




Office of the City Manager

ACTION CALENDAR

July 18, 2006

To: Honorable Mayor and
Members of the City Council

From:  Phil Kamlarz, City Manager

Submitted by: Stephen Barton, Director, Housing
Dan Marks, Director, Planning and Development

Subject: Authorizing Payment of In-Lieu Fees for Inclusionary Condominium Units

RECOMMENDATION

That the City Council conduct a public hearing and upon conclusion adopt first reading of an Ordinance amending Berkeley Municipal Code (BMC) Chapter 23C.12 by adding Section 23C.12.035 allowing an in-lieu fee in place of providing otherwise required inclusionary condominiums.

SUMMARY

The proposed amendment to the inclusionary ordinance will allow developers of new condominium projects to pay a fee to the City's Housing Trust Fund in place ("in-lieu") of selling twenty percent of the units at a below-market rate price to meet the requirements of the City's inclusionary ordinance. Staff estimates that the fees will bring in sufficient funds to create from two to four permanently affordable units for every inclusionary unit given up. The fee would be equivalent to 62.5% of the difference between the market price and the inclusionary price of inclusionary units. Taking sales costs into account this formula provides that approximately two-thirds of the economic gains go to the Housing Trust Fund and one-third to the developer.

The fee will be spread across all units in a project so that instead of paying 62.5% of the difference when designated inclusionary units are sold, the developer will typically pay one fifth of that amount, or 12.5% of the difference, as each unit is sold. When a developer receives a density bonus in return for providing below-market rate units the units must be provided and the in-lieu fee may not be used. In some cases the percentage of below market-rate units required by the inclusionary ordinance is greater than the percentage for which the developer receives a density bonus. In this case the in-lieu fee may be used for the percentage of inclusionary units that were not part of the requirements for the density bonus.

The in-lieu fee provides a substantial economic benefit to the developer, but not as much as would be provided by use of the density bonus provisions of State law, which allows the developer to add an additional 35% to the size of their project. Thus the in-lieu fee will provide

benefits to those developers who choose not to use all or part of the density bonus they would otherwise be entitled to by meeting the City's inclusionary requirement.

FISCAL IMPACT

Positive but the amounts will be uncertain because it will depend on whether developers choose to pay the fee rather than provide the inclusionary units. Funds will be placed in the Housing Trust Fund and could be used to repay the loan to the HTF from the General Fund reserve. A reasonable percentage can be used to cover administrative costs of the HTF program and this could help compensate for ongoing reductions in the CDBG allocation normally used for this purpose.

BACKGROUND

Under the proposed ordinance, developers of new condominium projects would have the option of paying a fee in-lieu of providing inclusionary units. The in-lieu fee would not be available for rental projects. Both the HAC and the Joint Density Bonus Committees have endorsed the in-lieu fee concepts and fee levels set forth in the proposed amendment.¹

The Planning Commission discussed the proposed Ordinance allowing payment of an in-lieu fee for required inclusionary units in condominium projects on June 28, 2006. The commission voted 6-0-3 to recommend the City Council adopted the proposed Ordinance and return to the Commission with a progress report one year from the effective date of the Ordinance. The Commissioners' discussion was generally supportive of the in-lieu fee policy because it could be a good source of funding for the Housing Trust Fund and members of the development community seem interested in the option. Three members abstained from the vote citing the desire for more information prior to their decision. Specifically, they were concerned the fee was set too high and should take into consideration the cost of developing units. Four members of the public discussed the proposed policy during the Public Comment and Public Hearing portions of the meeting. They expressed support for the concept; one commenter was concerned the fee was too high while another felt the affordability rates for inclusionary units are too high. (A more detailed discussion of this proposed ordinance is provided in the staff report submitted to the Planning Commission and is included in Attachment 3 of this report.)

The Current Inclusionary Program

Under the current inclusionary ordinance,² 20% of the units in a new apartment building must be affordable rental or condominium units. The allowable price for condominiums is set at 3 x 80% of area median income (AMI).³

¹ See minutes of HAC Meeting of April 6, p.2, para.6

² Berkeley Municipal Code, Ch. 23C.12.

³ From February 2004 through February 2006, the prices of units could be increased to an amount necessary to cover development costs up to a ceiling of 3 x 120% of AMI. As a practical matter, development costs always reach the 3 x 120% of AMI ceiling. Projects that obtain a 35% density bonus, based on the state density bonus law, were not eligible for the higher pricing standard based on development costs. (Such projects are limited to a 15% density bonus.) Although it has expired, the 3 x 120% of AMI ceiling is applicable to a substantial portion of the projects currently in the pipeline.

The amounts authorized by this ceiling are set forth in the table below. The table also indicates what level household incomes are needed for a family to qualify to purchase the unit, based on an assumption that a household uses 35% of its income for mortgage payments, property taxes, and insurance, and that the household makes a 10% down payment.

**Table 1: Allowable Inclusionary Unit Sales Prices and Affordability Levels¹
 3 x 80% of AMI Price Standards**

Unit size in square feet	<400	400 - 599	599-699	700-849	850-999	1,000-1,199	1,200 +
Number of people in the household	1 person	1.25 people	1.5 people	2.0 people	3 people	4 people	6 people
Allowable sale price – 3X80% of AMI standard	\$140,900	\$145,900	\$150,800	\$160,800	\$181,000	\$201,000	\$233,300
Household Income needed to afford allowable price	\$33,313	\$34,496	\$35,654	38,018	\$42,794	\$47,547	\$55,160
Maximum allowable household income (80% AMI)	\$46,960	\$48,620	\$50,300	\$53,600	\$60,230	\$67,040	\$77,760

¹ Standard of affordability: mortgage payments, taxes, and insurance = 35% of income; mortgage loan to price ratio – 90%; mortgage interest rate – 6%, taxes and insurance = 1.8% of price.

Since the introduction of the inclusionary program, in-lieu fees have not been authorized as a substitute for the direct provision of affordable units (an in-lieu fee is required for the decimal fraction of a unit over one unit that results from the inclusionary requirement by BMC Subsection 23C.12.030.B). This policy has been based on a commitment to integrating affordable housing into market housing projects. However, the changes in circumstances of the past few years and the surge in apartment construction have led to widespread discussion in Berkeley about inclusionary policies, including the wisdom of an in-lieu fee policy.

The surge in condominium prices and the introduction of luxury condominium units into Berkeley have altered the economic and policy circumstances associated with the provision of inclusionary housing. At one end of the spectrum, projects, which will have units selling for \$750,000 or even \$1 million, have been approved or are being considered (e.g. Arpeggio,

formerly known as Seagate, and a downtown hotel project under discussion that may include luxury condominiums on the top floors.)

High End Condominium Units and Potential In-lieu Fees

In the case of a unit with a market value of \$750,000 and an allowable inclusionary price of \$180,000 to \$270,000, the inclusionary “premium” is in the range of \$500,000. In other words, as a result of foregoing a market price in order to comply with the inclusionary requirement, the developer is foregoing \$500,000 in sales proceeds. The flip side of this picture is that the City is foregoing a substantial fraction of \$500,000 for affordable housing that the developer might be willing to provide in-lieu of the inclusionary unit.

In a hypothetical case, if the allowable inclusionary price was \$250,000 and the market price was \$750,000, both the developer and City might obtain greater benefit from the provision of inclusionary fee in the range of \$300,000. From the City’s perspective, a \$300,000 inclusionary fee could provide three or more units through the Housing Trust Fund with a much deeper level of affordability than the single condominium unit that would be provided through the current inclusionary approach, which would have a price fixed at \$250,000. This opportunity results from our ability to use Housing Trust Funds to leverage Federal and State funding. At the same time, the developer would have a strong incentive to pay the inclusionary fee because a \$700,000 net sale price (after a real estate commission and transfer taxes) minus a \$300,000 inclusionary fee would still leave a net of \$400,000, as opposed to a \$250,000 price that would be permitted for the sale of the inclusionary unit.

“Moderate” Cost Condominium Units and Potential In-lieu Fees

In 2005, the average sale price of a condominium unit in Berkeley was \$475,000. This average includes existing units as well as new units. In the case of more “modest” \$500,000 units, the difference between the inclusionary price and the market price is still in the range of \$230,000 to \$320,000, depending on the allowable inclusionary price. Under these circumstances the developer would still have an incentive to pay an inclusionary fee of \$150,000 or more.

Potential Benefits of an In-lieu Fee

Units provided through the Housing Trust Fund (HTF) typically are affordable to households with an income in the range of 30% to 50% of the AMI. The cost of producing such units is typically in the range of \$200,000 to \$300,000. However, the cost to the City for producing such units usually is a fraction of this amount, because HTF funds are used to leverage other subsidies. In the past few years the HTF contribution has been in the range of \$40,000 to \$75,000 per affordable unit provided.

The Proposed Ordinance

The proposed ordinance is designed to carry out the intent of obtaining in-lieu fees equal to 62.5% of the difference between the allowable price for an inclusionary unit and the market price of a condominium unit.

Further, the ordinance provides that:

- 1) in the event that the City Manager determines that an actual sales price does not reflect value, an appraisal may be conducted in order to determine the value of a unit for the purpose of establishing the in-lieu fee;
- 2) the payment of the fee shall be due upon the sale of a unit; and
- 3) developers who have already obtained permits as of the date of the adoption of this ordinance can exercise the in-lieu fee option for those units for which they did not benefit from the State Density Bonus Law, Section 65915 and if none of the units in the project have already been sold.

Method of Calculating In-Lieu Fees

A substantial portion of the inclusionary ordinances in the State allow for in-lieu fees. These ordinances use varying standards in order to determine the amount of in-lieu fees, including: fixed per unit fees; fees based on the difference between development costs and the allowable inclusionary price; fees based on the market value of the inclusionary unit; and fees based on square footage.

Here, it is proposed that the fee be based on a percentage of the differential between the allowable inclusionary price and the actual sales price⁴ because this approach bases the fee on the actual benefit that a developer is obtaining from releasing a unit from inclusionary restrictions.

The Amount of the Fee

The Housing Department's fee recommendation is guided by an interest in providing maximum funds for affordable housing. The policy must balance the interests of generating the highest possible fee from each sale while providing adequate incentives for developers to elect to pay the fee rather than to provide inclusionary units.

