



Office of the City Manager

ACTION CALENDAR

October 16, 2012

To: Honorable Mayor and Members of the City Council

From:  Christine Daniel, City Manager

Submitted by: Jane Micallef, Director, Department of Health, Housing & Community Services

Subject: Affordable Housing Mitigation Fee

RECOMMENDATION

1. Determine the appropriate amount for the Affordable Housing Mitigation Fee.
2. Adopt a Resolution setting the amount of the fee and other terms for its implementation.

FISCAL IMPACTS OF RECOMMENDATION

The Affordable Housing Mitigation Fee will generate funds for the Housing Trust Fund, to the extent that developers pay the fee versus opting to provide units. The amount generated will depend on the fee level set and the number of units for which fees are paid. Housing Trust Funds administration will be supported by a portion of fees collected, capped at ten percent by the ordinance, and by staff capacity supported by other sources.

CURRENT SITUATION AND ITS EFFECTS

The Council adopted Ordinance 7,192-N.S. in June 2011 as BMC 22.20.065 (Attachment 1). That ordinance established the authority for the City to collect a mitigation fee on market rate rental housing and required Council's subsequent adoption of a resolution establishing the amount of the fee and the universe of units to which it applies. Since then, proposed development projects have been notified that they are subject to the fee, but no fees can be collected without establishing an amount.

At its July 31, 2012 meeting, the City Council voted to discuss the Affordable Housing Mitigation Fee at a worksession in October 2012, and to consider a resolution establishing the amount of the fee with a range of \$15,000 to \$34,000 the same evening during the regular Council agenda. The attached draft resolution can be completed with the fee amount Council agrees to prior to adoption. In addition, the resolution excludes or exempts certain housing types (discussed in further detail below):

- Developments of four or fewer units;
- Cooperative student housing developed by the Berkeley Student Cooperative;

- Units built to replace units destroyed through no fault of the applicant, provided the applicant files a complete permit application within two years;
- Rehabilitated rental units unless they have been vacant more than two years before the applicant files a complete permit application;

Development Size: The attached draft resolution limits applicability of the fee to developments of five or more units. First, this is consistent with the Inclusionary Housing Ordinance—which is no longer enforceable in rental housing projects due to the *Palmer/Sixth Street Properties vs. City of Los Angeles* decision. Second, at its September meeting, the Housing Advisory Commission (HAC) supported exempting smaller developments. However, Bay Area Economics' nexus study supports a fee on developments of two or more units, and Council could make this policy choice.

Berkeley Student Cooperatives (BSC): The draft resolution includes a blanket exemption for units developed by Berkeley Student Cooperatives (BSC), the subject of a May 1, 2012 Council report (continued from March 6, 2012) which responded to a referral from the City Council on November 15, 2011. At the May 1, 2012 meeting, Council directed staff to include this language in the resolution. This language incorrectly did not appear in the draft resolution reviewed by the HAC.

Staff recommend against a blanket exception for Berkeley Student Cooperative. BSC provides housing for students at a low cost and serves many low income students. However, BSC has indicated—recently, as well as in past rehabilitation work funded by the City—that it cannot document the income of each tenant housed, and it does not limit residency to students with low incomes. If the City were to exempt BSC developed units from the fee on the basis of the rent charged rather than the income of the occupying household, it would represent a significant departure from longstanding policy. An exception based on rents charged rather than the specific individuals house may create an opportunity for other development types to request an exemption based on rent charged, even if no low-income Berkeley residents obtain housing as a result. Regardless of locally-adopted exceptions, federal housing funds cannot be used for housing developments in which the income of residents is not documented or is over applicable limits.

Without this exception, BSC might not need to pay the fee on its units for a variety of reasons. For example, under the proposed resolution, units rehabilitated by BSC will not be subject to the affordable housing mitigation fee as long as the units were not vacant for more than two years before a complete permit application was filed. In addition, BSC could satisfy the mitigation fee requirement by providing units affordable to those earning 50% of median income or below and documenting the income of those housed, or obtain an exemption by satisfying the affordability requirements of Affordable Housing Mitigation fee and documenting the income of those housed. Both of these options are described in the ordinance that was adopted. However, BSC would have to document the incomes of those students housed in order to qualify for these alternatives.

Units Destroyed Through No Fault of the Applicant: In the case of units which had been destroyed, the Department of Planning and Development would make a determination on a case by case basis of whether the units had been destroyed and whether it was through no fault of the applicant. A building is considered destroyed if the destruction meets the standard established in BMC Section 23C.04.090: 50% or more of its appraised value. Appraised value is the higher of the records of the Assessor of the County of Alameda for the fiscal year during which the destruction occurred; or an appraisal performed by a certified appraiser. In considering fault, staff will refer to the findings or report of whichever expert examines the property following the destructive incident. For example, Fire Inspectors investigate fires to determine the cause of the fire, and insurance companies often hire engineers to determine cause of a collapse.

