Berkeley City Council

ACTION CALENDAR
September 10, 2013
(Continued from July 16, 2013)

To: Honorable Mayor and Members of the City Council

From: Councilmembers Jesse Arreguín and Laurie Capitelli

Subject: Referral to City Manager: Changes to Municipal Code Regarding Affordable Housing Requirement Implementation

RECOMMENDATION:
Refer to the City Manager and Housing Advisory Commission:

1. The proposed changes to Berkeley Municipal Code (B.M.C.) Section 22.20.065, relating to affordability requirements and implementation of the Affordable Housing Mitigation Fee. Request that the City Manager and HAC review these concepts and provide a recommendation to the City Council on possible changes to the ordinance.

2. Requesting a report from the City Manager about how staff implement the provision allowing for reductions or waiver of fees, B.M.C. Section 22.20.080, including:
   a. What information is requested of the applicant to provide "satisfactory factual proof" that the waiver/reduction is a "hardship"?
   b. What process does city staff go through to determine how fee requirements make a project "infeasible"? What standard does the city use to determine "infeasiblity"?

   The report should also explore requiring that the applicant pay for a third party to evaluate financial information to determine how the fees affect financial feasibility. The City of San Carlos requires the applicant to pay for a third party to evaluate their pro forma to determine whether the fee would make the project infeasible.

Proposed Changes to Affordable Housing Fee Ordinance

CHANGES TO AFFORDABITY OF UNITS BUILT IN PROJECTS

Proposal: Explore the following changes to the depth of affordability of affordable units an applicant can elect to build on-site in lieu of paying the Affordable Housing Mitigation Fee:

a. Changing the percentages to more closely match the findings of the Bay Area Economics Nexus study, to require that half the units be rented to households

making 50% of the area median income, and requiring the remainder of the units to be at a mix of income ranges between 30-80% of the AMI.

b. Clarify that the affordability levels refer to gross rent, so that a utility allowance must be subtracted from the contract rent payable by the tenant. This is consistent with the prior Inclusionary requirement.

OPTION TO PAY FEES OVER TIME INSTEAD OF PAYING ENTIRE FEE AMOUNT AT ONCE

Proposal: *As an alternative to paying the entire mitigation fee prior to the issuance of a Certificate of Occupancy, amend the law to allow the developer and the city to negotiate an agreement to pay fees over a period of time with interest.*

Some developers have stated current fee of $28,000 too high, and therefore they cannot afford to pay it in its entirety and have instead elected to build the units on-site. One of the reasons given for this is the cost of initial financing. This option would allow developers to pay fees over time, reducing the financial burden, and making the option to pay fees more attractive. This option would be in addition to the option allowed under B.M.C Section 22.20.080 to request a reduction or waiver of mitigation fees if they make a project financially “infeasible”. This proposal also requests that staff require that the financial information be evaluated by a third party selected by the city and paid for by the applicant. As an alternative to providing the financial information to prove infeasibility, the applicant can elect to instead pay the fees over time. Staff should look at how the city can legally enforce this requirement after a Certificate of Occupancy is issued and how it can secure payment of the fee, such as through a Deed of Trust or a Regulatory Agreement.

ANNUAL INFLATION ADJUSTMENT OF THE FEE

Proposal: *Amend the Ordinance to adjust the mitigation fee annually based on the increase in either the Consumer Price Index for the San Francisco Bay Area or the Construction Cost Index for Northern California.*

Santa Monica has a similar fee and requires that it be adjusted annually based on the Construction Cost Index for Southern California. Without such an adjustment the mitigation fee loses its value over time, while rents continue to rise.

CITY WAIT LIST FOR ELIGIBLE TENANT HOUSEHOLDS, AND ONGOING MONITORING

Proposal: *Establish a city maintained wait list of eligible low income households that owners would be required to use in deciding who to rent affordable units to. The list could be maintained by the City or an agent of the city such as the Berkeley Housing Authority or a non-profit housing organization.*

Currently, the Affordable Housing Fee requirement allows developers to build affordable units in their projects instead of paying the fee. The units can only be rented to households making 50% of the Area Median Income. The requirement to screen and select households meeting income requirements is solely on the applicant. Applicants presently have to market, screen and select eligible tenants and annually verify that the tenants still meet income requirements and provide such information annually to the city. Meeting all of these requirements costs the applicants a significant amount of time and money.