The proposed fee structure would generate approximately the same level of fees but would tie the fee to the sales prices of all units in a project that are subject to the inclusionary ordinance, rather than designated particular units as inclusionary and only considering the market prices of those units. Spreading the fee over all units ensures that there is no effort to evade part of the fees through manipulation of the prices of certain units. Instead, in a typical project in which one-fifth of the units are inclusionary and the in-lieu fee is being used to replace all of the inclusionary requirement, the developer would pay one-fifth of the fee as each unit is sold, rather than paying the entire fee on every fifth unit.

For example, if there are five units in a project subject to the inclusionary ordinance requirement, for each unit, the fee would be equal to 12.5% of the difference between the price that would be permitted if each the unit was an inclusionary unit and the actual sale price of that unit because five units sold with a fee of 12.5% adds up to the equivalent of one unit sold with a fee of 62.5%

⁴ The standard would need to contain an exception in cases where the sale price is not arms-length or is without consideration. In such cases, the fee could be based on an appraised value.

($12.5 \times 5 = 62.5$).⁵ In other jurisdictions that have substantial in-lieu fees, the fees are made applicable to all units.

Units that are not counted when computing the required number of inclusionary units in a project (such as density bonus units) would not be subject to the in-lieu fee. Also, density bonus units would not be included when computing the formula for the in-lieu fee amount.

The proposed fee amount and formula for computing the in-lieu fee amount is as follows:

Section 23C.12.035 Payment of In-Lieu Fees as an Alternative to Providing Inclusionary Units within a Project

C. Amount of Fee

1. The in-lieu fee shall be sixty two and a half percent (62.5%) of the difference between the permitted sale price for inclusionary units and the amounts for which those units are actually sold by the applicant.
 2. This fee shall be calculated and collected based on the sales prices of all of the units in a project to which the inclusionary requirement applies, such that the fee as charged shall be a percentage of the difference between the actual sales price for each unit, and the sales price that would have been permitted had that unit been an inclusionary unit. The percentage shall be determined using the following formula: the number of units for which an in-lieu fee is substituted for an inclusionary unit divided by the total number of units to which the inclusionary ordinance applies, multiplied by 62.5%.
 3. This fee shall only be applicable to units in a project that are counted in determining the required number of inclusionary units in a project and shall not be applicable to any units provided as a density bonus.
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⁵ A fee designed to generate 62.5% of the difference between the inclusionary price and the full sales price will constitute a higher percentage of the difference between the inclusionary sales price and the net sales price because as a practical matter the net proceeds from market rate sales are more likely to equal about 90% of the gross sales price, as a result of a 6% real estate commission, a 1.5% transfer tax, and other related sales costs (including holding costs).

Table 2: Projected In-lieu Fees (Hypothetical Case, No Density Bonus)

	Size of Unit (sq.ft.)	850-999
a.	Market Price	\$500,000
b.	Inclusionary Price 3 x 80% of AMI	\$181,000
c.	Difference Between Market Price and Inclusionary Price	\$319,000
d. .625*(c)	In-lieu Fee Per Inclusionary Unit 62.5% of difference between market & inclusionary price	\$199,375
e. (.125*a)	In-lieu fee per unit-12.5% fee applied to every unit in a project	\$39,875

**Table 3: Benefit to Developer – Payment of In Lieu Fee v. Inclusionary Sale
 (Hypothetical Case, No Density Bonus)**

	Size of Unit (sq.ft.)	850-999
a.	Market Price	\$500,000
b.	Inclusionary Price 3 x 80% of AMI	\$181,000
c. .625*(a- b)	In-lieu Fee Per Inclusionary Unit 62.5% of difference between market & inclusionary price	\$199,375
d. ((.9*a)- c)	Net to developer after payment of inclusionary fee & 10% cost for sale	\$250,625
e. (.9*b)	Net to developer after sale at inclusionary price (10% cost for sale)	\$162,900
f. (d-e)	Net gain in revenue to developer from payment of in- lieu fee compared to receiving inclusionary price, assuming no Density Bonus units	\$87,725

Projects in the Pipeline Should be Able to Participate in the In-lieu Fee Program

If the in-lieu fee approach is the City's preferred policy it should be applicable to the substantial number of inclusionary units that are in the pipeline. As of April 2006 there are at least forty inclusionary units in projects planned for sale as condominiums where the project has received a use permit but construction has not been completed. The allowable inclusionary price of a substantial portion of those units would be 3 x 120% of AMI, as allowed under the inclusionary ordinance at that time. If this ordinance is adopted it is likely that the City would obtain in-lieu payments in the near future, to the extent that the units are not necessary to justify the Density Bonus that has already been granted to the applicant.

Projects with State Mandated Density Bonuses Could Not Pay an in-lieu Fee in Place of Providing Affordable Units

Eligibility for a state mandated density bonus⁶ is contingent on the provision of affordable units within a housing development. Therefore, developer would not be able to pay in-lieu fees for inclusionary units that are used to qualify for state density bonuses. In the case of some condo projects, a density bonus requires fewer affordable units than the City of Berkeley requires as inclusionary units. The developer would still have the option to pay the in lieu fee for those inclusionary units that are not necessary to qualify for the State Density Bonus.

An In-lieu Fee Option Compared with the Density Bonus Option

As Table 4 below demonstrates, the in-lieu fee option would clearly be an economically attractive alternative to supplying inclusionary condominium units in a project that has not obtained a density bonus.

However, the degree to which the in-lieu fee option would be an attractive alternative to a density bonus would be dependant on the particular economic circumstances of a project. In the course of meeting the City's inclusionary requirement, most condo projects would be entitled to a 15% density bonus under the State Density Bonus Law (i.e., 20% of the condos reserved for moderate income family ownership provides a 15% bonus.) . Most condo projects get only a 15% density bonus; rental projects can get a 35% density bonus by providing 20% of the rental units at the "lower" income level (i.e., 80% of AMI) OR by providing 11% of the units at the "very low" income level (i.e., 50% of AMI). If the project got a 25% bonus 2 years ago as a rental project and now they want to go condo, they would have to provide between 13 & 14% of the units at 80% AMI or 7% of the units at 50% AMI. In theory, the per unit profit associated with the construction of density bonus units is higher than the profit associated with the development cost of the units in the "base" project, because the land cost is the same whether or not the density bonus units are constructed. Therefore, the marginal cost of constructing the density bonus units is lower than the cost associated with the "base" projects units, because there is no incremental land cost associated with the construction of the density bonus units.

A 35% density bonus based on the provision of a 20% share of affordable units in a project results in 1.75 bonus units for each inclusionary unit. Since developers can in fact make up the

⁶ See Government Code Sections 65915-65918.

costs of providing the inclusionary units through the density bonus, it is important that the in-lieu fee be set at a level that also provides significant financial benefits to the developer. It is difficult to compare the economic factors associated with each option due to intangible differences between the in-lieu and density bonus options, such as a reduction in neighborhood opposition to projects that do not include a density bonus component, and, therefore, have a smaller scale.

The following table is designed to make a hypothetical comparison between the costs and benefits of the in-lieu fee and density bonus options. In this case, if the developer pays the in-lieu fee, rather than supplying the inclusionary unit, the loss for each inclusionary unit that is required is \$43,475 ((market sale price minus (production cost + in-lieu fee)). If the developer obtains a density bonus, the loss from each inclusionary unit (allowable sale price minus production cost) is \$132,100; but the extra profit from the 1.75 density bonus units is \$406,700, for an overall gain of \$275,500. In this model, even complete elimination of the inclusionary requirement and any in-lieu fee will not provide as great a return to the developer as the density bonus. For this reason, we do not expect that most developers will choose in-lieu fees in place of the density bonus.

Table 4: Comparison In-Lieu Fee v. Density Bonus Options (Hypothetical Case)

			In-Lieu Fee Option	Density Bonus Option		
				One inclusionary unit	One inclusionary unit	1.75 density bonus units
a.			One inclusionary unit	One inclusionary unit		1.75 density bonus units
b.	Sq. ft		850 850 sq.ft/unit	850 850 sq.ft/unit		1487.5 850 sq.ft/unit
c.	Land cost/sf (\$90 sq.ft.)		76,500	76,500		none
d.	Const cost+soft costs (\$256 sf)		217,600	217,600		380,800
e.	Total Cost	(c+d)	294,100	294,100		380,800
f.	Price/Unit		500,000 ¹	181,000 ²		500,000 ¹
g.	Overall Price		500,000	181,000		875,000 (1.75 units)
h.	In-Lieu Fee (5 x 12.5% difference between market & inclusionary price)		199,375 62.5% of (\$500,000-\$181,000)	0		0
i.	Net Price after sale costs of 10% and payment of in-lieu fee		250,625	162,900		787,500
j.	Net Gain or Loss		-43,475	-131,200		406,700
k.	Net Gain or Loss taking into account inclusionary sale price, in-lieu fee and Density bonus unit profits		-43,475			275,500

¹ Market rate price.

² Inclusionary unit price.

ALTERNATIVES CONSIDERED

The Density Bonus Subcommittee requested that the staff consider an in-lieu fee for rental projects as well as condominium projects. At this time staff only proposing the in-lieu fee for condominium projects. There are a number of potential complications associated with the adoption of an in-lieu fee geared to rental projects. These issues will need much more extensive analysis which the Housing Department intends to undertake in the coming months.

CONTACT PERSON

Stephen Barton, Housing Director, 981-5400

Ken Baar, Senior Planner, Housing, 981-5420

Dan Marks, Director, Planning and Development Department, 981-7401

Attachments:

1. Ordinance
2. Public Hearing Notice for July 18 City Council meeting.
3. Staff Report to Planning Commission, June 28, 2006 (includes June 14, 2006 staff report)
4. Draft Planning Commission Meeting Minutes, June 28, 2006

ORDINANCE NO. -N.S.

