

Chapter 17.18 AFFORDABLE HOUSING PROGRAM

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17.18.010 Purposes.

The provision of safe and stable housing for households at all income levels is essential for the public welfare of the City of Newark. Housing in the city has become steadily more expensive and housing costs have gone up faster than incomes. Federal and state government programs do not provide enough affordable housing to satisfy the needs of very low, low, or moderate income households. The city wishes to retain an economically balanced community with housing available to households of all income levels, which is only possible if some of the housing built within the city is affordable to households with limited incomes. To this end, this chapter requires that all new residential developments of greater than five units allocate a certain amount of the units to households of different incomes.

In addition because nonresidential development attracts employees, of whom a quantifiable number will have very low, low, or moderate incomes, new nonresidential development projects increase the demand for and exacerbate the shortage of housing

available for people at these income levels. This chapter therefore imposes a nonresidential development housing impact fee in order to provide a means whereby developers of nonresidential projects contribute to the supply of housing for households with very low, low, and moderate incomes. (Ord. 404 § 5 (part), 2004)

#### 17.18.020 Definitions.

As used in this chapter, each of the following terms are defined as follows:

- A. "Applicant" means any person, firm, partnership, association, joint venture, corporation, or any entity or combination of entities that seeks residential real property development permits or approvals from the City of Newark.
- B. "Developer" means the person(s) or legal entity(ies), who also may be the property owner, who is developing a particular project in the city.
- C. "For-sale unit" means a residential dwelling unit that is intended to be sold to owner-occupants upon completion.
- D. "Gross square floor area" means the sum of the gross horizontal floor areas of a building measured from the exterior face of exterior walls, or from the center line of a wall separating two buildings. In cases where no walls exist, the gross horizontal floor area shall be that area covered by the roof excluding two feet on each side of the structure for a standard roof projection. Outside areas used for sales and/or display may also be considered (e.g., plant nurseries, building materials, auto sales, etc.) when the community development director determines that the use of the outside area significantly contributes to the employee density of the building.
- E. "Inclusionary unit" means a dwelling unit which is required under this chapter to be rented to or sold to households with very low, low, or moderate incomes as defined in this chapter. The monthly rent for inclusionary rental units, including utilities and all fees for housing services, shall be equal to or less than one-twelfth of thirty percent of the maximum annual household income allowed for that category of unit. The sales price for inclusionary for-sale units shall result in a monthly mortgage payment, including principal and interest, which does not exceed one-twelfth of thirty-five percent of the maximum annual income for a household of the applicable income level. Maximum annual household income shall be set based on presumed occupancy levels of one person in a studio apartment, two persons in a one bedroom unit, three persons in a two-bedroom unit and one additional person for each additional bedroom thereafter.
- F. "Low income households" means households with incomes above the maximum income for very low income households and below the maximum income for low income households, as annually defined by the California Department of Housing and Community Development for each household size.
- G. "Market rate unit" means a new dwelling unit in a residential project that is not an inclusionary unit under the provisions of this chapter.
- H. "Median income" means the median income, adjusted for family size, applicable to Alameda County, as published annually by the California Department of Housing and Community Development.

I. "Moderate income households" means households with incomes above the maximum income for low income households and below the maximum income for moderate income households, as annually defined by the California Department of Housing and Community Development for each household size.

J. "Ownership unit" means a dwelling unit that is intended to be offered for sale.

K. "Rental unit" means a dwelling unit that is intended to be offered for rent or lease.

L. "Residential development" means a detached single-family dwelling, multiple dwelling structures, group of dwellings, condominium or townhouse developments, condominium conversions, cooperative developments, or mixed use developments that include dwelling units.

M. "Residential development project" means a project for the construction or placement of any dwelling unit in a permanent location, or the subdivision of land which is planned, designed, or used for single-family residential and/or multifamily residential land uses, and includes contiguous or noncontiguous parcels that have one or more applications filed within a twenty-four-month period and which are owned by the same party or parties.

N. "Very low income households" means households with incomes below the maximum income for very low income households, as annually defined by the California Department of Housing and Community Development for each household size. (Ord. 404 § 5 (part), 2004)

17.18.020

#### 17.18.030 Inclusionary housing program general requirements.

A. All new residential development projects consisting of five or more dwelling units, for which an application for any use permit, planned unit development permit or building permit is filed after the effective date of the ordinance, shall develop and maintain fifteen percent of the total number of the dwelling units within the residential development as inclusionary units according to the terms of this chapter.

