fee level, or the one that is adopted.*

**Vote:** Ayes – Kesarwani, Wengraf, Droste; Noes – Bartlett, Harrison, Hahn, Robinson, Arreguin; Abstain – None; Absent – Davila.

Councilmember Davila absent 8:38 p.m. – 9:14 p.m.



## Council Action Items

**Action:** M/S/Carried (Harrison/Hahn) to adopt the revised material submitted by Councilmember Harrison revised to read as follows:

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 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 April 30, 2019.

2. Refer to the Planning Commission to consider modifying the structure of in-lieu fees for owner-occupied developments to a flat per-unit fee, as with rental developments, or a per square foot fee; the Commission should return to Council with a report.

3. Refer to the Housing Advisory Commission to assess the appropriateness of the fee level as suggested in the proposed amendments to BMC 23C.12.

4. The Planning Commission is to consider the following language from the item submitted at the meeting: *It is possible that the new fee structure will be adopted prior to the Housing Advisory Commission approving the level of the fee. In this instance, those projects that opt to pay the in-lieu fee and are permitted after the new fee structure is adopted but before the new fee level is adopted shall be given the choice of paying the current fee level, or the one that is adopted.*

**Vote:** Ayes – Bartlett, Harrison, Hahn, Robinson, Arreguin; Noes – Wengraf; Abstain – Kesarwani, Droste; Absent – Davila.

## Information Reports

### 22. Referral Response: Supporting Worker Cooperatives

**From:** City Manager

Contact: Jordan Klein, Economic Development, 981-7530

**Action:** Item 22 held over to February 26, 2019.

### 23. Referral Response: City Maintained Below Market Rate Units (BMR) Online Resource

**From:** City Manager

Contact: Kelly Wallace, Housing and Community Services, 981-5400

**Action:** Received and filed.

### 24. Mental Health Commission 2018/2019 Work Plan

**From:** Mental Health Commission

Contact: Karen Klatt, Commission Secretary, 981-5400

**Action:** Received and filed.

**Public Comment – Items Not Listed on the Agenda - 0 speakers.**

## Adjournment



Kate Harrison  
Councilmember District 4

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

To: Honorable Mayor and Members of the City Council

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

Subject: 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

RECOMMENDATION

Refer to the Planning Commission an amendment to BMC Section 23C.12.020 (Inclusionary Housing Requirements - Applicability of Regulations) 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. Adopt an updated resolution pursuant to BMC 22.20.065 (Affordable Housing Mitigation Fee) addressing the same issue for rental projects.

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. 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 rented 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.

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 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.

#### 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

Kate Harrison, Berkeley City Councilmember, (510) 981-7140

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 Berkeley Municipal Code Section 23C.12.020 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 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.

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.

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. ##,###-N.S.

CHANGING THE AFFORDABLE HOUSING MITIGATION FEE PURSUANT TO BERKELEY MUNICIPAL CODE SECTION 22.20.065; AND RESCINDING RESOLUTION NO. 68,074-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 June 27, 2017 the City adopted Resolution NO. 68,074, establishing the fee at \$37,000 per new unit of rental housing; and

WHEREAS, Berkeley Municipal Code Section 22.20.065 and the Affordable Housing Mitigation fee both aim to address the need for below market rate housing and therefore should have parity in applicability;

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

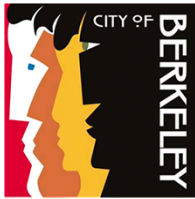
1. The Affordable Housing Mitigation Fee authorized and provided for by Section 22.20.065 shall be \$37,000 per new unit of rental housing, payable at the issuance of Certificate of Occupancy, but shall be subject to a \$3,000 discount if paid in its entirety no later than issuance of the building permit 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 unless they meet any of the following criteria:
  - a) Residential housing projects for the construction of one to four new 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 resolution;

- b) Residential housing projects proposed 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 units, regardless of how said property may be divided.
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 have not received final approval as of the effective date of the fee.

BE IT FURTHER RESOLVED that Resolution No. 68,074-N.S. is hereby rescinded.

### Track Changes from Resolution No. 68,074-N.S

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 unless they meet any of the following criteria:
  - a) Residential housing projects for the construction of one to four new units, when such units are added to an existing one to four unit property or any part of two or more contiguous properties, which has been developed after August 14, 1986, and the resulting number of units totals five or more. All units on such a property are subject to the requirements of this resolution;
  - b) Residential housing projects proposed on any part of a property or two or more contiguous properties under common ownership and control whose size and zoning designation would cumulatively allow construction of five or more units.
- 4.5. For the purposes of this resolution, "new rental housing" shall not include cooperative student housing developed by the Berkeley Student Cooperative.
- 5.6. The definition of "new rental housing" excludes units which are offered at no cost to support nonprofit public benefit activities.
- 6.7. 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.
- 7.8. 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.
- 8.9. 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 have not received final approval as of the effective date of the fee.