ADDING BERKELEY MUNICIPAL CODE SECTION 23C.12.035 AUTHORIZING COMPLIANCE WITH THE INCLUSIONARY HOUSING ORDINANCE THROUGH THE PAYMENT OF IN-LIEU FEES

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

Section 1. Section 23C.12.035 is added to Berkeley Municipal Code Chapter 23C.12 as follows:

Section 23C.12.035 Payment of In-Lieu Fees as an Alternative to Providing Inclusionary Units within a Project

- A. Applicability. As an alternative to providing inclusionary units required in an ownership project, the applicant may elect to enter in an agreement with the City to pay fees as set forth in this section, in-lieu of providing units that are not required to be provided at below market prices pursuant to Government Code Section 65915.
- B. Purpose. The fee shall be deposited in the City's Housing Trust Fund.
- C. Amount of Fee.
 - 1. The in-lieu fee shall be sixty two and a half percent (62.5%) of the difference between the permitted sale price for inclusionary units and the amounts for which those units are actually sold by the applicant.
 - 2. This fee shall be calculated and collected based on the sales prices of all of the units in a project to which the inclusionary requirement applies, such that the fee as charged shall be a percentage of the difference between the actual sales price for each unit, and the sales price that would have been permitted had that unit been an inclusionary unit. The percentage shall be determined using the following formula: the number of units for which an in-lieu fee is substituted for an inclusionary unit divided by the total number of units to which the inclusionary ordinance applies, multiplied by 62.5%.
 - 3. This fee shall only be applicable to units in a project that are counted in determining the required number of inclusionary units in a project and shall not be applicable to any units provided as a density bonus.
 - 4. In the event that the City Manager makes a determination that an actual sales price does not reflect the fair market value of a unit, the City Manager shall propose an alternate price based on the fair market value of the unit. In the event that the developer and the City Manager cannot agree on a fair market value the City Manager shall select an appraiser to carry out an appraisal of the unit and the appraised value shall be used as the market value.
- D. Calculation of Inclusionary Sales Price.
 - 1. The allowable inclusionary sales price for the purpose of calculating the in-lieu fee pursuant to this section shall be three (3) times eighty percent (80%) of the Area Median

Income (AMI) last reported as of the closing date of the sale of the unit, with the exception that if the developer has already been authorized to charge an inclusionary sale price based on development costs pursuant to Ordinance 6,790-N.S. (adopted January 27, 2004, sunsetted February 19, 2006) the allowable inclusionary sale price for the purposes of this section shall be the price permitted under that ordinance.

2. Area median income (AMI) shall be calculated in accordance with the affordability regulations established by the City Manager pursuant to Section 23C.12.090.

E. Time of Payment of Fee. The developer shall be required to pay the applicable in-lieu fee no later than the closing date of the sale of a unit as a condition of said closing.

F. Use Permit Obtained Prior to Adoption of This Section. This section shall apply to projects for which all required Permits have already been issued, as long as no units on those projects to which this section would apply have been sold.

Section 2. The proposed action is exempt from review under the California Environmental Quality Act based on Public Resources Code Section 21080(b)(8) and Guidelines Section 15378(b)(4).

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Old City Hall, 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.

**NOTICE OF PUBLIC HEARING – BERKELEY CITY COUNCIL
COUNCIL CHAMBERS, 2143, MARTIN LUTHER KING WAY**

PROPOSED INCLUSIONARY HOUSING “IN-LIEU” FEE

**July 18, 2006
7:00 P.M.**

Background

Pursuant to the City’s Inclusionary Housing Ordinance (Berkeley Municipal Code (BMC) Chapter 23.C.12) twenty percent of all units in new construction projects must be made available as inclusionary units at specified affordable rents or sales prices and can only be rented or sold to households meeting specific income limits.

Proposed Fee

The City of Berkeley is proposing an amendment to the Inclusionary Housing Ordinance, in the form of a new BMC Section 23C.12.035. This amendment would adopt an optional fee that developers may pay to the City’s Housing Trust Fund in lieu of providing inclusionary units in new condominium projects. Thus, developers of these projects would have the option of providing the required inclusionary condominium units or paying the in-lieu fee. The proposed fee would be equivalent to 62.5% of the difference between the allowable inclusionary sale price for each inclusionary unit and the actual sale price of an equivalent condominium unit at a market level.

In projects that have obtained density bonuses those affordable units that served as the basis for the density bonus would not be eligible for the in-lieu fee option because eligibility for a density bonus requires that the units actually be provided on site. .

The staff report setting forth the analysis and data supporting the the proposed ordinance is available from the Housing Department, 2180 Milvia St., 2nd floor, Berkeley, CA 94704, Tel: (510) 981-5420.

For further information, please contact Tim Stroshane or Stephen Barton, Housing Department at (510) 981-5400

Anyone wishing to speak at the public hearing may receive a speaker card from the City Clerk at the start of the Council meeting up until the closure of the public hearing.

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. Comments received no later than Monday, July 10, 2006 will be included in Council agenda packets.

Comments received thereafter up until noon on July 17, 2006 will be submitted to Council as supplemental communications at the meeting. For further information, call Sara T. Cox, City Clerk, 981-6900. FAX: (510) 981-6901. TDD: (510) 981-6903.

Sara T. Cox, City Clerk

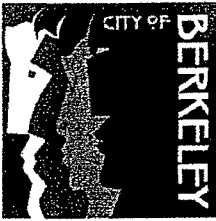
Published: Thursday, July 6, 2006
Thursday, July 13, 2006

COMMUNICATION ACCESS INFORMATION:

To request a meeting agenda in large print, Braille, or on cassette, or to request a sign language interpreter for the meeting, call 981-6900 (Voice) or 981-6903 (TDD) at least 5 working days prior to the meeting to insure availability. Captioning services are provided at the meeting, on B-TV, and on the Internet. In addition, assisted listening devices for the hearing impaired are available from the City Clerk prior to the meeting, and are to be returned before the end of the meeting.

Please refrain from wearing scented products at public meetings.





#11

June 28, 2006

Planning and Development Department
Land Use Planning Division

Staff Report

To: Members of the Planning Commission
From: Jordan Harrison
Assistant Planner
Date: June 28, 2006
Subject: In-Lieu Fee Option for Condominium Inclusionary Units

Recommendation

That the commission consider the proposed amendments to Chapter 23C.12 adding Section 23C.12.035 authorizing payment of in-lieu fees for inclusionary units discussed in the attachments to this report and recommend the City Council adopt the proposed amendments.

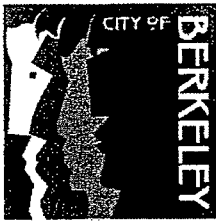
Background

On June 14 the Commission set for hearing consideration of the proposed amendments without discussion. The materials from the June 14 meeting, including the proposed amendment text, are attached to this report. We received a request for additional information from Commissioner Wengraf via email; the email is attached. There was not sufficient time to prepare a response to be included in the packet; we will prepare a response to Commissioner Wengraf for the June 28 meeting.

Attachments:

1. Item 11 from June 14, 2006, "Policy Issues to Consider related to Authorizing Payment of In-Lieu Fees for Inclusionary Condominium Units."
2. Email dated June 20, 2006 from Commissioner Wengraf to Secretary Paine.
3. Information on in-lieu fees in other cities prepared for the Joint Density Bonus Subcommittee by Secretary Paine.

Staff Report_In Lieu fee policy_planning_6-28.doc



#11

June 14, 2006

11

Attachment 1
June 28, 2006

Planning and Development Department
Land Use Planning Division

Staff Report

To: Members of the Planning Commission
From: Jordan Harrison
Assistant Planner
Date: June 14, 2006
Subject: **Policy Issues to Consider related to Authorizing Payment of In-Lieu Fees for Inclusionary Condominium Units**

Recommendation

That the Commission:

1. Consider the proposed amendments to Chapter 23C.12 adding Section 23C.12.035 authorizing payment of in-lieu fees for inclusionary units discussed in Attachment 1 to this report;
2. Consider the policy discussion below; and
3. Set a public hearing for June 28, 2006 to consider recommendations to the City Council.

Environmental Review

The adoption of the proposed Zoning Ordinance amendments authorizing payment of in-lieu fees for condominium inclusionary units is statutorily and categorically exempt from the requirements of the California Environmental Quality Act ("CEQA"), based on Public Resources Code Section 21080(b)(8) and Guidelines Section 15378(b)(4), because the funds generated by the in-lieu fee are not committed to any specific project that may result in a physical impact on the environment and will be deposited into the City's Housing Trust Fund. Further, the funds could be used to finance infill housing development in the City, which is generally exempt from CEQA under Guidelines Section 15332, or other affordable housing programs consistent with the goals of the Housing Element that would not have a physical impact on the environment.

Background

The Joint Density Bonus Sub-committee discussed the idea of an in-lieu fee on February 2, 2006 and conducted a straw vote in favor of the idea on February 21, 2006. On May 9 the Sub-committee considered the proposed in-lieu fee for inclusionary units prepared by Housing Department staff and passed the following motion.

M/S/C to recommend that the Planning Commission consider amendments to the inclusionary ordinance allowing an in-lieu fee in the approximate amount described in staff's memo as an option to providing otherwise required inclusionary condominium units, with the aim of improving the amount of affordable housing and the options available to housing developers in Berkeley. (Judd/Poschman) Ayes: Metzger, Judd, Blake, Allen, Wengraf, Poschman, Stoloff, Arrequin, Bowman. Noes: None. Abstain: None. Absent: Burke.

At the May 9 meeting the Sub-committee also passed a motion to "recommend that the HAC consider an in-lieu fee option for otherwise required inclusionary rental units with the aim of improving the amount of affordable housing and the options available to housing developers in Berkeley." Subsequent to review by the Joint Density Bonus Sub-committee, Planning Department staff reviewed the proposed in-lieu fee to identify potential land use policy implications or administrative issues, as discussed below.

Discussion & Analysis

In order to assist the Planning Commission's consideration of the proposed in-lieu fee option for inclusionary condominium units Planning and Housing Department staff have prepared the following discussion of policy issues presented in question and answer format. Responses to the questions were provided by Stephen Barton, Housing Department Director.