Some other cities such as the City of San Carlos keep a wait list of eligible households for the landlord to choose from to interview and decide who to rent their affordable units to. Shifting the requirement of screening tenants to see if they meet the income requirements to the City or its designee would reduce some of the burden on developers and would make sure that the units are being rented to low income households.

This will enable the City to establish appropriate priorities, such as for applicants who currently live or work in Berkeley, with additional points for other priorities such as school district employees or people with children in the Berkeley schools.

Proposal: *Request that the City Manager come back with a proposed process for monitoring affordable units built under the Affordable Housing Fee Ordinance, including whether a designee of the City such as the Rent Board or a non-profit developer, could process paperwork provided by owners on the income eligibility of tenants occupying affordable units, the rents charged, and whether vacancies exist. The City should also consider amending the ordinance to require an annual monitoring fee so that the process of tenant selection and eligibility monitoring does not add to City costs.*

The City should monitor compliance based on the annual reports provided by owners of the occupancy and rents charged. If the City decides to limit the renting of units to eligible tenants on a list established by the City or an agent of the City, it would ensure greater compliance and availability of housing to low income tenants. There was no such process for the prior inclusionary requirement, and owners could independently select qualified which made monitoring more difficult.

BACKGROUND:

In June of 2011, the Berkeley City Council adopted Ordinance No. 7,192 allowing the City to establish an Affordable Housing Mitigation Fee on new rental housing and setting the terms for how the fee would be calculated, when it would be paid, and allowing developers the option to build affordable units in the project in lieu of paying the mitigation fee.

On October 16, 2012, the City Council adopted a resolution setting the fee at $28,000 per unit and calling for review after one year. Then, on February 19, 2013 the City Council reduced the fee to $20,000 for projects whose applications have been submitted and receive approval by October 2014. Since the adoption of the fee amount,

several projects have been approved and many are still going through the entitlement process. Most of these projects state that they have elected to build the affordable units on-site in order to satisfy the Affordable Fee requirement, rather than paying the fee, although it is possible that some will choose to pay the fee once the buildings are ready for occupancy.

Since the on-site option has been the primary method used by developers to meet the affordable housing requirement, it is important that several issues be addressed to ensure that maximize affordable housing opportunities. Several unintended consequences have arisen since the adoption of the fee.

Some applicants have stated that the current fee level is too high and that building the units on-site is more financially feasible, possibly because of financing issues. As stated previously, some developers have also opted to take a density bonus since they would qualify under state law simply by building the required units on-site. This has not only resulted in much larger projects, which have more impacts on neighborhoods, but has also means no revenue into the Housing Trust Fund.

The current law requires that all fees must be paid prior to issuance of a Certificate of Occupancy. While this is an ideal deadline, which the city has leverage to ensure payment of the required fees, some developers might not be able to afford to pay the fee in its entirety at that time.

Berkeley Municipal Code Section 22.20.080 allows the City to negotiate with the developer to waive or reduce fees in cases of hardship. However, if the City cannot determine that payment of the fee would make the project infeasible, then this option could not be exercised. Also using this hardship exception sets a precedent which could result in other fees and requirements being waived or reduced simply if the developer claimed hardship which would go against the city's goal of mitigating the projects impacts on affordable housing. It might also result in less revenue to the Housing Trust Fund.

A better option which should be established is allowing the city and developer to enter into an agreement to pay the entire fee amount over a period of time, at an amount negotiated, with compounding interest. This would ensure that the entire fee could be eventually paid, reducing the financial impact of the fee requirements, making projects more feasible, and making the option to pay the fee more desirable.

The ordinance is also silent on how the property owner will review and select tenants who meet the income eligibility requirements and how the city will monitor compliance.

Given the large number of projects in the pipeline, and the need to address these unintended consequences in order to maximize affordable housing opportunities, it is important that these changes be evaluated.

FINANCIAL IMPLICATIONS:
Unknown. Staff in several city departments (Housing, Planning and City Attorney) will need to review the proposed changes and discuss and development recommendations. Some staff time will be involved in developing a report for commission discussions and in presenting to commissions, and in drafting a report back to Council. In general, following these recommendations will increase the value of mitigations provided to the City. Establishing a tenant selection and annual monitoring fee will increase City revenue.

