



# PRIOR AFFORDABLE HOUSING REQUIREMENTS

FOR ALL DEVELOPMENT PROJECTS VESTED ON/BEFORE MARCH 31, 2023

Planning and Development  
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**INFORMATION** for all **development projects subject to the Affordable Housing Mitigation Fee** (Berkeley Municipal Code (BMC) Section 22.20.065) and for **rental housing development projects subject to Inclusionary Housing provisions** (BMC Chapter 23.328) that vested to the requirements in place on or before March 31, 2023.

(See Exhibit A and Exhibit B, respectively.)

## HOUSING DEVELOPMENT PROJECTS,

as defined in 23.328.020, that do not have established vesting under SB 330 or an issued building permit as of March 31, 2023, are subject to the current affordable housing requirements.

For housing development projects subject to the current requirements, please refer to [BMC Chapter 23.328](#) and our current [Affordable Housing Requirements](#).

## BACKGROUND

The City Council adopted new affordable housing requirements and related fees that went into effect on April 1, 2023. The following information applies only to residential housing projects that vested to the land use requirements prior to the new regulations taking effect. To be vested, the project must have one of the following:

- **Complete SB 330 Preliminary Housing Development Application** ("SB 330 Pre-Application") submitted on/before March 31, 2023; or
- **Issued building permit** on/before March 31, 2023

## INFORMATION FOR RENTAL HOUSING PROJECTS VESTED ON/BEFORE MARCH 31, 2023

Developers of new rental housing with five or more units must comply with the City's affordable housing requirements through one of the options below:

- Pay the Affordable Housing Mitigation Fee; or
- Provide 20 percent of the units in your building as Below Market Rate units; or
- Provide fewer than the required units and pay a prorated fee.

Find details about each of these options in the following sections.

## MITIGATION FEE (EXHIBIT A)

The Affordable Housing Mitigation Fee is adjusted every two years. As of July 1, 2022, the fee is set at follows:

- **Paid at Certificate of Occupancy: \$46,185 per rental unit; or**
- **Paid at building permit: \$43,185 per rental unit.**

## THE FOLLOWING FORMULA IS USED TO CALCULATE THE AFFORDABLE HOUSING MITIGATION FEE :

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

### WHERE:

- **FEE** = \$46,185 or \$43,185 (see above)
- **A** = Total Number of Units in the Project
- **B** = Number of Very-Low Income Units Provided in the Project.
- **C** = Number of Low-Income Units Provided in the Project.

*The fee is automatically adjusted every two years, beginning in 2018.*

## PAY THE AFFORDABLE HOUSING



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## PROVIDE 20 PERCENT OF UNITS AS BELOW MARKET RATE HOUSING

To avoid paying the Affordable Housing Mitigation Fee completely, 20 percent of the units in your project must be provided as Below Market Rate housing. These units will be reserved for low-income and very low-income households, and the maximum rental prices will be set by the City of Berkeley. You must provide these Below Market Rate units for the life of the project.

Out of these Below Market Rate units, half must be provided to low-income households (80 percent of Area Median Income), and half must be provided to very low-income households (50 percent of Area Median Income). If an odd number of affordable units are provided, the majority must be very low-income.

In addition, of the total Very Low-Income units, 40 percent of the units must be reserved for Section 8 voucher holders and 40 percent must be reserved for City of Berkeley Shelter + Care certificate holders.

## PROVIDE FEWER THAN 20 PERCENT BELOW MARKET RATE UNITS AND PAY A PRORATED FEE

As a hybrid option, you can choose to provide fewer than 20 percent of your project's units as Below Market Rate and pay a prorated Affordable Housing Mitigation Fee. You will still need to designate at least 50 percent of the Below Market Rate units for very low-income households.

### NEXT STEPS

You must make your decision about how you intend to comply with these requirements before the City of Berkeley will issue your Certificate of Occupancy or Temporary Certificate of Occupancy (if any). You must decide prior to your building permit if you opt to choose the reduced fee amount.

If you choose to provide Below Market Rate units, you must sign a Regulatory Agreement before the City will issue your building permit. If you choose to provide units, you will need to follow City guidelines for managing these units.

**For more information, please contact [AffordableHousing@berkeleyca.gov](mailto:AffordableHousing@berkeleyca.gov).**

#### Exhibit A:

Prior BMC Chapter 22.65 Mitigations and Fees – Conditions of Approval for Development Projects (applies to all development projects vested on/before March 31, 2023)

#### Exhibit B:

Prior BMC Chapter 23.328 Inclusionary Housing (applies to rental housing projects vested on/before March 31, 2023)

**Chapter 22.20**  
**MITIGATION AND FEES--CONDITIONS FOR APPROVAL OF DEVELOPMENT PROJECTS**

## Sections:

- [22.20.010](#) Applicability of chapter.
- [22.20.020](#) Findings.
- [22.20.030](#) Purpose.
- [22.20.040](#) Definitions.
- [22.20.050](#) Designated implementing authority.
- [22.20.060](#) Requirements.
- [22.20.065](#) Affordable housing mitigation fee.
- [22.20.070](#) Exception/limit where applicant establishes inapplicability or unconstitutionality of general requirements.
- [22.20.080](#) Exception--Hardship.
- [22.20.090](#) Procedure.
- [22.20.100](#) Appeal.
- [22.20.110](#) Mitigation rationale.