Group Accommodations: Group living accommodation would also be subject to the ordinance, with an equivalence of two bedrooms equal to one unit.

Hardship: The resolution also references BMC Sections 22.20.070 and 22.20.080, existing sections of the code which allow provide for exceptions or limits to fees which do not apply or are unconstitutional, or in case of hardship.

The Housing Advisory Commission reviewed a draft resolution at its meeting on September 6, 2012 and passed motions supporting the following:

1. The HAC's recommendation of the affordable housing fee of **\$28,000 per unit** remains consistent with the previously recommended amount of \$28,000 made to City Council. M/S/C: Soto-Vigil, Rios. Ayes: Casalaina, Murphy, Rios, Soto-Vigil, Wang, Wolfe.
2. The draft resolution includes this sentence: "Any fee under this resolution that is imposed on a project within the **Downtown Area Plan** shall be automatically reduced by the amount paid for other impact fees." The HAC disagrees with treating Downtown projects differently from other projects and is concerned that such a provision would result in less revenue to the Housing Trust Fund. The HAC recommends this clause be stricken, and that no fee reduction be allowed in the Downtown unless the developer provides a financial feasibility that is reviewed/critiqued by City staff, which demonstrates that the affordable housing mitigation fee would make or create a disincentive to the development. M/S/C: Soto-Vigil, Wolfe. Ayes: Casalaina, Murphy, Rios, Soto-Vigil, Wang, Wolfe.
3. If there is a financial **hardship** for a developer to pay the affordable housing mitigation fee prior to the issuance of a certificate of occupancy, the resolution should allow developers the option to pay the affordable housing fee with interest over a period not to exceed five (5) years. M/S/C: Wolfe, Soto-Vigil. Ayes: Casalaina, Murphy, Rios, Soto-Vigil, Wang, Wolfe.
4. The HAC wanted more information and references to any applicable local law regarding how it would be determined that a unit had been "**destroyed**" and whether

or not it was “**through the fault of the owner.**” M/S/C: Wolfe, Soto-Vigil. Ayes: Casalaina, Murphy, Rios, Soto-Vigil, Wang, Wolfe.

5. Housing Mitigation Fee resolution should only apply to buildings of **five (5) or more units**. M/S/C: Casalaina, Soto-Vigil. Ayes: Casalaina, Murphy, Rios, Soto-Vigil, Wang, Wolfe.

Staff responses to the Commission’s concerns are as follows:

- Whether the City should credit **Downtown Area Plan** fees against the Affordable Housing Mitigation Fee is a policy issue for the Council. The attached draft resolution includes language for an offset.
- BMC Section 22.20.080 already allows developers to demonstrate that the fee is a **hardship** in order to get a fee reduction or waiver.
- Staff recommend against allowing developers to pay the fee in **installments**, particularly in installments to be paid after building occupancy. Once the building is occupied, the City would not have anything securing its interest. which could result in an inability to collect a portion of the fee. In addition, monitoring, billing, and collecting fee installments require dedicated staff time and reduce the amount of time staff could spend creating more housing and monitoring affordable housing to ensure it serves low income households.
- The staff determination of whether a unit had been **destroyed**, and whether the applicant was **at fault**, is discussed above in this report.
- The attached resolution limits the Fee’s application to developments with **five or more units**, consistent with the HAC’s recommendation and the inclusionary housing ordinance. The Council can elect to apply the fee to all multifamily developments (two units or more).

BACKGROUND

In 2009, the *Palmer/Sixth Street Properties vs. City of Los Angeles* court ruling found that inclusionary housing requirements on rental developments violate the Costa-Hawkins Rental Act of 1995, thereby invalidating the City’s inclusionary requirements for rental housing, although the inclusionary requirements for condominiums still stand. At the January 26, 2010 Council meeting, Council members expressed interest in housing policy options that could not only compensate for the loss of inclusionary rental housing, but achieve an even higher percentage of affordable units.

Through a competitive process, Bay Area Economics was selected to complete an impact fee nexus study, quantifying the need for affordable housing created by the development of new market rate rental housing. BAE’s report was presented at a worksession on June 29, 2010. Based on questions and comments at that time, staff worked with BAE to refine the study further, and presented it at the January 25, 2011 meeting.