CITY COUNCILMEMBER  
**RIGEL ROBINSON**  
DISTRICT 7

ATTACHMENT 3

CONSENT CALENDAR  
TBD (Continued from February  
26, 2019)

To: Honorable Mayor and Members of the City Council

From: Councilmembers Rigel Robinson, Sophie Hahn, Mayor Jesse Arreguin,  
and Councilmember Lori Droste

Subject: Refer to the City Manager and the Housing Advisory Commission to Consider  
Reforming the Affordable Housing Mitigation Fee

RECOMMENDATION

Refer to the City Manager, the Planning Commission, and the Housing Advisory Commission to consider possible reforms to the Affordable Housing Mitigation Fee, including adopting a per-square-foot fee structure, potentially on a geographic basis.

BACKGROUND

Currently, all new residential development of five units or more must either pay an Affordable Housing Mitigation Fee to the City's Affordable Housing Trust Fund, set aside 20% of a project's units as below market rate housing, or some combination of the two. For rental developments, the fee is currently calculated based on the number of residential units in the project according to the following formula (BMC Section 22.20.065):

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

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.

By calculating Affordable Housing Mitigation Fees on a per-unit basis, current law incentivizes developers to build fewer units. In the past, developers have replaced standard layouts (studio, one-bedroom, and two-bedroom units) with dorm-style layouts (up to eight beds per unit). This increases the *density* of each unit but reduces the overall *number* of units, allowing applicants to pay significantly smaller fees without providing any additional housing.

Another way for developers to reduce their contribution to the Affordable Housing Trust Fund is to build larger, more expensive units, rather than smaller, more affordable units. This perverse incentive is clearly in opposition to the City's affordable housing goals.



This problem was highlighted in a recent report by the Turner Center. In interviews with architects and builders, they were told that a conscious decision was sometimes made to increase unit size but decrease unit count to reduce fees.<sup>1</sup> Calculating the fee on a per-square-foot basis eliminates that incentive. Developers would no longer be able to reduce their contribution to the Affordable Housing Trust Fund by manipulating floor layouts. In addition, by eliminating the financial penalty for building more units, developers would be incentivized to propose denser projects, which is directly in line with the City's housing goals.

Such a change was recently enacted in San Francisco, taking effect January 1<sup>st</sup> of this year. The language from San Francisco's website (<https://sf-planning.org/inclusionary-affordable-housing-program>) describing the process they undertook to arrive at their new model is attached. Staff and the Commissions should consider their research, methodology, and conclusions when drafting their response.

A per-square-foot fee may not be desirable across all neighborhoods in Berkeley. The same Turner Center study found that "in some cities there is a need for larger family-sized units, and in those places a per-square-foot fee that incentivizes smaller units might be less desirable."<sup>2</sup> In considering this referral, staff and the Commissions should consider the need for different housing types in different parts of the City. A per-bed fee may be more appropriate for some neighborhoods where micro-units would be out of place while still disincentivizing dorm-style layouts.

This referral asks staff and the Commissions to analyze the current fee structure and possible alternatives, with particular regard to the per-unit form. Staff and the Commissions should consider the need for different styles of housing in different parts of the city. The final recommendation presented to council should include one or more possible amendments to the code to address these changes.

#### FINANCIAL IMPLICATIONS

Potential revenues increases to the Affordable Housing Trust Fund from larger structures facing higher fees; potential revenue decreases from smaller units facing lower fees. Analysis must be conducted to determine the overall effect of these countervailing forces. Multiple fee levels should be assessed, including those that results in net zero changes in Affordable Housing Trust Fund revenues and those that increase revenues.

#### ENVIRONMENTAL SUSTAINABILITY

Increasing the affordability and density of housing near public transit has the potential to substantially reduce greenhouse gas emissions in line with the City's environmental

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<sup>1</sup> [http://turnercenter.berkeley.edu/uploads/Development\\_Fees\\_Report\\_Final\\_2.pdf](http://turnercenter.berkeley.edu/uploads/Development_Fees_Report_Final_2.pdf)

<sup>2</sup> Ibid

goals. Potential revenue increases to the Affordable Housing Trust Fund could permit greater expenditures on housing affordability near transit.