**Applies only to development projects vested on/before March 31, 2023**

See Berkeley Municipal Code Title 23, Zoning, for current requirements

**22.20.010 Applicability of chapter.**

The regulations, requirements and provisions of this chapter and council resolutions adopted pursuant hereto shall apply to any development project. (Ord. 6179-NS § 1, 1993)

**22.20.020 Findings.**

- A. There is a shortage of affordable housing, licensable space for child care services and affordable child care and public facilities, adequate employment training and placement services and amenities within the City of Berkeley;
- B. Persons who live and/or work in the City have serious difficulty locating housing, child care and public facilities, adequate employment training and placement services and amenities at prices they can afford;
- C. Local revenues, as supplemented by federal and state sources, do not provide an adequate source of funding to meet local needs for housing, child care and public facilities, adequate employment training and placement services and amenities;
- D. Certain development projects create an influx of new employees and their families to the City, and thus generate additional need for affordable housing, child care and public facilities, adequate employment training and placement services and amenities;
- E. Many potential employees are unable to accept moderately-paying jobs because of a lack of childcare facilities or the cost of obtaining adequate child care. This, in turn, results in increased social and economic costs to the City;
- F. In addition, such development projects create individual and cumulative impacts, including changes in, and in many cases deterioration of, the visual environment; an increase in noise, air and water pollution levels; new and increased traffic and parking impacts; power, sewer and other utility demand and consumption; loss of valuable open space; and increased demands on parks, schools, libraries, police, fire and public facilities, services and amenities;
- G. The increased demand for affordable housing, child care and public services, adequate employment training and placement facilities and amenities, and the other impacts generated by development projects, unless mitigated, are detrimental to the City's public health, safety and general welfare;
- H. The public policy of the City of Berkeley, as reflected by the City's master plan and housing element, is (1) to make an adequate supply of housing available to all economic segments of the community, (2) to provide adequate

**Applies only to development projects vested on/before March 31, 2023**

municipal services and facilities, and (3) to control the design and operation of development projects to insure their compatibility within adjacent residential areas. (Ord. 6179-NS § 2, 1993)

#### **22.20.030 Purpose.**

The purpose of this chapter is to assure that development projects mitigate and/or compensate for the increased demand for affordable housing, child care and public services, adequate employment training and placement facilities and amenities and other impacts attributable to and generated by such development projects within the City of Berkeley. (Ord. 6179-NS § 3, 1993)

#### **22.20.040 Definitions.**

- A. "Applicant" means any individual, person, firm, partnership, association, joint venture, corporation, entity, combination of entities or authorized representative thereof, who undertakes, proposes and/or applies to the City for, any development.
- B. "Benefits" shall include, but not be limited to, any of the following: increased tax revenues; new local employment opportunities; development of desirable public amenities and/or services; potential attraction of additional commercial development; potential stimulation of commercial activity.
- C. "Development project" means any activity involving or requiring the issuance by the City of Berkeley to a person or entity of a use permit, variance, building permit, subdivision approval (including tentative, final and parcel maps), license, certificate or other entitlement of any kind.
- D. "Infeasible" means incapable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors.
- E. "Mitigate" and "mitigation" means any of the following:
1. Minimizing impacts by limiting the degree or magnitude of a proposed development project;
  2. Rectifying the impact by repairing, rehabilitating or restoring the impacted area or environment;
  3. Reducing or eliminating the impact over time by ongoing programs, preservation, maintenance and/or other operations;
  4. Compensating for the impact by paying a fee and/or providing replacement and/or substitute resources, facilities, services and/or environments. (Ord. 6179-NS § 4, 1993)

#### **22.20.050 Designated implementing authority.**

- A. The City Manager shall be the designated authority to develop and implement rules and regulations pertaining to this chapter, and shall have the authority to take any actions they may deem necessary and/or appropriate to work and/ or negotiate with applicants to advance the purposes of this chapter.
- B. The Planning Commission, Zoning Adjustments Board and City Council shall have the authority to impose those mitigation and/or fees authorized by this chapter as conditions of discretionary subdivision approvals, use permits and/or variances.
- C. The City shall have the authority to impose administratively those mitigations and/or fees required by this chapter as conditions of permits and entitlements which are not subject to discretionary review by the Planning Commission, Zoning Adjustments Board and/or City Council, including administrative use permits, zoning permits and building permits. (Ord. 6179-NS § 5, 1993)

#### **22.20.060 Requirements.**

- A. The applicant of any development project, for which any permit, variance, approval or entitlement of any kind is required by the City, as a condition of such permit, variance and/or other entitlement, shall provide and/or pay to the City those mitigation and/or fees necessary to eliminate, mitigate and/or reduce to an acceptable level those impacts and/or increased demand for affordable housing, child care and/or public services, adequate employment training and placement facilities and amenities which are anticipated to be generated by and/or attributable to such development project as established by resolution of the City Council or as otherwise imposed administratively by the City, or by the Planning Commission, Zoning Adjustments Board, or City Council.
- B. Nothing in this chapter shall be construed as requiring the City to grant any individual permit, variance, approval and/or other entitlement of any kind for which the applicant proposes or agrees to provide mitigation and/or fees under this chapter.
- C. The mitigation and/or fees authorized by this chapter are in addition to any otherwise authorized by law. (Ord. 6179-NS § 6, 1993)

#### **22.20.065 Affordable housing mitigation fee.**

A. Findings and purpose.

1. The State of California has established a Regional Housing Needs Allocation (RHNA) process under which it allocates a "fair share" of the regional housing need, updated periodically, to each local jurisdiction. The RHNA for the San Francisco Bay Area allocates to Berkeley a "fair share" that calls for adequate sites for 2,431 housing units for the period from 2007 to 2014, including sites for 164 extremely low income units, 164 very low income units, 424 lower income units, and 549 moderate income units. The City's Housing Element, adopted on October 19, 2010, complies with this RHNA.
2. In 1990, the City established the Housing Trust Fund to pool available funding for affordable housing development. The majority of resources in the Housing Trust Fund have been from federal sources, although state and local sources have been significant as well. Since 1990, the City has provided Housing Trust Funds to affordable housing developments throughout the City, and has revised the Housing Trust Fund Guidelines a number of times, most recently in 2009, to reflect changing market conditions and City priorities.
3. While Housing Trust Funds are a significant source of support for affordable housing developments within the City, Housing Trust Funds alone are not sufficient to cover the costs of providing affordable housing today. Each development must leverage multiple federal and state sources of funding to be financially feasible. Even then, the housing produced is not sufficient to meet local needs for housing for lower income households, as documented in the Housing Element, the Everyone Home Plan adopted in 2006, and the 2010 Consolidated Plan.
4. In 1986 the City adopted an Inclusionary Housing Ordinance, which required, among other things, that a percentage of all new residential rental units in projects of 5 or more units be provided at below market rates for the life of the project. The City of Berkeley's Inclusionary Housing Ordinance has been an important tool in creating affordable housing in the City since its adoption.
5. In 1993, the City established an affordable housing linkage fee on commercial development, designed to mitigate the need for affordable housing it creates. Income from this linkage fee has been administered through the Housing Trust Fund, mitigating some impact of commercial development.
6. Even in combination with other funding sources, the City's linkage fee and its Inclusionary Housing Ordinance have not been sufficient to fully address local housing needs.
7. A 2009 decision of the California Court of Appeal (Palmer/Sixth Street Properties v. City of Los Angeles (2009) 175 Cal. App. 4th 1396) has further impaired the City's ability to provide for needed--and state-allocated--