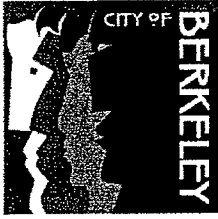
1. How will this ordinance be affected by a project that only proposes 3 units when 5 probably could fit on the lot? The current ordinance already requires that an inclusionary unit be provided in this situation, therefore the developer would have the option to pay an in-lieu fee based on the formula.
2. What happens when a project is approved with the in-lieu fee option, then the owner decides to rent out the units rather than sell? What affordability level will the units be rented at? (the fee is paid at the time of sale, so the inclusionary requirement will not have been satisfied yet) We already have language in the inclusionary agreements that requires that under such circumstances, when a condo project is rented, the development has to meet the inclusionary rental requirement. Housing staff is working with the City Attorney's Office on new and more detailed boilerplate that will be applied to all projects and cover all possibilities in one document.
3. What happens when a rental project with a density bonus is approved, then the applicant proposes a UP MOD to make the project condominium units? (I assume they could continue to have density bonus units with inclusionary units, but the in-lieu fee option would not be available to them.) The ordinance language is clear that if they obtain a density bonus they must provide the affordable units as committed to under the density bonus, either through a low rent or a low sales price with resale restrictions, and they can not use the in-lieu fee for the units committed to under the density bonus. However, they can apply the in-lieu fee to inclusionary units that were not part of the density bonus. For example, with the Seagate project 7 units are very low-income and were used to get a density bonus but another 6 units are just regular inclusionary. The developer could pay the in-lieu fee instead of providing the 6 inclusionary units that were not part of obtaining a density bonus. This could bring approximately \$2,000,000 into the City's Housing Trust Fund for those six units alone, depending on the market price once the units are built.
4. Does the money gained for the housing trust fund to fund presumably more (in number and/or affordability rate) lower income units offset loss of the public benefits of

inclusionary affordable units spread out in the city and among market-rate units? The ordinance is structured to encourage every condominium developer to buy out of the inclusionary requirement because we estimate that we can support three or more households for every one that we give up. Whether this sufficiently off-sets the public benefits of the inclusionary units is a trade-off for the citizens of Berkeley to make through the commissions and the City Council. The HAC has already made its determination that it believes the benefits outweigh the costs.

5. Would it be preferable for there to be a unit value threshold so that the in-lieu fee could only be used for inclusionary units in luxury projects, rather than more modest projects? Given current condominium prices, the idea of a minimum threshold of \$100,000 or \$150,000 per unit is pretty much moot because we don't expect any market-rate condominiums to come on the market at prices that would result in in-lieu fees at a lower level. Housing staff has no objection to putting such a minimum into the ordinance, we just didn't do it in this draft because it seemed unnecessary.

Attachments

1. Staff Report from Housing Department staff and proposed Zoning Ordinance Amendment.



To: Planning Commission
From: Stephen Barton, Director of Housing
Date: June 14, 2006
Subject: Adding BMC Section 23C.12.035 to Chapter 23C.12 Authorizing Payment of In-Lieu Fees for Inclusionary Condominium Units

A. Recommendation:

That the Planning Commission consider the proposed amendments to the inclusionary ordinance allowing an in-lieu fee in place of providing otherwise required inclusionary condominiums and set a public hearing for June 28, 2006 to consider recommendations to the City Council.

B. Background Discussion

Under the proposed ordinance, developers of new condominium projects would have the option of paying a fee in-lieu of providing inclusionary units. The in-lieu fee would not be available for rental projects. Both the HAC and the Joint Density Bonus Committees have endorsed the in-lieu fee concepts and fee levels set forth in the proposed amendment.

1. The Current Program

Under the current inclusionary ordinance,¹ 20% of the units in a new apartment building must be affordable rental or condominium units. During the past few years, two ceilings have been in effect for the pricing of inclusionary condominium units. The "base" ceiling is 3 x 80% of area median income (AMI). From February 2004 through February 2006, the prices of units could be increased to an amount necessary to cover development costs up to a ceiling of 3 x 120% of AMI. As a practical matter, development costs always reach the 3 x 120% of AMI ceiling. Projects that obtain a 35% density bonus, based on the state density bonus law, were not eligible for the higher pricing standard based on development costs.² The 3 x 120% of AMI ceiling is applicable to a substantial portion of the projects currently in the pipeline, although it has expired.

The amounts authorized by these ceilings are set forth in the table below. The table also indicates what level a household's income needs to be in order to afford these prices,

¹ Berkeley Municipal Code, Ch. 23C.12

² Such projects are limited to a 15% density bonus.

based on an assumption that a household uses 35% of its income for mortgage payments, property taxes, and insurance, and makes a 10% down payment.

(Table 1)
Allowable Inclusionary Unit Sales Prices and Affordability Levels
3 x 80% and 3 x 120% of AMI Price Standards

	<400 sq.ft.	400-599 sq.ft.	600-699 Sq.ft.	700-849 sq.ft.	850-999 sq.ft.	1,000- 1,199 sq	1,200 +
Allowable sale price – 80% of AMI standard	140,900	145,9000	150,800	160,800	181,000	201,000	233,300
Household Income needed to afford allowable price	\$33,313	\$34,496	\$35,654	38,018	\$42,794	\$47,547	\$55,160
Allowable sale price – 120% of AMI standard	211,130	218,800	226,300	241,200	271,400	301,700	349,900
Household Income needed to afford allowable price	\$49,958	\$51,731	\$53,505	\$57,028	\$64,168	\$71,332	\$82,728

* Standard of affordability: mortgage payments, taxes, and insurance = 35% of income; mortgage loan to price ratio – 90%; mortgage interest rate – 6%, taxes and insurance = 1.8% of price.

2. The Levels of New Apartment Construction & The Differences Between Market Prices and Inclusionary Prices

Berkeley adopted its inclusionary housing program in 1986. In the past few years, the inclusionary program has started to play a larger role. From 1986 through 2000, 467 new apartment units were constructed. From 2000 through 2005, permits were obtained for 960 apartment units. As of the end of 2005, there were 129 inclusionary units in projects with use permits that have not been completed, and another 91 inclusionary units in projects with pending applications. In addition, developers have expressed interest in submitting applications for the construction of many more units.

Low interest rates have fueled the surge in new apartment construction. The new trends have also been marked by a surge in condominium prices with an accompanying shift from the provision of new rental units to the provision of condominium units.

(Table 2)
Condominium Sales Prices in Berkeley
1990 – 2005

Year	No. of Sales	Median Price
1995	51	\$165,804
1999	120	\$228,500
2000	87	\$305,000
2001	105	\$301,500
2002	92	\$335,000
2003	113	\$355,000
2004	122	\$443,000
2005	135	\$480,000

Source: Compilations by Housing Department staff based on Realquest.com data

As a result of these trends, the gap between inclusionary prices and market prices has increased from less than \$100,000 to \$250,000 to \$500,000. These developments have drastically increased the potential benefits from an in-lieu program.

3. Introduction of the "In-Lieu" Concept

Since the introduction of the inclusionary program, in-lieu fees have not been authorized as a substitute for the direct provision of affordable units (an in-lieu fee is required for the decimal fraction of a unit over one unit that results from the inclusionary requirement by BMC Sub-section 23C.12.030.B). This policy has been based on a commitment to integrating affordable housing into market housing projects. However, the changes in circumstances of the past few years and the surge in apartment construction have led to widespread discussion in Berkeley about inclusionary policies, including the wisdom of an in-lieu fee policy. The joint density bonus committee, which has been discussing issues relating to new construction and inclusionary housing, expressed support for the in-lieu fee concept on May 9, 2006.

The surge in condominium prices and the introduction of luxury condominium units into Berkeley have completely altered the economic and policy circumstances associated with the provision of inclusionary housing. At one end of the spectrum, projects which will have units selling for \$750,000 or even \$1 million have been approved or are being considered (e.g. Arpeggio, formerly known as Seagate, and a downtown hotel project under discussion that may include luxury condominiums on the top floors that is.)

High End Condominium Units and Potential In-lieu Fees

In the case of a unit with a market value of \$750,000 and an allowable inclusionary price of \$180,000 to \$270,000, the inclusionary "premium" is in the range of \$500,000. In other words, as a result of foregoing a market price in order to comply with the inclusionary requirement, the developer is foregoing \$500,000 in sales proceeds. The flip side of this picture is that the City is foregoing a substantial fraction of \$500,000 for affordable housing that the developer might be willing to provide in-lieu of the inclusionary unit.

In a hypothetical case, if the allowable inclusionary price was \$250,000 and the market price was \$750,000, both the developer and City might obtain greater benefit from the provision of inclusionary fee in the range of \$300,000. From the City's perspective, a \$300,000 inclusionary fee could provide three or more units through the Housing Trust Fund with a much deeper level of affordability than the single condominium unit that would be provided through the current inclusionary approach, which would have a price fixed at \$250,000. At the same time, the developer would have a strong incentive to pay the inclusionary fee because a \$700,000 net sale price (after a real estate commission and transfer taxes) minus a \$300,000 inclusionary fee would still leave a net of \$400,000, as opposed to a \$250,000 price that would be permitted for the sale of the inclusionary unit.

"Moderate" Cost Condominium Units and Potential In-lieu Fees

In 2005, the average sale price of a condominium unit in Berkeley was \$475,000. This average includes existing units as well as new units. In the case of more "modest"

\$500,000 units, the difference between the inclusionary price and the market price is still in the range of \$230,000 to \$320,000, depending on the allowable inclusionary price. Under these circumstances the developer would still have an incentive to pay an inclusionary fee of \$150,000 or more.

Potential Benefits of an In-lieu Fee

Units provided through the Housing Trust Fund (HTF) typically are affordable to households with an income in the range of 30% to 50% of the AMI. The cost of producing such units is typically in the range of \$200,000 to \$300,000. However, the cost to the City for producing such units usually is a fraction of this amount, because HTF funds are used to leverage other subsidies. In the past few years the HTF contribution has been in the range of \$40,000 to \$75,000. The required amounts are expected to increase as a result of the expiration of state subsidy programs and/or the City's use of certain types of allowable subsidies for projects that are already in the pipeline.

C. Policy Recommendations for an In-lieu Fee

1. In-Lieu Fees for Condominium Projects

A substantial portion of the inclusionary ordinances in the State allow for in-lieu fees. These ordinances use varying standards in order to determine the amount of in-lieu fees, including: fixed per unit fees; fees based on the difference between development costs and the allowable inclusionary price; fees based on the market value of the inclusionary unit; and fees based on square footage.