CONTACT PERSON:
Jesse Arreguin, Councilmember, District 4 981-7140
Laurie Capitelli, Councilmember, District 5 981-7150

Attachments:
1. Berkeley Municipal Code Section 22.20.065 (Affordable Housing Mitigation Fee Ordinance)
2. Berkeley Municipal Code Section 22.20.080 (Hardship Waiver for fees)
3. 2013 Area Median Income for Oakland PMSA
4. City of San Carlos requirements on Tenant Selection and Waiving Fees

ORDINANCE NO. 7,192--N.S.

AMENDING BERKELEY MUNICIPAL CODE CHAPTER 22.20 TO AUTHORIZE ADOPTION OF AN 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 hereby added 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 is 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 a[illegible] 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 marketrate 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 (19.040.010.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:

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

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.

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.

* * * * * *

At a regular meeting of the Council of the City of Berkeley held on June 14, 2011, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Anderson, Arreguin, Maio, Moore, Worthington and Bates.

Noes: Wengraf.

Abstain: Capitelli and Wozniak.

Absent: None.

22.20.080 Exception--Hardship.

A. Notwithstanding any other provision of this chapter, the requirements of this chapter in the discretion of the City may be waived or limited for a particular development project where both of the following findings are made:

1. The imposition of the mitigation and/or fees otherwise required by the City make the development of the particular project infeasible; and

2. The benefits to the City from the particular development project outweigh its burdens in terms of increased demand for affordable housing, child care and/or public facilities, adequate employment training and placement services and/or amenities and/or other impacts which reasonably may be anticipated to be generated by and/or attributable to the development project.

B. The burden of establishing by satisfactory factual proof the applicability and elements contained in subsections (A)(1) and (A)(2) of this section shall be on the applicant. (Ord. 6179-NS § 8, 1993)

FY 2013 Income Limits Documentation System

FY 2013 Income Limits Summary

Oakland-Fremont, CA HUD Metro FMR Area										
FY 2013 Income Limit Area	Median Income Click Here	FY 2013 Income Limit Category	1 Person	2 Person	3 Person	4 Person	5 Person	6 Person	7 Person	8 Person
Oakland-Fremont, CA HUD Metro FMR Area	$89,200	Very Low (50%) Income Limits Click Here	$31,250	$35,700	$40,150	***$44,600***	$48,200	$51,750	$55,350	$58,900
		Extremely Low (30%) Income Limits Click Here	$18,750	$21,400	$24,100	***$26,750***	$28,900	$31,050	$33,200	$35,350
		Low (80%) Income Limits Click Here	$45,100	$51,550	$58,000	***$64,400***	$69,600	$74,750	$79,900	$85,050

The **Oakland-Fremont, CA HUD Metro FMR Area** contains the following areas: Alameda County, CA ; and Contra Costa County, CA .

For details on the calculation steps for each of the various parameters, please click the “Median Income” column heading or the Income Limits row labels (“Very Low-Income (50%) Limits”, “Extremely Low-Income (30%) Limits”, and “Low-Income (80%) Limits").

Income Limit areas are based on FY 2013 Fair Market Rent (FMR) areas. For a detailed account of how this area is derived please see our associated FY 2013 Fair Market Rent documentation system.

Other HUD Metro FMR Areas in the Same MSA

Select another FY 2013 HMFA Income Limit area that is a part of the **San Francisco-Oakland-Fremont, CA MSA**

San Francisco, CA HUD Metro FMR Area

Select HMFA Income Limits Area

Data file last updated **Tues., Dec. 11, 2012**.

Update URL For bookmarking or E-Mailing

Press below to select a different state

Select a new state

or

Select a FY 2013 HUD Metropolitan Fair Market Rent Area's Income Limits:

Oakland-Fremont, CA HUD Metro FMR Area

Select HMFA Income Limits Area

Technical Problems or questions? Contact Us.

San Carlos Ordinance

18.16.100 Rental units.

A. Initial Rents for Below Market Rate Units. The initial rent of below market rate units shall be set by the City at least thirty days prior to marketing of the below market rate units so that the eligible households will pay an affordable rent. The initial rent shall be based on the City's assumptions for utility costs and the formula for calculating rents contained in the below market rate housing agreement. The City shall provide the builder with an estimate of the initial rent for the below market rate units at an earlier date upon written request by the builder.