**Applies only to development projects vested on/before March 31, 2023**

affordable housing. Palmer holds that the City may not require rents to be limited in rental projects unless it provides assistance to the rental project, thus invalidating the City's Inclusionary Housing Ordinance requirements as to rental projects.

8. Accordingly, the only remaining feasible and practicable option to meet the City's RHNA for below market rate units is to impose an affordable housing mitigation fee on new market-rate rental units, to mitigate the impacts of those new units on the need for affordable housing.

9. New market-rate rental housing, including Density Bonus Units, contributes to the demand for goods and services in the City, increasing local service employment at wage levels which often do not permit employees to afford housing in the City.

10. An "Affordable Housing Fee Nexus Study," dated June 2010 (the "Nexus Study"), prepared by BAE Urban Economics, quantifies the impacts of new market-rate rental units on the need for affordable housing in the City.

11. That study estimated the additional spending attributable to each new housing unit in the City, then translated this spending into jobs at a range of income levels. The study estimated the number of households (53) the job-holders (93) would make up, and their household incomes. The City relied on this study to set a fee of \$34,000 in 2015.

12. A new Nexus Study, dated March 25, 2015, prepared by BAE Urban Economics, using the same methodology, and presented to Council supported a maximum fee at \$84,400.

#### B. Definitions.

1. "Density Bonus Project" means a Development project that receives a density bonus pursuant to Government Code Section [65915](#).

2. "Density Bonus Units" means additional units to which an applicant for a Density Bonus Project is entitled and constructs pursuant to Government Code Section [65915](#).

3. "Income" means combined annual gross income from all sources.

4. "Low-income Household" shall mean a household whose income is no more than 80% of AMI.

5. "Low-income Unit" means any dwelling unit that is rented, for the life of the Development project in which it is located, at a price affordable to a Low-Income Household of an appropriate size for the dwelling unit, and restricted to households with an income not exceeding 80% of AMI.

6. "Qualifying Units" means those below market-rate units in a Density Bonus Project that entitle the applicant to a density bonus pursuant to Government Code Section [65915](#).

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

8. "Very Low-Income Unit" means any dwelling unit that is rented, for the life of the Development project in which it is located, at a price affordable to a Very Low Income Household of an appropriate size for the dwelling unit, and restricted to households with an income not exceeding 50% of AMI.

9. For purposes of this Section, affordable rents shall be determined in accordance with the provisions of Health and Safety Code section [50105](#), [50052.5\(b\)\(2\)](#), and [50052.5\(h\)](#), and California Code of Regulations Chapter 25 Section 6918.

10. Tenant-paid utility costs will be deducted from gross rent to determine the rent paid by the tenant. Utility costs will be based on the Berkeley Housing Authority Section 8 utility allowance, or future equivalent standard.

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11. Minimum bedroom size will be 70 square feet, consistent with Berkeley's Housing Code (19.40.010.A, Uniform Housing Code Chapter 5, Section 503.2).

C. The City Council may by resolution adopt an affordable housing impact fee ("Fee"), which shall be imposed on the development of new rental housing in Berkeley, subject to limitations set forth in this Chapter and any additional limitations set forth in the Resolution. All such Fees shall be managed consistent with Government Code Sections [66000](#) et seq. Up to 10 percent of Fees may be used to pay for administration of the Fee or the Housing Trust Fund or any successor fund with the same purpose, and the remainder shall be deposited in the City's Housing Trust Fund or any successor fund with the same purpose.

1. All Fees shall be paid, at the issuance of a Certificate of Occupancy, except as set forth in this subdivision or in the City Council Resolution that adopts the Fee.
2. No later than the date the first building permit is issued for a Development project that is subject to the Fee, the applicant may elect to avoid the Fee by providing, for the life of the project, a number of units equal to 20% of the total units in the project at rental rates affordable to Low-Income and Very Low-Income Households and pay a proportionately reduced Fee as calculated in Section [22.20.065.D](#). Subject to administrative regulations promulgated pursuant to subdivision H, 40% of the Very Low-Income units in Development projects that have not obtained final approval under Title 23 as of September 20, 2016, shall be reserved for holders of Berkeley Housing Authority Section 8 vouchers and 40% shall be reserved for holders of City of Berkeley Shelter + Care certificates. In all such cases the applicant shall execute a written agreement with the City indicating the number, type, location, approximate size and construction schedule of all such dwelling units and other information as required for determining compliance with this Section. All such units shall be reasonably dispersed throughout the project, be of the same size and contain, on average, the same number of bedrooms as the market rate units in the project; and be comparable with the design or use of market rate units in terms of appearance, materials and finish quality. The owner of any units produced under this option must report to the City annually on the occupancy and rents charged for the units.
3. In making its election under the preceding paragraph, an applicant for a Development project subject to this Section may provide less than 20% of the total units in the project as Low-Income and Very Low-Income Units and pay a proportionately reduced Fee as calculated in Section [22.20.065.D](#).
4. In projects providing more than one below market rate unit (meaning the combination of Low-income Units and Very Low-Income Units), at least 50% of the units shall be affordable to Very Low-income Households. When there is an uneven number of units provided under this ordinance, the majority of the below market rate units shall be Very Low-Income units.
5. Units that meet the criteria established for affordable housing rents in the City's Housing Trust Fund guidelines, as amended shall be exempt from the Fee.