A draft ordinance was presented first at a worksession in May 2011 and Council adopted ordinance 7,192-N.S. on June 28, 2011. The ordinance was designed to be efficient to administer and easily understood by developers. It includes a provision to allow developers the option of building affordable units in-lieu of paying the fee. Satisfying the fee requirements through the provision of units will require providing units affordable to households earning 50% of Area Median Income equal in number to 10% of the number of market rate units. For example, a 22-unit project providing two affordable units would not owe any additional fee. Developers could choose to satisfy the fee requirement with a mix of units and fees. For example, a 22-unit project providing one affordable unit would have satisfied half the fee requirement, and could pay the other half as a fee.

Developments providing sufficient affordable units in order to qualify for a density bonus could not be charged a fee to the extent the qualifying units are affordable to household at 50% Area Median Income or below; similarly developers opting to provide units in order to qualify for a fee waiver could not be prevented from obtaining a density bonus. The existing Inclusionary Housing Ordinance continues to apply to ownership housing. The ordinance requires the amount of the fee to be set by resolution, as well as more details about the universe of units to which the fee would apply.

The study supports an affordable housing impact fee of up to \$34,000 per market rate rental unit. In January 2011, staff recommended a fee of \$20,000 per market rate unit, based on the estimated cost of complying with the Inclusionary Housing Ordinance in rental housing. The Housing Advisory Commission voted to recommend a higher fee of \$28,000 per market rate rental unit.

RATIONALE FOR RECOMMENDATION

The City has unmet needs for affordable housing, as documented in the City's *2007-2014 Housing Element* as well as the *2010 Consolidated Plan*. The 2009 the *Palmer/Sixth Street Properties vs. City of Los Angeles* court ruling eliminated one of the City's tools that had been responsible for creating hundreds of units of affordable rental housing—the Inclusionary Housing Ordinance as applied to rental housing. The Affordable Housing Mitigation Fee will result in both units of affordable housing as well as resources to support the development of affordable housing.

ALTERNATIVE ACTIONS CONSIDERED

The City could choose not to set a fee amount at this time

CONTACT PERSON

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Attachments:

- 1: BMC 20.22.065 (Affordable Housing Mitigation Fee ordinance)
- 2: Resolution

Attachment 1:
BMC 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 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 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.

11. The maximum fee amount supported by the Affordable Housing Fee Nexus Study is \$34,000, based on the need for units affordable to lower income households with an annual income not exceeding 65% of the area median income ("AMI").

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. "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.

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

6. "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.

7. 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.

8. 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 prior to issuance of a certificate of occupancy, except as set forth in this subdivision or in the City Council Resolution that adopts the Fee.

2. 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 10% of the market rate units in the project at rental rates affordable to Very Low-Income Households. An applicant for a Development project subject to this Section may provide less than 10% of market rate units as Very Low-Income Units and pay a proportionately reduced Fee. 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. 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. Application to density bonus projects that include Very Low-Income Units.

1. The total fee payable for such projects shall be:

$$[(A-B) \times \text{Fee}] - [(B/((A-B) \times 10\%)) \times ((A-B) \times \text{Fee})]$$

Where:

A = Total number of units in the project

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

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

F. 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.

G. 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. (Ord. 7192-NS § 1, 2011)

RESOLUTION NO. ##,### –N.S.

ESTABLISHING AFFORDABLE HOUSING MITIGATION FEE PURSUANT TO
BERKELEY MUNICIPAL CODE SECTION 22.20.065

WHEREAS, in 2011, the City Council adopted Berkeley Municipal Code section 22.20.065, authorizing an affordable housing mitigation fee on the construction of new rental units in Berkeley; and

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

WHEREAS, the City Council has considered the appropriate fee on a number of occasions since adoption of Section 22.20.065, including July 12, 2011, July 17, 2012, July 31, 2012 and has concluded that the appropriate fee amount is \$ [REDACTED]; and

WHEREAS, this amount is appropriate because Bay Area Economics' "Affordable Housing Nexus Study" found a nexus between the housing needs created by new market rate units and a fee of up to \$34,000; and

WHEREAS, Section 22.20.065 also authorizes the City Council, by resolution, to specify additional limitations not inconsistent with 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 \$ [REDACTED] per unit of new rental housing.
2. For purposes of this resolution, "new rental housing" includes group living accommodations, 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.
3. For purposes of this resolution, "new rental housing" shall not include developments of four units or fewer units.
4. For the purposes of this resolution, "new rental housing" shall not include cooperative student housing developed by the Berkeley Student Cooperative.
5. 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.
6. Any fee under this resolution that is imposed on a project within the Downtown Area Plan shall be automatically reduced by the amount paid for other impact fees.
7. 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.