CONTACT PERSON

Councilmember Rigel Robinson, (510) 981-7170

Attachments:

1: San Francisco's Amendments (<https://sf-planning.org/inclusionary-affordable-housing-program>)

Attachment 1: San Francisco's Amendments

## 2019 Affordable Housing Fee Update

Effective January 1, 2019, residential development projects that comply by paying the Affordable Housing Fee will be subject to the following fee based on the Gross Floor Area of residential use, rather than the number of dwelling units. The fee will be applied to the applicable percentage of the project, as set forth in Section 415.5 of the Planning Code:

**Affordable Housing Fee:** \$199.50 per square foot of Gross Floor Area of residential use, applied to the applicable percentage of the project:

- **Small Projects** (fewer than 25 dwelling units): 20% of the project's Gross Floor Area of residential use
- **Large Projects** (25 or more units), **Rental:** 30% of the project's Gross Floor Area of residential use
- **Large Projects** (25 or more units), **Ownership:** 33% of the project's Gross Floor Area of residential use

**Note:** The impact fee register in place at the time of payment shall be applied. However, a project for which a Site Permit has been issued prior to January 1, 2019 shall remain subject to the fee method and amount set forth in the impact fee register in place as of December 31, 2018. Additionally, projects with an Environmental Evaluation Application that was accepted prior to January 1, 2013 pursuant to Planning Code Section 415.3(b) shall also remain subject to the fee method and amount set forth in the impact fee register in place as of December 31, 2018. [The impact fee register may be found here.](#)

This change is pursuant to amendments to Section 415.5 that were adopted by the Board of Supervisors in July, 2017 (Board File No. 161351). Specifically, the Code requires that the Fee reflect MOHCD's actual cost to subsidize the construction of affordable housing units over the past three years, and directed the Controller to develop a new methodology for calculating, indexing, and applying the Fee, in consultation with the Inclusionary Housing Technical Advisory Committee (TAC). In May, 2018 the Controller and TAC determined that the Fee should be applied on a per gross square foot basis to ensure that MOHCD's cost to construct the required amount of off-site affordable housing is appropriately and equitably captured from all projects, regardless of the size and number of units distributed within the project. The Controller directed MOHCD, in consultation with the Planning Department, to convert MOHCD's per unit cost to a per-square-foot fee, based on the average residential Gross Floor Area of projects that have paid the Fee in the past three years. The Fee amount indicated above has been calculated accordingly.

Pursuant to Section 415.5 and the specific direction of the Controller and TAC, MOHCD shall update the amount of the Affordable Housing Fee each year on January 1, using the MOHCD average cost to construct an affordable unit in projects that were financed in the previous three years and the Planning Department's average residential Gross Floor Area of projects that have elected to pay the Fee and have been entitled in the same time period. Each year this analysis will be updated to include new projects from the most recent year, and drop older projects that no longer fall into the three year period of analysis. The updated Fee amount will be included in the Citywide Impact Fee Register that is posted December 1 and effective on January 1.

## NOTICE OF PUBLIC HEARING BERKELEY CITY COUNCIL

**DATE/TIME: TUESDAY, APRIL 30, 2019 – 6:00 P.M.**

**LOCATION: BUSD Board Room, 1231 Addison Street, Berkeley**

### **ZONING ORDINANCE AMENDMENTS THAT MODIFY THE INCLUSIONARY HOUSING REQUIREMENTS FOR PROJECTS ON CONTIGUOUS LOTS UNDER COMMON OWNERSHIP**

The proposed amendments modify the Applicability of Regulations Section of the Inclusionary Housing Requirements (BMC 23C.12.020) to cover residential projects built on contiguous lots under common ownership and/or control. Amendments respond to City Council's February 19, 2019 referral to broaden inclusionary housing requirements. The Planning Commission recommended substantially similar amendments and considerations at its meeting on April 3, 2019. Changes would apply Citywide in all zoning districts where residential development is allowed.

Changes to be considered are 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 proposed on any part of a single lot or on a grouping of contiguous lots under common ownership and/or control, design, marketing, or financing, whose collective size, including the area of any surface easements and zoning designation is such to allow 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 any part of a single lot or on a grouping of contiguous lots under common ownership and/or control, design, marketing, or financing, whose collective size, including the area of any surface easements, and zoning designation is such to allow construction of five or more Dwelling Units, regardless of whether those units are all built simultaneously.

B. For the purposes of this Section, "common ownership and/or control" shall be interpreted broadly.

C. For purposes of this Section, "Residential Housing Project" means a project involving the construction of at least one Dwelling Unit. 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 provided however that Live/Work Units are subject to low income inclusionary provisions set forth in Section 23E.20.080.

D. 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)

A copy of the agenda material for this hearing will be available on the City's website at [www.CityofBerkeley.info](http://www.CityofBerkeley.info) as of April 18, 2019.

For further information, please contact Alene Pearson at 510-981-7489. Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, in order to ensure delivery to all Councilmembers and inclusion in the agenda packet.

Communications to the Berkeley City Council are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to the City Council, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the City Clerk. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the City Clerk at 981-6900 or [clerk@cityofberkeley.info](mailto:clerk@cityofberkeley.info) for further information.  
**Published:** Friday, April 19, 2019

**Noticing per California Government Code Sections 65856(a) and 65090**

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I hereby certify that the Notice for this Public Hearing of the Berkeley City Council was posted at the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way, as well as on the City's website, on April 18, 2019.

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Mark Numainville, City Clerk