D. Projects that include Low-income and Very Low-Income Units, including Qualifying Units, will qualify to pay a discounted fee if providing fewer than the number of units equal to 20% of the total units in the project.

The following equation calculates the proportional discount to the fee based on the portion of units in the project that are provided at Low-Income and Very Low Income rents. The total fee payable for such projects shall be:

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

Where:

A = Total number of units in the project

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

**Applies only to development projects vested on/before March 31, 2023**

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

- E. The City Council may by resolution opt to vary the AHMF and in lieu unit options by areas of the city and/or zoning districts, subject to preparing an appropriate nexus analysis to support any increase in the AHMF.
- F. The City Council may by resolution establish fees for the administration of the program established by this Section.
- G. Compliance with this Section shall be a condition of approval of all Development projects subject to this Section, whether or not such a condition is expressly included in the Use Permit.
- H. Consistent with Government Code [66000](#), this Section will be revisited every 5 years to confirm whether the purpose, the nexus, and the amount of the fee are still valid.
- I. Administrative Regulations. The City Manager or their designee shall promulgate rules and regulations pertaining to this chapter, including but not limited to setting and administering gross rents, requiring guarantees, entering into and recording agreements with applicants and taking other appropriate steps necessary to assure that the required Low Income and Very Low Income Units are provided and occupied by Very Low Income and Low Income Households. (Ord. 7562-NS § 1, 2017)

**22.20.070 Exception/limit where applicant establishes inapplicability or unconstitutionality of general requirements.**

- A. Notwithstanding any other provision of this chapter, the requirements of this chapter shall not apply or shall be limited as follows:
1. No mitigation and/or fees shall be imposed on any applicant or development project where the applicant establishes to the City's satisfaction that the proposed development project will not generate any additional need for affordable housing, child care and/or public facilities, adequate employment training and placement services or amenities or any other impact for which a mitigation and/or fee is otherwise required;
  2. The amount and/or level of any mitigation and/or fee under this chapter shall not exceed the reasonable cost of either satisfying the additional demand for affordable housing, child care and/or public facilities, adequate employment training and placement services or amenities or of eliminating and/or reducing to an acceptable level any other impact which reasonably may be anticipated to be generated by or attributed to any individual development project;
  3. The City shall not condition any permit in any manner which results in a deprivation of the applicant's constitutional rights.
- B. The burden of establishing by satisfactory factual proof the applicability and elements of subsections (A)(1), (A)(2) and (A)(3) of this section shall be on the applicant
- C. No exemption or limit shall be granted pursuant to this section unless a finding is made, based on satisfactory factual proof provided by the applicant, that at least one of the requirements set forth in subsection (A)(1), (A)(2) or (A)(3) of this section has been satisfied. (Ord. 6179-NS § 7, 1993)

**22.20.080 Exception--Hardship.**

- A. Notwithstanding any other provision of this chapter, the requirements of this chapter in the discretion of the City may be waived or limited for a particular development project where both of the following findings are made:
1. The imposition of the mitigation and/or fees otherwise required by the City make the development of the particular project infeasible; and

**Applies only to development projects vested on/before March 31, 2023**



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

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

#### **22.20.090 Procedure.**

A. Upon receipt of any application for a permit, approval and/or other entitlement subject to the provisions of this chapter, the City shall review the application, obtain information and take any other steps it deems necessary to determine whether and to what extent the proposed development project will generate and/or result in impacts which require mitigation pursuant to this chapter. The City shall calculate, according to formulae and rationales to be maintained and provided upon request to the applicant, the amount of mitigation and/or fees required to be provided by the applicant to offset and/or mitigate the impacts of the proposed development project.

B. For those proposed development projects subject to this chapter which do not require original discretionary review by the Planning Commission, Zoning Adjustments Board and/or City Council, the mitigation and/or fees required by this chapter shall be imposed administratively by the City as a condition of the issuance and/or granting of the permit, approval and/or entitlement otherwise required for any such development project. The amount of such mitigation and/or fees to be imposed shall be determined by the City.

C. Where the mitigation and/or fees required pursuant to this chapter are to be imposed administratively by the City, and where the applicant seeks to establish an exception pursuant to Section [22.20.070](#) or [22.20.080](#), the City shall have the authority to limit and/or reduce the amount of mitigation and/or fees up to fifty percent of the amount which otherwise would be required by the chapter. The amount of mitigation and/or fees to be imposed by the City shall not be limited or reduced below fifty percent of the amount which otherwise would be required by this chapter without the approval of the Zoning Adjustments Board or City Council.

D. Where the mitigation and/or fees required pursuant to this chapter are to be imposed by the Planning Commission, Zoning Adjustments Board and/or City Council, and where the applicant seeks to establish an exception pursuant to Section [22.20.070](#) or [22.20.080](#), the Planning Commission, Zoning Adjustments Board and/or City Council shall have the authority either to waive, or, alternatively, to limit and/or reduce, the amount of mitigation and/or fees which otherwise would be required by this chapter.

E. The City shall adopt written findings which explain both the rationale for the imposition of any fee and/or mitigation, including the amount thereof, and any reduction or exception granted including the findings required by Section [22.20.070](#) or Section [22.20.080](#). Such findings shall be provided to the applicant at the time the permit or entitlement is issued. (Ord. 6179-NS § 9, 1993)

#### **22.20.100 Appeal.**

A. The applicant or any development project aggrieved by any administrative decision of the City in imposing any mitigation and/or fee pursuant to this chapter may appeal such decision to the Zoning Adjustments Board in the same manner as provided in Section 20.4 of the City's zoning ordinance (No. 3018-N.S.).