B. Selection of Tenants. Rental units will be offered to eligible households at an affordable rent. If no eligible households are identified by the City pursuant to Section 18.16.080, the owners of rental below market rate units shall fill vacant units by selecting income-eligible households from the San Mateo County Office of Housing Section 8 Housing Choice Voucher program or similar program. If no eligible households are identified from the County program or similar program, owners may fill vacant units through their own selection process; provided, that they publish notice of the availability of below market rate units according to guidelines established by the Administrator.

C. Certification of Eligibility. The owner of rental below market rate units shall certify each tenant household's income to the City or City's designee at the time of initial rental and annually thereafter. The owner shall obtain and review documents from each tenant household that provide written verification of income, including but not limited to such documents as income tax returns for the previous calendar year, W-2 statements, and pay stubs. Income verification shall be submitted on a form approved by the City.

D. Nondiscrimination. When selecting tenants, the owners of below market rate units shall follow all fair-housing laws, rules, regulations, and guidelines. The owner shall apply the same rental terms and conditions to tenants of below market rate units as are applied to all other tenants, except as required to comply with this chapter (for example, rent levels and income requirements) or with other applicable government subsidy programs.

E. Move-In Costs. Total deposits, including security deposits, required of households occupying a below market rate unit shall be limited to first and last month's rent plus a cleaning deposit not to exceed one month's rent.

F. Annual Report. The owner shall submit an annual report summarizing the occupancy of each below market rate unit for the year, demonstrating the continuing income eligibility of each tenant, and the rent charged for each below market rate unit. The Administrator may require additional information to confirm household income and rents charged for the unit if he or she deems it necessary.

G. Periodic Audit. The City maintains the right to periodically audit the information supplied to the City for the annual report if deemed necessary to ensure compliance with this chapter. In addition, owners of below market rate units shall cooperate with any audits conducted by the City, State agencies, Federal agencies, or their designees.

H. Rent Regulatory Agreements. A rent regulatory agreement provided by the City shall be recorded against the residential development prior to final inspection or issuance of any certificate of occupancy for any dwelling unit in the residential development. The rent regulatory agreement shall include the developer's agreement to rent the below market rate units at affordable rents for not less than fifty-five years. The rent regulatory agreement shall include, but not be limited to, the limitations on rents required by this section, provisions for selection of tenants and tenant eligibility, provisions for nondiscrimination and monitoring, and other provisions required to ensure compliance with this chapter.

I. Changes in Tenant Income. If, after moving into a below market rate unit, a tenant's household income exceeds the limit for that unit, the following shall apply:

1. If the tenant's income does not exceed the income limits of other below market rate units in the residential development, the owner may, at the owner's option, allow the tenant to remain in the original unit and re-designate the unit as affordable to households of a higher income level, as long as the next vacant unit is redesignated for the income category previously applicable to the tenant's household. Alternatively, if a below market rate unit meeting the tenant's revised income threshold becomes available within six months and the tenant meets the income eligibility for that unit, the owner shall allow the tenant to apply for that unit.

2. If there are no units designated for a higher income category within the residential development that may be substituted for the original unit, the owner may raise the tenant's monthly rent to an amount, net of utilities, that is the lesser of rent for a comparable market rate unit in the residential development or one-twelfth of thirty percent of the tenant's household income. Upon vacancy by the tenant, the unit must be rented to a household in the income category previously applicable to the unit.

3. If the tenant's income exceeds the income designated for all below market rate units in the residential development, the tenant shall be given six months' notice to vacate the unit. If within those six months another unit in the residential development is vacated, the owner may, at the owner's option, allow the tenant to remain in the original unit, increase the rent to that for a comparable market rate unit in the residential development, and designate the newly vacated unit as a below market rate unit affordable at the income level previously applicable to the unit converted to market rate. The newly vacated unit shall be comparable in size (for example, number of bedrooms, bathrooms, square footage, etc.) to the original unit. (Ord. 1438 § 4 (Exh. A (part)), 2011: Ord. 1416 § 3 (Exh. A (part)), 2010: Ord. 1340 § 1 (part), 2004. Formerly 18.200.120)

18.16.130 Waivers of affordable housing requirements.

A. As part of an application for the first approval of a residential development, a builder may request that the requirements of this chapter be reduced, adjusted, or waived based upon a showing that applying the requirements of this chapter would result in an unconstitutional taking of property or would result in any other unconstitutional result. Any such request shall be submitted concurrently with the below market rate housing plan required by this chapter. The builder shall set forth in detail the factual and legal basis for the claim, including all supporting technical documentation, and shall bear the burden of presenting the requisite evidence to demonstrate the alleged unconstitutional result. The City may assume each of the following when applicable:

1. The builder will benefit from the incentives set forth in the municipal code; and

2. If required to provide below market rate units, the builder will provide the most economical affordable housing units feasible in terms of financing, construction, design, location and tenure.