Here, it is recommended that the fee be based on a percentage of the differential between the allowable inclusionary price and the actual sales price,³ because this approach bases the fee on the actual benefit that a developer is obtaining from releasing a unit from inclusionary restrictions.

2. In-lieu Fees for Rental Projects

At this time, the Housing Department is only proposing an in-lieu fee for condominium projects and is not proposing an alternative in-lieu fee schedule for rental projects. There are a number of potential complications associated with the adoption of an in-lieu fee geared to rental projects. These issues will need much more extensive analysis.

First, it is not as easy to determine the appropriate "in-lieu" fee for a rental property. An in-lieu fee for rental projects could be based on the capitalized value of the difference between a market rent and the allowed rents. Under such an approach, it would be necessary to make a determination of the market rents for each inclusionary unit before any units in a project (market or inclusionary) were actually rented.

Currently, it is standard practice for developers to obtain an underlying condominium map for rental projects. After a ten-year period there are strong incentives for a change to condominium ownership, including a termination of expensive construction liability

³ The standard would need to contain an exception in cases where the sale price is not arms-length or is without consideration. In such cases, the fee could be based on an appraised value.

insurance requirements. At that time it would be appropriate to require that any in-lieu fee be tied to the schedule applicable to condominium projects. If in-lieu fees based on rental values have already been charged, then transitional issues will need to be worked out to determine the condominium fees.

In addition, from the City's perspective an in-lieu fee based on rental values might not generate more affordable housing than the provision of the inclusionary units within market-rate projects. This will depend on what kind of formula is developed to set the potential fee. From the developer's perspective there is not as much incentive to use in-lieu fees in a rental project because the return from the payment of the fee would only be realized over a long period through a right to collect market rents as opposed to inclusionary rents. Furthermore, if the fees were substantial, then owners might find it difficult to obtain long-term financing to cover the cost of paying the in-lieu fee in advance.

On May 9, 2006, the Joint Density Bonus subcommittee moved to recommend that "the HAC consider an in-lieu fee option for otherwise required inclusionary rental units with the aim of improving the amount of affordable housing and the options available to housing developers in Berkeley." In the meantime, it should be noted that the gap between the market value of an income stream of market level rents and an income stream of inclusionary rents (e.g. \$1,800 versus \$1,100 or \$800) would be in the range of \$100,000 to \$140,000 compared to the much larger gaps between market condo prices and inclusionary condo prices. Therefore, the potential for in-lieu fees for rental projects would be much smaller.

3. The Amount of the Fee

The Housing Department's fee recommendation is guided by an interest in providing maximum funds for affordable housing. The policy must balance the interests of generating the highest possible fee from each sale while providing adequate incentives for developers to elect to pay the fee rather than to provide inclusionary units.

In the Department's report to the HAC of April 6, 2006, staff proposed to set the fee at 65% of the difference between the allowable inclusionary price and the actual sale price of each unit designated as an inclusionary unit. This fee concept was endorsed by the HAC. (The HAC recommended that the "Planning Commission and the City Council adopt amendments to the inclusionary ordinance allowing an in-lieu fee as proposed in the Housing Department's April 6 report to the HAC.⁴) After additional consideration, subsequent to the review of this proposal by the HAC, Housing Department staff proposed a different fee structure, which would generate approximately the same level of fees but would tie the fee to the sales prices of all units in a project that are subject to the inclusionary ordinance, rather than designated particular units as inclusionary and only considering the market prices of those units.

For example, if there are five units in a project subject to the inclusionary ordinance requirement, for each unit, the fee would be equal to the 12.5% (62.5% / 5) of the

⁴ See minutes of HAC meeting of April 6, p. 2, para. 6.

difference between the price that would be permitted if each the unit was an inclusionary unit and the actual sale price of that unit. Units that are not counted when computing the required number of inclusionary units in a project (such as density bonus units) would not be subject to the in-lieu fee. Also, density bonus units would not be included when computing the formula for the in-lieu fee amount. The outcome of this approach would be to generate a fee equal to 62.5% of the difference between the allowable sales price for each inclusionary unit and the actual sales price. This approach is recommended because the application of a 62.5% fee to selected inclusionary units might create situations in which the owner feels little incentive to sell and/or maximize the price for those units, and would create a strong incentive for under the table deals.⁵ Also, an across-the-board fee for all units would obviate the need to select inclusionary units. In other jurisdictions that have substantial in-lieu fees, the fees are made applicable to all units.

The proposed formula for computing the in-lieu fee amount is as follows (See Section C(2) of the proposed ordinance) :

“This fee shall be calculated and collected based on the sales prices of all of the units in a project to which the inclusionary requirement applies, such that the fee as charged shall be a percentage of the difference between the actual sales price for each unit, and the sales price that would have been permitted had that unit been an inclusionary unit. The percentage shall be determined using the following formula: the number of units for which an in-lieu fee is substituted for an inclusionary unit divided by the total number of units to which the inclusionary ordinance applies, multiplied by 62.5%.

⁵ Therefore, a fee designed to generate 62.5% of the difference between the inclusionary price and the full sales price would constitute a higher percentage of the difference between the inclusionary sales price and the net sales price. E.g. If the full sale price was \$500,000 and the allowable inclusionary price was \$225,000, the fee would be \$171,875 (.625 * \$275,000). However, as a practical matter the net proceeds from market rate sales are more likely to equal about 90% of the gross sales price, as a result of a 6% real estate commission, a 1.5% transfer tax, and other related sales costs (including holding costs). Therefore, the net sales proceeds would be \$450,000 and the in-lieu fee would take up \$171,875 of a \$225,000 difference between the net sale proceeds and an allowable inclusionary price. (In the case of the original sale of an inclusionary unit the commission and customary closing costs can be added to the sale price.)

(Table 3)
Projected In-lieu Fees
(Hypothetical Case)

	Size of Unit (sq.ft.)	600-699	850-999	1,000-1,199	1,200 +
a.	Market Price	\$400,000	\$500,000	\$750,000	\$1,000,000
b.	Inclusionary Price 3 x 80% of AMI	\$150,800	\$181,000	\$201,100	\$233,300
c. .625*(a-b)	In-lieu Fee Per Inclusionary Unit 62.5% of difference between market&inclusionary price	\$155,750	\$199,375	\$343,063	\$479,188
d. ((.9*a)-c)	Net to developer after payment of inclusionary fee & 10% cost for sale	\$204,250	\$250,625	\$331,938	\$420,813
e. (.95*b)	Net to developer after sale at inclusionary price (5% cost for sale)	\$143,260	\$171,950	\$191,045	\$221,635
f. (d-e)	Net gain to developer from payment of in-lieu fee compared to receiving inclusionary price	\$60,990	\$78,675	\$140,893	\$199,178
g. (.125*a)	In-lieu fee per unit-12.5% fee applied to every unit in a project	\$31,150	\$39,875	\$68,613	\$95,838
h.	Inclusionary Price 3 x 120% of AMI	\$226,300	\$271,400	\$301,700	\$349,900
j. (a - h)	In-lieu Fee Per Inclusionary Unit 62.5% of difference between market&inclusionary price	\$108,563	\$142,875	\$280,188	\$406,313
k. (.90a-j)	Net to developer after payment of inclusionary fee & 10% cost for sale	\$251,438	\$307,125	\$394,813	\$493,688
l. (.95 * h)	Net to developer after sale at inclusionary price & 5% cost for sale	\$214,985	\$257,830	\$286,615	\$332,405
m. (k-l)	Net gain to developer from payment of in-lieu fee compared to receiving inclusionary price	\$36,453	\$49,295	\$108,198	\$161,283
n.	In-lieu fee per unit- 12.5% fee applied to every unit in a project	\$21,713	\$28,575	\$56,038	\$81,263

4. Projects in the Pipeline Should be Able to Participate in the In-lieu Fee Program

If the in-lieu fee approach is the City's preferred policy it should be applicable to the substantial number of inclusionary units that are in the pipeline. As of April 2006, at least

forty of the inclusionary units in projects with use permits which still have not been completed are slated for condominium sales.

5. Projects with State Mandated Density Bonuses Could Not Pay an in-lieu Fee in Place of Providing Affordable Units

Eligibility for state mandated density bonuses⁶ is contingent on the provision of affordable units within a housing development. Therefore, developer would not be able to pay in-lieu fees for inclusionary units that are used to qualify for state density bonuses.

6. An In-lieu Fee Option Compared with the Density Bonus Option

As Table 3 demonstrates, the in-lieu fee option would clearly be an economically attractive alternative to supplying inclusionary condominium units in a project that has not obtained a density bonus.

However, the degree to which the in-lieu fee option would be an attractive alternative to a density bonus would be dependant on the particular economic circumstances of a project. In the course of meeting the City's inclusionary requirement, most owners will be entitled to a 35% density bonus under state law. In theory, the per unit profit associated with the construction of density bonus units is higher than the profit associated with the development cost of the units in the "base" project, because the land cost is the same whether or not the density bonus units are constructed. Therefore, the marginal cost of constructing the density bonus units is lower than the cost associated with the "base" projects units, because there is no incremental land cost associated with the construction of the density bonus units.

A 35% density bonus based on the provision of a 20% share of affordable units in a project results in 1.75 bonus units for each inclusionary unit. Since developers can in fact make up the costs of providing the inclusionary units through the density bonus, it is important that the in-lieu fee be set at a level that also provides significant financial benefits to the developer. It is difficult to compare the economic factors associated with each option due to intangible differences between the in-lieu and density bonus options, such as a reduction in neighborhood opposition to projects that do not include a density bonus component, and, therefore, have a smaller scale.

The following table is designed to make a hypothetical comparison between the costs and benefits of the in-lieu fee and density bonus options. In this case, if the developer pays the in-lieu fee, the loss from the in-lieu fee option for each inclusionary unit that would have been required (as compared to a situation in which there was no inclusionary ordinance) is \$44,100. If the developer obtains a density bonus, the loss from the inclusionary unit is \$132,100; but the extra profit from the 1.75 density bonus units \$406,700.

⁶ See Government Code Sections 65915-65918.