B. The applicant of any development project aggrieved by any decision made by the Planning Commission or Zoning Adjustments Board pursuant to this chapter may appeal such decision to the City Council pursuant to the appeal procedure, if any, governing appeal of decisions made concerning the underlying entitlement such as the use permit or subdivision map. (Ord. 6179-NS § 10, 1993)

#### **22.20.110 Mitigation rationale.**

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The City Manager shall establish, maintain on file and use standard formulae, rationales and calculations by which the amount of mitigation and/or fees required to offset or reduce certain impacts may be determined. Such formulae and calculations shall be provided to any person upon request. (Ord. 6179-NS § 11, 1993)

**The Berkeley Municipal Code is current through Ordinance 7735-NS, passed October 27, 2020.**

Disclaimer: The City Clerk's Office has the official version of the Berkeley Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

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## Chapter 23.328 INCLUSIONARY HOUSING

**Applies only to rental housing projects vested on/before March 31, 2023**

See Berkeley Municipal Code Title 23, Zoning, for current requirements

Sections:

- 23.328.010 Chapter Purpose and Applicability.**
- 23.328.020 General Requirements.**
- 23.328.030 Payment of In-Lieu Fees as an Alternative to Providing Inclusionary Units.**
- 23.328.040 Requirements Applicable to All Inclusionary Units.**
- 23.328.050 Inclusionary Unit Requirements for Rental Housing Projects.**
- 23.328.060 Inclusionary Unit Requirements for Ownership Projects.**
- 23.328.070 Special Requirements for Avenues Plan Area.**
- 23.328.080 Administrative Regulations.**
- 23.328.090 Fees.**

### **23.328.010 Chapter Purpose and Applicability.**

A. *Purpose.* The purpose of this chapter is to:

1. Promote Housing Element goals to develop affordable housing for households with incomes below the median, as defined in this chapter, or, in the case of limited equity cooperatives, households with incomes below 120 percent of the median.
2. Require the inclusion of affordable dwelling units in specified proposed developments ("projects").

B. *Applicability.*

1. The following types of projects must comply with the inclusionary housing requirements of this chapter:
  - (a) Residential housing projects constructing five or more dwelling units.
  - (b) Residential housing projects constructing one to four new dwelling units when:
    - i. Such units are added to an existing one to four-unit property developed after August 14, 1986; and
    - ii. The resulting number of units totals five or more.
  - (c) Residential housing projects proposed on lots with a size and zoning designation that allows construction of five or more dwelling units.
2. This chapter does not apply to dormitories, fraternity and sorority houses, boarding houses, residential hotels, or live/work units.

3. Live/work units are subject to low income inclusionary provisions in Section [23.312](#) (Live/Work).
4. This chapter sets forth specific inclusionary housing requirements for the Avenues Plan Area, which prevails over any conflicting requirements set forth elsewhere. (Ord. 7787-NS § 2 (Exh. A), 2021)

### **23.328.020 General Requirements.**

#### *A. Minimum Percent of Units.*

1. Any project subject to this chapter is required to include at least 20 percent of the total number of dwelling units within the project as inclusionary units, except that limited equity cooperatives are required to include at least 51 percent of their units as inclusionary units.
2. In applying the percentages above, any decimal fraction above a whole number of dwelling units shall be paid as an in-lieu fee as stated in Section [23.328.040](#) (Requirements Applicable to All Inclusionary Units).

#### *B. Median Income Levels.* For the purpose of determining the median income levels for households under this chapter, the City shall use the Oakland Primary Metropolitan Statistical Area (PMSA) statistical figures that are available to the City from the most recent U.S. Census. (Ord. 7787-NS § 2 (Exh. A), 2021)

### **23.328.030 Payment of In-Lieu Fees as an Alternative to Providing Inclusionary Units.**

#### *A. Applicability.*

1. 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](#).
2. This section applies to projects for which all required permits have already been issued, as long as no units within such a project have been sold.

#### *B. Deposit.* The fee shall be deposited in the City's Housing Trust Fund.

#### *C. Fee Amount.*

1. The in-lieu fee shall be 62.5 percent 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. The 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.

3. 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 percent.
4. This fee shall only apply to units in a project that are counted in determining the required number of inclusionary units in a project and shall not apply to any units provided as a density bonus.
5. If the City Manager determines 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.
6. If the developer and the City Manager cannot agree on a fair market value, the City Manager shall select an appraiser to prepare 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 amount shall be three times 80 percent 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 [23.328.080](#) (Administrative Regulations).

E. *Time of Payment of Fee.* The developer shall pay the in-lieu fee no later than the closing date of the sale of a unit as a condition of the closing. (Ord. 7787-NS § 2 (Exh. A), 2021)

## **23.328.040 Requirements Applicable to All Inclusionary Units.**

A. *Recipient Requirement.*

1. All inclusionary units other than those in limited equity cooperatives shall be sold or rented to:
  - (a) The City or its designee; or
  - (b) Low income, lower income, or very low-income households.
2. Units in limited equity cooperatives shall be sold or rented to households whose gross incomes do not exceed 120 percent of the Oakland PMSA median.

B. *Agreement.* The applicant shall execute a written agreement with the City indicating the number, type, location, approximate size, and construction schedule of all dwelling units and other information as required to determine compliance with this chapter.