B. The City Council, based upon legal advice provided by or at the behest of the City Attorney, may approve a reduction, adjustment, or waiver if the Council determines that applying the requirements of this chapter would effectuate an unconstitutional taking of property or otherwise have an unconstitutional application to the property. The reduction, adjustment, or waiver may be approved only to the extent necessary to avoid an unconstitutional result after adoption of written findings, based on legal analysis and the evidence. If a reduction, adjustment, or waiver is granted, any change in the residential development shall invalidate the reduction, adjustment, or waiver, and a new application shall be required for a reduction, adjustment, or waiver. (Ord. 1438 § 4 (Exh. A (part)), 2011: Ord. 1416 § 3 (Exh. A (part)), 2010. Formerly 18.200.150)

Jesse Arreguín
Councilmember, District 4

ACTION CALENDAR
July 16, 2013
(Continued from May 21, 2013)

To: Honorable Mayor and Members of the City Council

From: Councilmember Jesse Arreguín

Subject: Referral to City Manager: Amendments to Affordable Housing Fee Ordinance

RECOMMENDATION:
Refer to the City Manager and Housing Advisory Commission:

1. The proposed changes below to Berkeley Municipal Code (B.M.C.) Section 22.20.065 (Affordable Housing Fee Ordinance) for review and recommendation, and to develop an ordinance for Council discussion and action.

2. Amendments to Berkeley Municipal Code (B.M.C.) Section 22.20.080 (Hardship waiver) to establish more specific criteria for determining whether the fee requirements make a project infeasible and therefore make it eligible for a fee reduction. Is there a baseline standard that staff uses? A specific rate of return on the project?

Additionally, explore removing language allowing fees to be waived entirely.

Proposed Changes to Affordable Housing Fee Ordinance

UPDATING NEXUS STUDY AND CHANGES TO AFFORDABITY OF UNITS FOR ON-SITE OPTION

1. Request that BAE update their nexus study based on current rents. This should be relatively inexpensive since they can simply survey recent developments in Berkeley, as they did before, and put the new numbers into the same model they used in the nexus study. Given how rapidly rents have increased recently, this will likely lead to a higher percentage of affordable housing required to mitigate impacts.

2. Explore the following changes to the depth of affordability of affordable units an applicant can elect to build onsite in lieu of paying the Affordable Housing Mitigation Fee:

Martin Luther King Jr. Civic Center Building ● 2180 Milvia Street, 5th Floor, Berkeley, CA 94704 ● Tel: (510) 981-7140
Fax: (510) 981-7144 ● TDD: (510) 981-6903 ● E-Mail: jarreguin@cityofberkeley.info ● Web: www.jessearreguin.com

a. Changing the percentages to more closely match the findings of the Bay Area Economics Nexus study, with every ten affordable apartments divided as follows: 4 affordable to people with incomes at 30% of the area median, 4 affordable at 50% of area median and 2 affordable to households with incomes up to 65% of area median. These numbers could then be adjusted as needed based on the updated nexus study.

b. Clarify that the affordability levels refer to gross rent, so that a utility allowance must be subtracted from the contract rent payable by the tenant. This is consistent with the prior Inclusionary requirement.

c. Explore increasing the percentage of affordable units to be built under the on-site option to 20% of the total units in the project.

OPTION TO PAY FEES OVER TIME INSTEAD OF PAYING ENTIRE FEE AMOUNT AT ONCE

As an alternative to paying the entire mitigation fee prior to the issuance of a Certificate of Occupancy, amend the law to allow the developer and the city to negotiate an agreement to pay fees over a period of time with interest. B.M.C. Section 22.20.080 allows the City and developer in the case of “hardship” to waive or reduce mitigation fees. This option would be available to any developer regardless of whether the city can find that the payment of the fees would pose a “hardship”.