(Table 4)

**Hypothetical Comparison
In-Lieu Fee v. Density Bonus Options**

			In-Lieu Fee Option		Density Bonus Option	
			Base Project		Base Project	Density Bonus
a.	no. of units		1		1	1.75
b.	sq. ft		850		850	1487.5
			850 sq.ft/unit		850 sq.ft/unit	850 sq.ft/unit
					inclusionary unit	1.75 db units
c.	Land cost/sf		90		90	
d.	Const cost/sf		205		205	205
e.	Soft cost/sf		51		51	51
f.	Total cost/sf	(c+d+e)	346		346	256
g.	Cost	(b*f)	294100		294100	380800
h.	Market Price/Unit		500000			500000
i.	Inclusionary Price (3 x 80% of AMI standard)		180000		180000	
j.	Overall Price		500000		180000	875000 (1.75 units)
k.	In-Lieu Fee (5 x 12.5% difference between market & inclusionary price)	(h-i)*.625	200000		0	0
l.	Sale Costs	(h*.10)	50000		18000	87500
m.	Net Price after sale costs and in-lieu fee	(j-k-l)	250000		162000	787500
o.	Net Gain or Loss	(m-g)	-44100		-132100	406700
p.	Net Gain or Loss taking into account inclusionary sale price, in-lieu fee and density bonus unit profits		-44100			274600

7. The Proposed Ordinance

The proposed ordinance is designed to carrying out the intent of obtaining in-lieu fees equal to 62.5% of the difference between the allowable price for an inclusionary unit and the market price of a condominium unit. As discussed above, it sets forth a methodology for determining the fee. (See Section C(2) of the proposed ordinance).

Further, the ordinance provides that:

- 1) in the event that the City Manager determines that an actual sales price does not reflect value, an appraisal may be conducted in order to determine the value of a unit for the purpose of establishing the in-lieu fee;
- 2) the payment of the fee shall be due upon the sale of a unit; and
- 3) developers who have already obtained permits as of the date of the adoption of this ordinance can exercise the in-lieu fee option if none of the units in the project have been sold.

Attachments:

1. Proposed Ordinance.
2. Public Hearing Notice for June 28 meeting.

ORDINANCE NO. -N.S.

ADDING BERKELEY MUNICIPAL CODE SECTION 23C.12.035 AUTHORIZING COMPLIANCE WITH THE INCLUSIONARY HOUSING ORDINANCE THROUGH THE PAYMENT OF IN-LIEU FEES

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

Section 1. Section 23C.12.035 is added to Chapter 23C.12 as follows:

Sec. 23C.12.035. Payment of In In-Lieu Fees as an Alternative to Providing Inclusionary Units within a Project

A. Applicability. As an alternative to providing inclusionary units required in an ownership project, the applicant may elect to enter in an agreement with the City to pay fees as set forth in this section, in-lieu of providing units that are not required to be provided at below market prices pursuant to Government Code section 65915.

B. Purpose. The fee shall be deposited in the City's Housing Trust Fund.

C. Amount of Fee.

1. The in-lieu fee shall be sixty two and a half percent (62.5%) of the difference between the permitted sale price for inclusionary units and the amounts for which those units are actually sold by the applicant.

2. This fee shall be calculated and collected based on the sales prices of all of the units in a project to which the inclusionary requirement applies, such that the fee as charged shall be a percentage of the difference between the actual sales price for each unit, and the sales price that would have been permitted had that unit been an inclusionary unit. The percentage shall be determined using the following formula: the number of units for which an in-lieu fee is substituted for an inclusionary unit divided by the total number of units to which the inclusionary ordinance applies, multiplied by 62.5%.

3. This fee shall only be applicable to units in a project that are counted in determining the required number of inclusionary units in a project and shall not be applicable to any units provided as a density bonus.

4. In the event that the City Manager makes a determination that an actual sales price does not reflect of the fair market value of a unit, the City Manager shall propose an alternate price based on the fair market value of the unit. In the event that the developer and the City Manager cannot agree on a fair market value the City Manager shall select an appraiser to carry out an appraisal of the unit and the appraised value shall be used as the market value.

D. Calculation of Inclusionary Sales Price.

1. The allowable inclusionary sales price for the purpose of calculating the in-lieu fee pursuant to this section shall be three (3) times eighty percent (80%) of the

Area Median Income (AMI) last reported as of the closing date of the sale of the unit, with the exception that if the developer has already been authorized to charge an inclusionary sale price based on development costs pursuant to Ordinance 6790 (adopted January 27, 2004, sunsetted February 19, 2006) the allowable inclusionary sale price for the purposes of this Section shall be the price permitted under that ordinance.

2. Area median income (AMI) shall be calculated in accordance with the affordability regulations established by the City Manager pursuant to section 23C.12.090.

E. Time of Payment of Fee. The developer shall be required to pay the applicable in-lieu fee no later than the closing date of the sale of a unit as a condition of said closing.

F. Use Permit Obtained Prior to Adoption of This Section. This section shall apply to projects for which all required Permits have already issued, as long as no units on those projects to which this section would apply have been sold.

PUBLIC HEARING NOTICE

Proposed Amendments to Zoning Ordinance - BMC 23C.12.035

The Planning Commission of the City of Berkeley will hold a public hearing on the above matter, pursuant to Zoning Ordinance Section 23A.20.030, on Wednesday, June 28, 2006 at the North Berkeley Senior Center, 1901 Hearst Avenue, Berkeley, CA at Martin Luther King Jr. Way (wheelchair accessible). The meeting starts at 7:00 p.m.

DESCRIPTION: The Housing Department Staff proposes that the Planning Commission amend Berkeley Municipal Code (BMC) Title 23C by adding a new section 23C.12.035 that would provide developers of new condominium projects with the option of paying "in-lieu" fees to the City's Housing Trust Fund as an alternative to providing inclusionary units. The proposed fee would normally be 62.5% of the difference between the allowable sale prices of inclusionary units and the average of actual sales prices of the market rate units in a project.

Following the public hearing, the Planning Commission may vote to adopt, modify, or reject the proposed amendments. If adopted by the Planning Commission, the proposed amendments will be forwarded for action by the City Council.

ENVIRONMENTAL REVIEW STATUS: Statutorily and categorically exempt under Section 21080(b)(8) and Guidelines Section 15378(b)(4) of the California Environmental Quality Act (CEQA).

PUBLIC COMMENT: Comments may be made verbally at the public hearing and in writing before the hearing. Those wishing to speak at the hearing must submit a speaker card by 7:15 p.m. The Commission may limit the number of speakers and the time granted to each speaker. Written comments to the Commission are encouraged and should be directed to: Planning and Development Dept., 2120 Milvia St., Berkeley, CA 94704; telephone 510-981-7400; e-mail cpaine@ci.berkeley.ca.us.

To assure distribution to Commission members prior to the meeting, correspondence must be received by 12:00 noon, seven (7) days before the meeting. 15 copies must be submitted of any correspondence with more than ten (10) pages or any item submitted less than seven days before the meeting.

COMMUNICATION ACCESS: To request a meeting agenda in large print, Braille, or on audiocassette, or to request a sign language interpreter for the meeting, call (510) 981-7410 (voice) or 981-6903 (TDD). Notice of at least five (5) business days will ensure availability. Agendas are also available on the Internet at: www.ci.berkeley.ca.us.

FURTHER INFORMATION: Questions about the proposal should be directed to Kenneth Baar at (510) 981-5420 or kbaar@ci.berkeley.ca.us
To obtain copies of the Staff Report regarding this matter please contact Carli Paine at (510) 981-7403. TDD (510) 981-6903.

-----Original Message-----

From: Wengraf, Susan
Sent: Tuesday, June 20, 2006 6:50 PM
To: Paine, Carli
Subject: RE: in lieu fee questions?

Hi Carli,

I'm very far away....but I'll try to focus.

I'd like Steve to show us comparables with the following cities: West Hollywood, Santa Monica, Westwood, Davis, San Francisco.

Also, I'd like to know if the hardship rule will apply, as it does with the density bonus.

Also, I'd like to hear from developers on this.....can you query Kennedy, Nevo, DeClerq, and DeTienne?

Thanks,

Susan

In Lieu Fees: Cross City Comparison

City	In Lieu Option?	Applicability	In Lieu Fee	Use of fee funds	Other
Santa Monica	Yes	Any project with inclusionary requirement (2 or more units)	<ul style="list-style-type: none"> \$22.33/sq. ft for apartments \$26.08/sq. ft of condos 	Into HTF for new construction only	<ul style="list-style-type: none"> City has other fund for rehab of existing affordable housing 62% of projects opted to pay the fee in FY2003-04 Options for project: on site, off site, in lieu fee Fee determined by a nexus study.
Oakland	No				
Santa Cruz	Yes	Any project with inclusionary requirement (projects with 5 or more units) Council must approve a project's application to pay an in lieu fee.	<ul style="list-style-type: none"> 80% difference between market price and inclusionary price. Market price is determined by the appraiser. No less than: \$12,500 for a studio and one bedroom; \$25,000 for a two- or more bedroom unit. 	Funds go into a Housing Trust Fund and can support new construction or rehab of existing buildings used for affordable housing.	<ul style="list-style-type: none"> Options to meet inclusionary: on-site, off-site through credit transfer; low- or very-low income housing fund in lieu fees; land dedication
Ann Arbor, MI	Yes	For Planned Unit Developments	<ul style="list-style-type: none"> Set annually by City Council Calculated as the difference between cost to purchase a moderately-priced housing unit (at 33rd percentile of market price for housing units) and sales price that is affordable to a low income household (household of 4 at 80% AMI). 2006 fee is \$98,000. 		<ul style="list-style-type: none"> Can pay in lieu fee or do on site inclusionary units
Fremont	Yes	Only an option for projects with a lot size of 10,000 square feet or larger.	<ul style="list-style-type: none"> Difference between cost of building a unit and cost of providing a unit=\$31,000 to \$32,000. 	Funds a HTF to be spent on any kind of affordable housing production.	<ul style="list-style-type: none"> No developers have paid this fee (but there haven't been projects with lots this large since the ordinance was passed). Developers of smaller projects have requested to pay the in lieu fee and have been denied. Fee determined by a study.
Pasadena	Yes	Any developer responsible for providing inclusionary units can opt to pay it.	<ul style="list-style-type: none"> \$-per-sq-ft The City is divided into four sub areas and there different fees for each area \$1/square foot to \$17/sq. ft for rental units \$7/square foot to \$41/sq. foot for ownership units. 	Into a HTF to be used by non-profit housing developers to create affordable housing and rehab projects, also used for ownership and rental programs. These funds do not support a first-time home-buyers program; the City has a separate program for this.	<ul style="list-style-type: none"> Nearly all for sale projects use this option, except those that want a density bonus. Nearly all rental projects provide inclusionary units on site. Can meet inclusionary requirement via on site, off site, in lieu, land donation. Fee was determined by a nexus study.
Palo Alto	Yes	City determines if the in-lieu fee	<ul style="list-style-type: none"> Calculated on a project-by-project basis. For ownership units, the price is 7.5% of total 	Fund a Housing Development Fund to	<ul style="list-style-type: none"> Staff indicated developers are being undercharged and the City intends to strengthen the in-lieu fee program.