- C. *Timing.* All inclusionary units in a project and phases of a project shall be constructed concurrently with, or before, the construction of non-inclusionary units.
- D. *Criteria.* All inclusionary units shall be:
1. Reasonably dispersed throughout the project;
  2. Of the same size and contain, on average, the same number of bedrooms as the non-inclusionary units in the project; and
  3. Comparable with the design or use of non-inclusionary units in terms of appearance, materials, and finish quality.
- E. *In-Lieu Fee Requirement.* In projects where calculating the inclusionary requirement results in a fraction of a unit, the fraction shall be paid in the form of an in-lieu fee to the City.
1. Where Government Code Section [65915](#) does not apply, the in-lieu fee shall be the fractional value of the difference between development cost (excluding marketing costs and profit) and actual sales price for the average comparable unit in projects.
  2. Where Government Code Section [65915](#) does apply, the in-lieu fee shall be the difference between affordable cost for an appropriately-sized household and the fractional value of the average comparable actual sales price for the fraction of the unit in projects to require a density bonus or equivalent incentive.
- F. *Use of In-Lieu Fees.*
1. The in-lieu fee shall be used by the City or its designee (such as a non-profit housing development corporation) to provide, construct, or promote the creation or retention of low-income housing in Berkeley.
  2. The use of in-lieu fees for specific housing programs shall be brought before the Housing Advisory and Appeals Board for review and approval.
- G. *Exceptions.* Where the applicant shows, and the City agrees, that the direct construction and financing costs of the inclusionary units, excluding marketing cost and profit (and also excluding land costs if a density bonus or equivalent incentive is provided), exceeds the sales prices allowed for inclusionary units by this chapter, the Zoning Adjustments Board (ZAB) may approve one or more of the following measures to reduce costs or increase profitability:
1. Reduce the floor area or the interior amenities of the inclusionary units, provided that such units conform to applicable building and housing codes.
  2. Increase the number of bedrooms in the inclusionary units.
  3. In a home ownership project, construct rental units in a number required to meet the inclusionary provisions of this chapter applicable to rental housing projects.
  4. Waive the in-lieu fees for fractions of units. (Ord. 7787-NS § 2 (Exh. A), 2021)



## 23.328.050 Inclusionary Unit Requirements for Rental Housing Projects.

### A. *General Rental Requirements.*

1. All inclusionary units shall be occupied by low, lower, or very low-income households.
2. The maximum rental price for inclusionary units shall be affordable to an appropriate-sized household whose income is 81 percent of the Oakland PMSA median.
3. In projects requiring more than one inclusionary unit, at least 50 percent of those units shall be rented at a price that is affordable to low or lower-income households, provided that the City can make available rental subsidies through the federal Section 8 Existing Housing Program or an equivalent program.
4. When there is an uneven number of inclusionary units, the majority of units shall be priced to be affordable to a household at 50 percent of median income if subsidies are available.
5. If no rental subsidies are available, all inclusionary unit prices shall be affordable to households at 81 percent income of the Oakland PMSA median.
6. If an applicant agrees to provide 10 percent lower income inclusionary units, the rental price for such units shall be affordable to a household with income that is 60 percent of the Oakland PMSA median.
7. Dwelling units designated as inclusionary units shall remain in conformance with the regulations of this section for the life of the building.
8. The City or its designee shall screen applicants for the inclusionary units and refer eligible households of the appropriate household size for the unit.
9. For purposes of occupancy, the appropriate household size standards used by the housing authority for the federal Section 8 Existing Housing Program or any future equivalent program shall be used.
10. The applicant or owner shall retain final discretion in the selection of the eligible households referred by the City.
11. The owner shall provide the City with data on vacancies and other information required to ensure the long-term affordability of the inclusionary units by eligible households.

### B. *Affordability Defined.* A unit shall be considered affordable if the rent (including utilities) does not exceed 30 percent of a household's gross income.

1. Gross household income and utility allowance shall be calculated according to the guidelines used by the Berkeley Housing Authority for the federal Section 8 Existing Housing Program.
2. For purposes of calculating rent, appropriate household size shall be determined by using the schedule contained in the administrative regulations developed for this chapter. (Ord. 7787-NS § 2 (Exh. A), 2021)

## 23.328.060 Inclusionary Unit Requirements for Ownership Projects.

A. *General Sale Requirements.* Inclusionary units in ownership projects shall be sold as set forth below:

1. Inclusionary units in ownership projects shall be sold at a price that is affordable to an appropriate-sized household whose income is no more than 80 percent of the area median income reported for the Oakland PMSA for households of that size, unless the cost of development of the unit is greater than the affordable sales price.
2. Appropriate sizes of household and the ratio of income to sales price for affordable units shall be defined by City Manager regulation.
3. Inclusionary ownership units shall be affirmatively marketed to tenants with Section 8 housing vouchers, and who are known to be interested in participating in the Section 8 homeownership program, or other equivalent program(s) of the City, which are in effect at the time the units are offered for sale by the developer.

B. *Right of First Refusal and Purchaser Preference.*

1. The applicant for a project other than a limited equity housing cooperative is required to give right of first refusal to purchase any or all new inclusionary units to the City or a City designee for a period of not less than 60 days as evidenced by issuance of a certificate of occupancy.
2. Should the City choose not to exercise its right of first refusal, it shall provide the applicant or owner with a purchaser or with a list of eligible purchasers within a period of not less than 60 days.
  - (a) If the list is not provided, the applicant may select a low-income purchaser of the applicant's choice as long as the City verifies income eligibility and the unit is sold at an affordable price as described in this chapter.
  - (b) The City shall maintain a list of eligible low-income households and review the assets and incomes of prospective purchasers of the inclusionary units on a project-by-project basis and refer potential purchasers to the applicant or owner.
3. All purchasers of inclusionary units shall be first-time home buyers from low, lower, or very low-income households.
4. Purchasers are also required to occupy the unit except that such requirement may be waived with the approval of the City. In such cases, the unit shall be rented to a low, lower, or very low-income household at a rent affordable by such households.
5. Preference of inclusionary units are as follows:
  - (a) First preference will be given to eligible Berkeley residents.
  - (b) Second preference will be given to eligible persons employed in Berkeley.

(c) Other preferences may also be established administratively, with Planning Commission review, to help meet the City's Housing Element goals.

6. The City shall advise all prospective purchasers on the City's eligibility list of the resale restrictions applicable to ownership of inclusionary units and shall provide purchasers with a Declaration of Restrictions applicable to ownership of inclusionary units.