Developers have stated current fee of $28,000 too high, and that they can therefore not afford to pay it in its entirety and have instead elected to build the units on-site. One of the reasons given for this is the cost of initial financing. This option would allow developers to pay fees over time, reducing the financial burden, and making the option to pay fees more attractive.

ANNUAL INFLATION ADJUSTMENT OF THE FEE

Amend the Ordinance to adjust the mitigation fee annually based on the increase in either the Consumer Price Index for the San Francisco Bay Area or the Construction Cost Index for Northern California. Santa Monica has a similar fee and requires that it be adjusted annually based on the Construction Cost Index for Southern California. Without such an adjustment the mitigation fee loses its value over time, while rents continue to rise.

TENANT SELECTION AND MONITORING:

Owners who provide affordable units in their buildings should be required to rent to tenants on a list established by the City or an agent of the City such as the BHA or a non-profit housing organization. This will enable the City to establish appropriate priorities, such as for applicants who currently live or work in Berkeley, with additional points for other priorities such as school district employees or people with children in the Berkeley schools. Owners should only be allowed to reject the next applicant on the list for cause.

The City should monitor compliance based on the annual reports provided by owners of the occupancy and rents charged. If the City decides to limit the renting of units to eligible tenants on a list established by the City or an agent of the City, it would ensure greater compliance and availability of housing to low income tenants. There was no such process for the prior inclusionary requirement, and owners could independently select qualified which made monitoring more difficult.

The City should consider amending the ordinance to require an annual monitoring fee so that the process of tenant selection and eligibility monitoring does not add to City costs.

BACKGROUND:

In June of 2011, the Berkeley City Council adopted Ordinance No. 7,192 allowing the City to establish an Affordable Housing Mitigation Fee on new rental housing construction and setting the terms for how the fee would be calculated, when it would be paid, and allowing developers the option to build affordable units in the project in lieu of paying the mitigation fee.

On October 16, 2012, the City Council adopted a resolution setting the fee at $28,000 per unit and calling for review after one year. Then, on February 19, 2013 the City Council reduced the fee to $20,000 for projects whose applications have been submitted and receive approval by October 2014. Since the adoption of the fee amount, several projects have been approved and many are still going through the entitlement process. Almost all of these projects state that they have elected to build the affordable units on-site in order to satisfy the Affordable Fee requirement, rather than paying the fee, although it is possible that some will choose to pay the fee once the buildings are ready for occupancy.

Since the on-site option has been the primary method used by developers to meet the affordable housing requirement, it is important that several issues be addressed to ensure that maximize affordable housing opportunities. Several unintended consequences have arisen since the adoption of the fee.

Since the nexus study was done, rents have continued to rise dramatically, especially in the Downtown within walking distance of the BART and the Campus. While the addition of another thousand market-rate apartments will add to the viability of Berkeley's Downtown, these apartments are being marketed to a new demographic, highly paid professionals who are being priced out of the San Francisco rental market. This means that these apartments will not reduce pressure on the Berkeley rental market and may even increase it, if the new demographic group is successfully channeled to Berkeley. This increases the urgency of getting the maximum possible value from these projects in mitigations related to housing affordability.

Some applicants have stated that the current fee level is too high and that building the units on site is more financially feasible, possibly because of financing issues. As stated previously, some developers have also opted to take a density bonus since they would qualify under state law simply by building the required units on-site. This has not only

resulted in much larger projects, which have more impacts on neighborhoods, but has also meant no new revenue into our Housing Trust Fund.

The current law requires that all fees must be paid prior to issuance of a Certificate of Occupancy. While this is an ideal deadline, which the city has leverage to ensure payment of the required fees, some developers might not be able to afford to pay the fee in its entirety at that time.

Berkeley Municipal Code Section 22.20.080 allows the City to negotiate with the developer to waive or reduce fees in cases of hardship. However, if the City cannot determine that payment of the fee would make the project infeasible, then this option could not be exercised. Also using this hardship exception sets a precedent which could result in other fees and requirements being waived or reduced simply if the developer claimed hardship which would go against the city's goal of mitigating the projects impacts on affordable housing. It might also result in less revenue to the Housing Trust Fund.

A better option which should be established is allowing the city and developer to enter into an agreement to pay the entire fee amount over a period of time, at an amount negotiated, with compounding interest. This would ensure that the entire fee could be eventually paid, reducing the financial impact of the fee requirements, making projects more feasible, and making the option to pay the fee more desirable.