In Lieu Fees: Cross City Comparison

May 9, 2006

City	In Lieu Option?	Applicability	In Lieu Fee	Use of fee funds	Other
		option is appropriate for a development. On-site is required for multi-family projects (ownership and rental). The City tends to permit in lieu option for single family detached developments (usually these are priced over \$1 million) and for luxury rental projects.	<p>sales price for all market rate units in the project for a project with a 1.5% inclusionary requirement or 10% of total sales price for all market rate units for a project with a 20% inclusionary requirement. Prices are based on sales price (not appraised price); receive fees as part of close of escrow.</p> <ul style="list-style-type: none"> For rental projects, the entire project is appraised and the fee rate percent (7.5% for a 15% inclusionary requirement and 10% for a 20% inclusionary requirement) is applied to determine the fee. The developer may also pay an annual fee equal to the difference between the initial affordable rent and the market rent for each required unit. 	<p>support rental housing creation by non-profit developers. Fund also provides gap subsidy "soft" loans to non-profit developers to build new rental housing or to acquire, preserve, or rehab existing affordable units.</p>	<ul style="list-style-type: none"> Program is part of the Below Market Rate program in the Housing Element. It is not an ordinance in the Municipal Code. Options to meet the inclusionary requirement include on-site, off-site, land dedication, in lieu fee, subsidy for rental housing development or creation of subsidized rental housing.
Santa Barbara	Yes	For ownership units only	<ul style="list-style-type: none"> Difference between production cost of a condo unit (based on 85% of median sales price of condo units in the City) and price of a 2-bedroom dwelling unit that is affordable to a low income household with 70%AMI, assuming a 30% housing-cost to income ratio. \$310,000 per unit. May be reviewed and adjusted annually. 		
City of Berkeley (currently)	Yes	For fractional units of required inclusionary ownership units.	<ul style="list-style-type: none"> "fractional value of the difference between development cost (excluding marketing costs and profit) and actual sales price for the average comparable unit in projects, where Government Code Section 65915 does not apply." 62.5% of difference between inclusionary price and actual sales price 	Housing Trust Fund	
City of Berkeley (proposal)	Proposed	Any condominium project with inclusionary units		Housing Trust Fund projects	

In Lieu Fees in Other Cities

Information for the Joint Subcommittee on Density Bonus
5/9/06

Santa Monica, CA

Projects with two or more residential units must contribute inclusionary units.
(Depending on level of affordability, the required units may be 20% 10% or 100%)

Options for any project are: On site, off site, or in lieu fee.

The City of Santa Monica conducted a Nexus Study to determine fee size. The fee money goes into their Housing Trust Fund and is used only for new construction (the Nexus Study concluded that this was the only use because the fee would be in lieu of other new construction). The City does have other money to fund acquisition and rehab of existing buildings for affordable housing.

Fee Payment Option

- \$22.33 /square foot for apartments
- \$26.08 /square foot for condominiums
- These fees were adopted by City Council on October 11, 2005 and are applicable to projects whose applications were deemed complete after December 9, 2005

In FY 03-04, 62% of projects opted to pay the fee.

Oakland, CA

The City of Oakland does not have an in lieu fee option.

Santa Cruz, CA

Santa Cruz has had an in lieu fee option since it adopted its inclusionary ordinance in the 1980s. They require that any project with 5 or more units provide 15% of units as affordable. All inclusionary units target low- or very-low income households.

Options for meeting these requirements are: on-site, off-site through transfer of credits, low- or very-low income housing fund in-lieu fees, or land dedication.

The in-lieu fee for any unit equals 80% of the difference between the market price and the inclusionary price. The market price is determined through an appraiser. The fee is not to be less than \$12,500 for a studio and one-bedroom and not less than \$25,000 for a two-bedroom (or more) unit.

Council has to approve a project's application to pay an in lieu fee.

The funds go into a Housing Trust Fund and can support new construction or rehab of existing buildings for use as affordable housing.

Ann Arbor, MI

Ann Arbor has in-lieu fees for Planned Unit Developments as an option in addition to on-site affordable units. Ann Arbor requires that 10-15% of units to be affordable (depending on how much the project exceeds underlying density as laid out in the master plan for the area).

The in-lieu fee amount is set annually by the City Council. The amount is calculated as the difference between the cost to purchase a moderately priced housing unit and the sales price that is affordable to a low income household. They use 33rd percentile of market price for housing units as the moderately priced housing unit value and a household of 4 at 80% AMI for the low income household. For 2006, the fee rate is set at \$98,000. Previously, the fee was \$60,000.

Fremont

Fremont has an in lieu option for inclusionary units; this option is only available for projects in which the lot size is 10,000 square feet or larger.

The idea behind Fremont's in-lieu option is to provide an alternative so that they are not requiring affordable mansions.

The fee was calculated in a study done by Paul Rosan for the City. The fee is the difference between the cost of building a unit and the cost of providing a unit= \$31K to \$32K. So, the developer will pay \$31K per inclusionary unit s/he is responsible for providing. The Fremont inclusionary ordinance requires any project with 7 or more units to provide 15% units as affordable. The in lieu option was adopted with the ordinance in 2003. No developers have paid it (there haven't been developments with lots this big). Developers of other projects have requested to pay the in lieu fee and been denied. The money would go into a HTF and could be spent on any kind of affordable housing production (the study did not determine that it could only be spent on new construction).

Pasadena

Any developer can opt to pay the in lieu fee. It is one of four options for meeting the inclusionary requirement (on site, off site, in lieu, or land donation).

Nearly all for sale projects pay the fee, except for those that take a density bonus (they have to have their units on site).

All for rent projects provide their inclusionary units on site.

A nexus study used information on market sales and construction costs to derive a cost per square foot fee amount.

The fees go into the Housing Trust Fund and are used by non profit housing developers to create affordable housing. The funds also support preservation of existing affordable housing and rehab projects as well as ownership/rental programs. The HTF and in lieu fees do not support first time homebuyers programs; the City has a separate program for this.

Palo Alto

Palo Alto has a Below Market Rate program as part of their Housing Element Program (it is not an ordinance in the Municipal Code). The BMR requires that 15% of all units in projects with five or more residential units be provided for moderate, low, and very low income households. If the project is on five acres or more, 20% of the units are required to be affordable.

Options to meet the affordability requirement include: on-site, off-site, land dedication along with subsidies for rental housing development or creation of subsidized rental housing, and in lieu fees.

The City determines if the in-lieu fee option is appropriate for a development. The City usually requires the affordable units to be provided on site for multi-family projects including condos, townhouses, and rental apartments. The City tends to permit the in-lieu option for single-family detached (R-1) developments, which are homes that usually sell for over \$1 million. They also tend to permit payment of in-lieu fees for luxury rental projects. In-Lieu fees are permitted for requirements of fractional units.

The in-lieu fee amount is calculated on a project-by-project basis.

For for-sale projects, the in-lieu fee is calculated as 7.5% of total sales price for all market rate units in the project for a project with 15% inclusionary requirement, or 10% of total sales price for all market rate units for a project with 20% inclusionary requirement. They base the calculations on the sales price (as opposed to the appraised price) for for-sale projects and receive the fees from the development proceeds at the close of escrow.

For rental projects, the entire project is appraised and the fee rate percent (7.5% for projects that require 15% inclusionary and 10% for projects requiring 20% inclusionary) is applied to determine the fee. Alternately, the developer may pay an annual fee, calculated as the difference between the initial affordable rent and the market rate rent for each required unit.

The funds go into a Housing Development Fund, which funds rental housing creation through non-profit developers. The Fund also provides gap subsidy "soft" loans to non-profit developers to build new rental housing or to acquire, preserve and /or rehab existing affordable units.

The City has preserved 3 large HUD Section 8 projects with a total of 279 units with acquisition & rehab loans from the trust fund and from CDBG funds (they do not have any HOME funds) in addition to 8 existing rental apartment projects with 290 units that have been preserved or acquired and rehabbed through in-lieu fee payments to the trust fund.

The City of Palo Alto plans to revise and strengthen its in-lieu fee program; staff indicates that the developers are being under charged.

Santa Barbara

Santa Barbara requires that all projects with 10 or more ownership units must make 15% of the units available for sale to households at 120% AMI (for some projects, the requirement is for households at 130% or 160% AMI). For subdivisions in which 10 or more lots or units are created, 15% of these must be available for sale to households at 120% AMI.

The fee is the difference between the production cost of a condo unit (based on 85% of median sales price of condo units in the City) and the price of a 2-bedroom dwelling unit affordable to a low income household with 70% AMI, assuming a 30% housing-cost to income ratio.

Council may review and adjust the fee annually. At the time of adoption, the fee was \$310,000 per required unit.

This program does not apply to production of rental units.

DRAFT MINUTES OF REGULAR PLANNING COMMISSION MEETING
June 28, 2006

1 Time: The meeting was called to order by Chair Burke at 7:07 p.m.

2
3 Location: North Berkeley Senior Center.