7. Purchasers of inclusionary units in limited equity cooperatives at time of first occupancy shall be first time home buyers with gross incomes no greater than 120 percent of the Oakland PMSA median.

8. Subsequent purchasers of inclusionary units in limited equity cooperatives shall be first time home buyers whose yearly gross income is no more than 44 percent of the cost of a unit at the time of sale, provided that such income is no more than 110 percent of the Oakland PMSA median.

C. *Resale Restrictions.* All inclusionary units developed under this chapter except for those in limited equity cooperatives are subject to the resale restrictions set forth below.

1. Home ownership inclusionary units offered for sale or sold under the requirements of this chapter shall be offered to the City or its designee for a period of at least 60 days by the first purchaser or subsequent purchasers from the date of the owner's notification to the City of intent to sell.

2. The resale price of the unit shall not exceed the original price and customary closing costs, except to allow for:

(a) The lower of any increase of either the Consumer Price Index (CPI) for all urban consumers (as produced by the U.S. Bureau of Labor Statistics or its successor agencies) applicable to the Oakland PMSA; or

(b) The increase as measured in household income guidelines published annually by the U.S. Department of Housing and Urban Development (or its successor agencies) for the Oakland PMSA.

3. The resale formula shall supersede and replace the earlier resale formula in deed restrictions executed between February 19, 1987 (adoption date for Ordinance [5791-N.S.](#)) and May 23, 2006.

(a) The City, or its designee, shall notify each such owner of this change to the resale formula contained in their deed restriction within 60 days of adoption of this section.

(b) All other terms and conditions of these deed restrictions shall remain in effect.

4. If the City does not act on its right of first refusal, the same procedure for new inclusionary units shall be used for selection of a purchaser.

5. The seller shall not levy or charge any additional fees nor shall any finders fee or other monetary consideration be allowed, other than customary real estate commissions if the services of a licensed real estate agent are employed.

6. The City or its designee may monitor resale of inclusionary units in limited equity cooperatives.

7. The City or its designee shall monitor the resale of ownership of inclusionary units.
8. The owners of any inclusionary units shall attach, lawfully reference in the grant deed conveying title of any such inclusionary ownership unit, and record with the County Recorder a Declaration of Restrictions provided by the City, stating the restrictions imposed pursuant to this chapter. Violators of any of the terms may be prosecuted by the City. (Ord. 7787-NS § 2 (Exh. A), 2021)

### **23.328.070 Special Requirements for Avenues Plan Area.**

A. *City Council Findings.* The City Council finds and determines that:

1. The Avenues Plan process identified several regional and Berkeley-specific barriers to housing development.
2. Among the Berkeley-specific barriers were:
  - (a) High land prices;
  - (b) Lengthy, difficult, and uncertain permit processes; and
  - (c) Insufficient financing, especially for affordable housing projects.
3. The Avenues Plan area represents a core area of Berkeley where it is particularly appropriate to encourage housing development because of the area's generally good access to workplaces, transit service, senior services, and retail stores.
4. The policy to encourage housing in this area is reflected in several documents, including, but not limited to, the City's Housing Element of the General Plan, the Concept Plan for the General Plan revision, the Downtown Plan, the South Berkeley Area Plan, the West Berkeley Plan, and the University Avenue statement of planning of goals.
5. Despite the City's support for housing in this area, new housing development here has been limited and this has hindered revitalization of the area.
6. As part of a multi-pronged experimental strategy to create incentives to encourage housing development, relaxation of various inclusionary zoning requirements within the Avenues Plan area as set forth in this section is appropriate.
7. These changes will also assist the buyer of below market rate inclusionary units, by allowing buyers to gain greater appreciation on their investments (market conditions permitting), making the investment more similar to conventional home ownership, while retaining the long term affordability of inclusionary units.
8. The changes will also encourage the construction of larger family-sized units, rather than the smaller units which have generally been built in multi-family developments.

9. These changes in inclusionary zoning will be followed by mechanisms to make more financing available and changes in zoning standards and permit processes.

10. The success of these changes will be reviewed annually until the five-year time period of the Avenues Plan experiment expires July 1, 2000.

**B. Applicability.**

1. This section shall remain in effect until July 1, 2000, at which time the Planning Commission, in consultation with other relevant commissions, shall re-examine its effectiveness. At that time the Commission may initiate modifications to, or an extension of, this section.

2. This section applies on the streets and the addresses listed in Table 23.328-1. The area of applicability consists of the entire C-DMU District and portions of the C-C, C-U, C-SA, C-W, C-N, R-2A, R-3, and R-4 districts as indicated in the table. Within this area, this section supersedes any inconsistent provisions in this chapter.

**Table 23.328-1. AVENUE AREAS PLAN AREA: STREET AND ADDRESS RANGE**

<b>Street</b>	<b>Address</b>
Acton	1940--2100
Addison	841--1145 odd, 1846 up
Adeline	All
Alcatraz Avenue	1700--1937
Allston Way	1901--1999 odd, 2000 up
Ashby Avenue	1830--2117, 2118--2198 even
Bancroft Way	2000--2300
Berkeley Square	All
Berkeley Way	1200--1800 even only, 1800--1920, 1920--2000 even only, 2000 up
Blake	1800--2100
Bonar	2000--2099
Bonita	1900--1950 even, 1950--1999
Browning	portion of West Campus only
California	1950--2009

**Table 23.328-1. AVENUE AREAS PLAN AREA: STREET AND ADDRESS RANGE**

<b>Street</b>	<b>Address</b>
Carleton	2000--2117
Center	All
Channing Way	1800--1850 even, 2000--2200, 2200--2300 odd
Cowper	All
Chestnut	1910--1950 even, 1950 up
Curtis	1900--2100, portion BUSD
Delaware	1041--1112, 2000--2200 even
Derby	2000--2113
Dover	All
Durant Avenue	2000--2300
Dwight Way	1800--1850 even, 1850--2200
Ellis	3124--3320 odd
Emerson	2000--2111
Essex	1901--2106
Fairview	1750 up
Fulton	2200--2400, 2400--2606 even
Grant	1800--1900 odd, 1900--2050, 2501--2599 odd
Harold Way	All
Harmon	1750 up
Harper	2901--3123 odd
Haste	1900--1998 even, 2000--2200
Hearst	1032--1200, 1800--2000 even, 2000--2200
Henry	1900 up

The Berkeley Municipal Code is current through Ordinance 7849-NS, passed December 13, 2022.