The ordinance is also silent on how the property owner will review and select tenants who meet the income eligibility requirements and how the city will monitor compliance.

Given the large number of projects in the pipeline, and the need to address these unintended consequences in order to maximize affordable housing opportunities, it is important that these changes be evaluated.

FINANCIAL IMPLICATIONS:
Unknown. Staff in several city departments (Housing, Planning and City Attorney) will need to review the proposed changes and discuss and development recommendations. Some staff time will be involved in developing a report for commission discussions and in presenting to commissions, and in drafting an ordinance for Council action. In general, following these recommendations will increase the value of mitigations provided to the City. Establishing a tenant selection and annual monitoring fee will increase City revenue.

CONTACT PERSON:
Jesse Arreguin, Councilmember, District 4 981-7140

Attachments:
1. Ordinance No. 7,192 Amending Berkeley Municipal Code Section 22.20.065 (Affordable Housing Mitigation Fee Ordinance)
2. Berkeley Municipal Code Section 22.20.080 (Hardship Waiver for fees)
3. 2013 Area Median Income for Oakland PMSA

ORDINANCE NO. 7,192-N.S.

AMENDING BERKELEY MUNICIPAL CODE CHAPTER 22.20 TO AUTHORIZE ADOPTION OF AN 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 hereby added 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 is 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 marketrate 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 (19.040.010.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:

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

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.

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.

* * * * * *

At a regular meeting of the Council of the City of Berkeley held on June 14, 2011, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Anderson, Arreguin, Maio, Moore, Worthington and Bates.

Noes: Wengraf.

Abstain: Capitelli and Wozniak.

Absent: None.

22.20.080 Exception--Hardship.

A. Notwithstanding any other provision of this chapter, the requirements of this chapter in the discretion of the City may be waived or limited for a particular development project where both of the following findings are made:

1. The imposition of the mitigation and/or fees otherwise required by the City make the development of the particular project infeasible; and

2. The benefits to the City from the particular development project outweigh its burdens in terms of increased demand for affordable housing, child care and/or public facilities, adequate employment training and placement services and/or amenities and/or other impacts which reasonably may be anticipated to be generated by and/or attributable to the development project.

B. The burden of establishing by satisfactory factual proof the applicability and elements contained in subsections (A)(1) and (A)(2) of this section shall be on the applicant. (Ord. 6179-NS § 8, 1993)

FY 2013 Income Limits Documentation System

FY 2013 Income Limits Summary

Oakland-Fremont, CA HUD Metro FMR Area										
FY 2013 Income Limit Area	Median Income Click Here	FY 2013 Income Limit Category	1 Person	2 Person	3 Person	4 Person	5 Person	6 Person	7 Person	8 Person
Oakland-Fremont, CA HUD Metro FMR Area	$89,200	Very Low (50%) Income Limits Click Here	$31,250	$35,700	$40,150	***$44,600***	$48,200	$51,750	$55,350	$58,900
		Extremely Low (30%) Income Limits Click Here	$18,750	$21,400	$24,100	***$26,750***	$28,900	$31,050	$33,200	$35,350
		Low (80%) Income Limits Click Here	$45,100	$51,550	$58,000	***$64,400***	$69,600	$74,750	$79,900	$85,050

The **Oakland-Fremont, CA HUD Metro FMR Area** contains the following areas: Alameda County, CA ; and Contra Costa County, CA .

For details on the calculation steps for each of the various parameters, please click the “Median Income” column heading or the Income Limits row labels (“Very Low-Income (50%) Limits”, “Extremely Low-Income (30%) Limits”, and “Low-Income (80%) Limits").

Income Limit areas are based on FY 2013 Fair Market Rent (FMR) areas. For a detailed account of how this area is derived please see our associated FY 2013 Fair Market Rent documentation system.

Other HUD Metro FMR Areas in the Same MSA

Select another FY 2013 HMFA Income Limit area that is a part of the **San Francisco-Oakland-Fremont, CA MSA**

San Francisco, CA HUD Metro FMR Area

Select HMFA Income Limits Area

Data file last updated **Tues., Dec. 11, 2012**.

Update URL For bookmarking or E-Mailing

Press below to select a different state

Select a new state

or

Select a FY 2013 HUD Metropolitan Fair Market Rent Area's Income Limits:

Oakland-Fremont, CA HUD Metro FMR Area

Select HMFA Income Limits Area

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