4
5 **ROLL CALL**

6
7 Commissioners Present: Poschman, Gurley, Burke, Wengraf, Pollack, Sheen, DeStaebler,
8 Samuels, Stoloff

9
10 Commissioners Absent: None

11
12 Staff Present: Paine, Gatzke, Sorensen, Harrison, Marks, Barton

13
14 **ORDER OF THE AGENDA**

15 No Changes.

16
17 **PUBLIC COMMENT PERIOD**

18 Speaker 1: Patrick Kennedy spoke regarding the in lieu fee proposal. He said that it was
19 hard to rent retail space and that new housing could help the downtown area. He said that
20 the current inclusionary ordinance and in lieu fee would make development more
21 difficult. He suggested that the in lieu fee be based on the cost of construction and should
22 be lowered.

23
24 Speaker 2: Claire Risley spoke in support of the LPO and said she was opposed to the
25 compromise.

26
27 Speaker 3: Zelda Bronstein quoted Allan Jacobs regarding the relationship between
28 enforcement of laws and political will and land use development.

29
30 **PLANNING STAFF REPORT**

31 Secretary Paine delivered the Planning Staff Report. She noted that item 14, which
32 related to zoning for economic development on Telegraph Avenue was removed from the
33 agenda and that staff would bring the item for discussion to the July 26 meeting.

34 She also reported that the parking in yards item was continued to the Council's July 11
35 meeting. The City Council adopted the budget, which included the Planning
36 Commission's work plan, at its June 27 meeting. Council discussed, but did not take
37 action on, the SCIP DEIR at its June 27 meeting. The Transportation Services Fee would
38 be taken up by Council at its July 11 meeting.

39 She also noted that the Landmarks Preservation Commission had discussed the LPO and
40 continued the item to the June 29 meeting.

41
42 **CHAIRPERSON'S REPORT**

43
44 None.

45 **COMMITTEE REPORTS**

DRAFT MINUTES OF REGULAR PLANNING COMMISSION MEETING
June 28, 2006

47 **Creeks Task Force:** Chair Burke reported that the CTF would meet on July 10 regarding
48 best practices.

49
50 **Density Bonus Subcommittee:** Commissioner Poschman reported that the
51 Subcommittee had met on June 27 and discussed base projects.

52
53 **Downtown Area Plan Citizen Advisory Committee:** Commissioner Samuels reported
54 that the DAPAC met on June 25 and determined that all meetings of the Technical
55 Advisory Committee be open to the DAPAC and the public in the future. The developers
56 of the Hotel Conference Center presented to the DAPAC. Commissioner Wengraf
57 proposed the idea of a DAPAC resolution to ensure that the Anthropology museum be in
58 the museum portion of the project.

59
60 **Downtown BART Plaza and Transit Area Design Plan Citizens Advisory**
61 **Committee:** Commissioner Sheen reported that the last meeting was June 25 and that
62 the process will continue with the DAPAC. He submitted a document from the project
63 consultant for the Planning Commission Secretary to circulate to the Commissioners.

64
65 **Major Residential Additions Subcommittee:** No meeting had occurred since the last
66 Planning Commission meeting.

67
68 **Southside Plan Subcommittee:** The next meeting of the Southside Plan Subcommittee
69 will be on July 25 from 4:15-6 PM in the third floor conference room of the Permit
70 Services Center.

71
72 **APPROVAL OF MINUTES**

73
74 M/S/C to approve the minutes from the June 14 meeting as amended.
75 (Sheen/DeStaebler). Ayes: Poschman, Gurley, Burke, Wengraf, Pollack, Sheen,
76 DeStaebler, Samuels, Stoloff. Noes: None. Abstain: None. Absent: None.

77
78 **UPCOMING AGENDA ITEMS**

79
80 The Commission reviewed upcoming agenda items.

81 **ACTION ITEMS**

82 **9. Public Hearing: Proposed 180 Unit Condominium Project: Tract Map 7774:**
83 **2016-2022 Kittredge Street, Berkeley**

84
85 M/S/C to open the public hearing. (Wengraf/Gurley) Ayes: Poschman, Gurley, Burke,
86 Wengraf, Pollack, Sheen, DeStaebler, Samuels, Stoloff. Noes: None. Abstain: None.
87 Absent: None.

88
89 Senior Planner Sorenson reviewed the project and staff report.

90

DRAFT MINUTES OF REGULAR PLANNING COMMISSION MEETING
June 28, 2006

91 Speaker 1: John Gutierrez, the applicant, said that the project was new construction and
92 that there he had agreed to affordability terms with the City Attorney. He noted that was
93 present to answer questions.

94
95 Speaker 2: John DeClerq noted that he was present for questions.

96
97 Speaker 3: Claire Risley said she wanted to know the levels of affordability.

98
99 M/S/C to close the public hearing. (Wengraf/Samuels) Ayes: Poschman, Gurley, Burke,
100 Wengraf, Pollack, Sheen, DeStaebler, Samuels, Stoloff. Noes: None. Abstain: None.
101 Absent: None.

102
103 The Commission discussed the project.

104
105 M/S to adopt the tract map. (Stoloff/Gurley).

106
107 The project terms were further discussed and the motion was withdrawn.

108
109 M/S/C to approve the tentative tract map with conditions identical to the applicable
110 conditions in the Use Permit. (Pollack/Wengraf) Ayes: Poschman, Gurley, Burke,
111 Wengraf, Pollack, Sheen, DeStaebler, Samuels, Stoloff. Noes: None. Abstain: None.
112 Absent: None.

113
114 **10. Landmarks Preservation Ordinance:** Planning Director Marks presented the
115 history of the Landmarks Preservation Ordinance (LPO) including the Negative
116 Declaration, the initiative effort, and the June 2006 compromise proposal. He noted that
117 the LPC would develop a recommendation to Council at its June 29 meeting and that the
118 Council would take up the item at its July 11 meeting. He said that the Commission could
119 make a comment to be carried to the Council or not.

120
121 The Commission discussed the issues.

122
123 M/S in support of the general direction of the most recent LPO revisions and urging the
124 Council to adopt ordinance language that, to the extent practicable, reflects the concerns
125 and issues expressed in the Planning Commission's LPO recommendations of May 2005.
126 (Stoloff/Pollack)

127
128 A substitute motion was made.

129 M/S/C in view of continued action on the LPO, to pass on taking an action.
130 (Wengraf/Samuels). Ayes: Poschman, Gurley, Burke, Wengraf,, Sheen, DeStaebler,
131 Samuels, Stoloff. Noes: Pollack. Abstain: None. Absent: None.

132
133 **11. Public Hearing: In Lieu Fee Option for Condominium Inclusionary Units**

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June 28, 2006

134 M/S/C to open the public hearing. (Sheen/Samuels) Ayes: Poschman, Gurley, Burke,
135 Wengraf, Pollack, Sheen, DeStaebler, Samuels, Stoloff. Noes: None. Abstain: None.
136 Absent: None.

137 Assistant Planner Harrison presented the staff report and noted that the item was
138 scheduled to go before the Council on July 18.

139 Housing Director Barton reviewed the proposed in lieu fee and the formula for
140 calculating the fee.

141

142 Speaker 1: Steve Wollmer spoke in support of the in lieu fee concept and encouraged the
143 idea for rental projects as well as condominium projects. He said he was concerned that
144 the City's sale price is not affordable under the state definition and suggested looking at
145 Fremont's approach.

146

147 Speaker 2: Claire Risley said she thought developers' profits were too high and supported
148 an in lieu fee.

149

150 Speaker 3: Jesse Arreguin spoke in favor of the in lieu fee option and said that the HAC
151 supported the proposal and is currently working on a proposal for an inclusionary rental
152 unit in lieu option.

153

154 M/S/C to close the public hearing. (Poschman/Stoloff) Ayes: Poschman, Gurley, Burke,
155 Pollack, Sheen, DeStaebler, Samuels, Stoloff. Noes: None. Abstain: None. Absent:
156 Wengraf.

157

158 The Commission discussed the options and issues.

159

160 M/S/C to recommend that the Council adopt the inclusionary ordinance amendment for
161 the in lieu fee option and request that staff provide an update on the program one year
162 after adoption. (Sheen/DeStaebler) Ayes: Sheen, Burke, Stoloff, Gurley, DeStaebler,
163 Poschman. Noes: None. Abstain: Samuels, Pollack, Wengraf. Absent: None.

164

165 **12. Background Information Related to the Condominium Conversion Ordinance:**
166 Housing Director Barton provided an update on the Council workshop on the Condo
167 Conversion Ordinance. He reported that Council wanted to uphold the existing structure
168 of 100 units per year and had an interest in lower fees for long-term owner-occupants in
169 smaller projects. Staff would present another workshop at the last meeting of September
170 and bring a panel of condominium experts.

171

172 The Commission discussed the information.

173

174 **13. Request to Set Hearing: Zoning Ordinance Amendments Addressing Heights of**
175 **Fences and Other Unenclosed Accessory Structures on Residential Lots and**
176 **Installation of Solar Energy Equipment By-Right (BMC Section 23D.08.060, the**
177 **residential use tables in 23D.xx.030, and Sub-section 23D.04.030.G)**

178

179 Assistant Planner Harrison provided an overview of the proposed amendments.

DRAFT MINUTES OF REGULAR PLANNING COMMISSION MEETING
June 28, 2006

180 M/S/C to set the Public Hearing for July 26, 2006. (Wengraf/Poschman) Ayes:
181 Poschman, Gurley, Wengraf, Burke, Pollack, Sheen, DeStaebler, Samuels, Stoloff. Noes:
182 None. Abstain: None. Absent: None.

183
184 M/S/C to cancel the July 12 meeting. (Poschman/Stoloff) Ayes: Poschman, Gurley,
185 Wengraf, Burke, Pollack, Sheen, DeStaebler, Samuels, Stoloff. Noes: None. Abstain:
186 None. Absent: None.

187

188 **ADJOURNMENT**

189 **The meeting was adjourned at 10:10**

190

191 Note on Commission Meeting Reporting:

192 In June 2005, the City Council adopted a plan that requires commission secretaries to
193 submit an annual report that summarizes for each meeting a) the number of
194 commissioners in attendance, b) the number of members of the public in attendance, c)
195 the number of speakers at Public Comment and d) the length of the meetings.

196

197 For the June 28, 2006 Planning Commission meeting, the following will be reported:

198 Commissioners in attendance: 9

199 Members of the public in attendance: 18

200 Speakers at Public Comment: 3

201 Length of the meeting: 3 hours 3 minutes