**Applies only to rental housing projects vested on/before March 31, 2023**



**Table 23.328-1. AVENUE AREAS PLAN AREA: STREET AND ADDRESS RANGE**

<b>Street</b>	<b>Address</b>
Jefferson Avenue	2000--2050
King	3221 up, odd
Kittredge	All
Martin Luther King Jr. Way	1900--2050, 2051--2199 odd, 2400--2450 even, 2450--2600, 2900 up
McGee Avenue	1900--2050
McKinley Avenue	2400--2500 odd
Milvia	1800--1950 odd, 1950--2199, 2200--2450 odd, 2450--2550, 2550--2900 odd only
Newbury	All
Oregon	2000--2122
Otis	All
Oxford	1800--2200
Parker	1800--1998 even, 2000--2200
Prince	1830--2105
Russell	1820--2000 even, 2000--2117
Sacramento	1900--2000, 2050--2100 even
San Pablo Avenue	1800--2199
Shattuck Avenue	1800 up
Shattuck Square	All
Stuart	2100--2107
Tremont	All
University Avenue	840 up
Walnut	1800 up

The Berkeley Municipal Code is current through Ordinance 7849-NS, passed December 13, 2022.

**Applies only to rental housing projects vested on/before March 31, 2023**

**Table 23.328-1. AVENUE AREAS PLAN AREA: STREET AND ADDRESS RANGE**

<b>Street</b>	<b>Address</b>
West	1950--1999
Whitney	All
Woolsey	1750--2110
6th	1916--2099
7th	1912--2099
8th	1910--2099
9th	1910--2099
10th	1908--2099
62nd	1700 up
63rd	1700 up

C. *Definitions.* For purposes of this section, the following definitions apply:

1. "Project" means the total number of housing units planned to be built on a single lot or on a grouping of contiguous, commonly owned, or controlled lots, regardless of whether those units are all built simultaneously.
2. "Affordable family-sized unit" means a unit which:
  - (a) Is at least 850 square feet in area if two bedrooms or 1,100 square feet if three bedrooms or more;
  - (b) Contains at least two lawful bedrooms;
  - (c) Contains at least as many bathrooms as the corresponding two-bedroom market rate units; and
  - (d) Is sold at a price that is affordable to an appropriate sized household whose income is no more than 80 percent of the metropolitan area median as reported by the Department of Housing and Urban Development (HUD).

D. *Number of Inclusionary Units Required.*

1. The number of inclusionary units required are shown in the Table 23.328-2.

**Table 23.328-2. NUMBER OF INCLUSIONARY UNITS REQUIRED**

Total Number of Units Built	Number of Required Inclusionary Units
10--14	1
15--19	2
Each additional multiple of 5 units	1 additional

2. For every five units which the applicant can show with bona fide sales documents have been sold at a price at or below that affordable to an appropriately sized household with an income of 100 percent of metropolitan area median, the applicant is released of the obligation to provide one inclusionary unit.

3. For every 10 affordable family-sized units, the applicant is released of the obligation to provide one inclusionary unit sold at a price at or below that affordable to an appropriately sized household with an income of 100 percent of metropolitan area median.

4. Within the area of applicability for that portion of a project wherein both the inclusionary and the non-inclusionary units contain at least as many bathrooms as the corresponding two-bedroom market rate units, only 10 percent of units must be inclusionary.

E. *Pricing Requirements.*

1. The first inclusionary unit in projects with units for sale shall be sold at a price that is affordable to an appropriately sized household whose income is no more than 80 percent of the Oakland PMSA median as reported by HUD.

2. Except as otherwise provided in Section [23.328.070.C.2.d](#) above, the second inclusionary unit shall be sold at a price that is affordable to an appropriate sized household whose income is no more than 100 percent of the PMSA median and subsequent inclusionary units shall be sold alternately at these price levels.

3. Inclusionary sale units in projects in the Avenues Plan Area shall be sold at a price such that first year housing cost (including homeowners' association dues, if any) for a household of appropriate size with an income at the targeted level shall not exceed 33 percent of income.

4. This cost shall be calculated assuming that the buyer makes a 10 percent down payment, which shall not be considered a portion of the cost.

5. The housing cost shall be calculated for each project at the time the condominium association budget is approved by the California Department of Real Estate and shall not be changed after that time for that project, regardless of future changes in cost.

6. The resale price of inclusionary units within the Avenues Plan Area may increase at the rate of increase of the Consumer Price Index for all urban consumers (CPI-U) applicable to the metropolitan area. (Ord. 7787-NS § 2 (Exh. A), 2021)

### **23.328.080 Administrative Regulations.**

The City Manager or the City Manager's designee shall promulgate rules and regulations pertaining to this chapter, including but not limited to setting and administering gross rents and sale prices, requiring guarantees, entering into recorded agreements with applicants and taking other appropriate steps necessary to ensure that the required low income and very low income dwelling units are provided and occupied by low income households. (Ord. 7787-NS § 2 (Exh. A), 2021)

### **23.328.090 Fees.**

The City Council, by resolution, may establish fees for the administration of this chapter. (Ord. 7787-NS § 2 (Exh. A), 2021)

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**The Berkeley Municipal Code is current through Ordinance 7849-NS, passed December 13, 2022.**

Disclaimer: The City Clerk's Office has the official version of the Berkeley Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

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