The foregoing requirement shall be applied no more than once to an approved residential development project, regardless of changes in the character or ownership of the residential development, provided the total number of dwelling units does not change.

B. Where the calculation of the fifteen percent requirement for inclusionary units results in a fraction of a unit, any decimal fraction less than or equal to 0.50 may be disregarded and any decimal fraction greater than 0.50 shall be constructed as one unit.

C. The inclusionary units required as a result of subsection A of this section shall be made affordable to households with very low, low, and moderate incomes based on the following requirements for rental units and for-sale units:

1. Rental Units. Rental units in residential developments subject to inclusionary requirements shall be offered at the income levels specified below. When the calculation for inclusionary units results in a fraction of a unit, the procedure established in subsection B of this section applies; however, the total number of inclusionary units shall be fifteen percent of the total number of units;

- a. Forty percent of inclusionary units (six percent of total units) shall be reserved for very low income households,
  - b. Forty percent of inclusionary units (six percent of total units) shall be reserved for low income households, and
  - c. Twenty percent of inclusionary units (three percent of total units) shall be reserved for moderate income households;
2. For-Sale Units. For-sale units in residential developments subject to inclusionary requirements shall be sold at the income levels specified below. When the calculation for inclusionary units results in a fraction of a unit, the procedure established in subsection B of this section applies; however, the total number of inclusionary units shall be fifteen percent of the total number of units;
- a. Fifteen percent of inclusionary units (two and one-fourth percent of total units) shall be reserved for low income households, and
  - b. Eighty-five percent of inclusionary units (twelve and three-fourths percent of total units) for moderate income households.
- D. Inclusionary units built on-site shall be comparable to the market rate units in terms of the following:
1. The inclusionary units shall have the same range of numbers of bedrooms and bathrooms provided in the residential development project as a whole;
  2. The exterior appearance of the inclusionary units shall be indistinguishable from that of market rate units;
  3. The inclusionary units shall be dispersed throughout the residential development project;
  4. The inclusionary units shall be provided or have access to the same amenities as the market rate units, such as air conditioning, covered garages, recreation facilities and laundry facilities; and
  5. All inclusionary units in a residential development project or phase of a project shall be constructed concurrently with the market rate units.
- E. When selecting tenants or purchasers for inclusionary units, all persons in each of the following categories of otherwise qualified persons shall be selected before persons from the next succeeding category are selected:
1. Residents displaced by the proposed project;
  2. Current residents of the City of Newark;
  3. People who work in the City of Newark;
  4. People who have immediate family living in the City of Newark;
  5. All other eligible persons.
- (Ord. 404 § 5 (part), 2004)

#### 17.18.040 Incentives.

Residential development projects that comply with this chapter may elect the following:

A. Density Bonus. The city council, upon request, may approve an increase in the number of units permitted in a proposed residential development project provided that the

increase in density is consistent with the state density bonus law as set forth in Section 65915 of the California Government Code.

B. Alternative Designs. Inclusionary units may be smaller in aggregate size and have different interior finishes and features than market rate units in the same residential project as long as the finishes and features are durable, of good quality, and consistent with contemporary standards for new housing. (Ord. 404 § 5 (part), 2004)

#### 17.18.050 Alternatives to on-site construction.

The City of Newark intends that inclusionary units shall be constructed on the same site as the market rate units in the development, except in cases of unique hardship, or cases in which the required subsidy for the inclusionary units would be unreasonably large given the nature of the development.

A. Off-Site Construction. Inclusionary units may be constructed on a separate site within the City of Newark only if:

1. The size, number of bedrooms, and amenities for the inclusionary units will be equal to or greater than would have been provided if the units were constructed on-site;
2. The off-site units will be greater in number, larger or affordable to households with lower incomes than would otherwise be required by Section 17.18.030;
3. Approval for off-site units is secured concurrently with or prior to approval of the market rate portion of the development, and completion of the off-site units is secured by a requirement that final inspections for occupancy for the related market rate units be completed after those for the inclusionary units; and
4. The planning commission and city council shall also find that:
  - a. The off-site location is appropriate for residential development,
  - b. Placing the inclusionary units off-site would result in a better development than if the inclusionary units were built on-site, and
  - c. Placing the inclusionary units off-site would further affordable housing opportunities in the city to an equal or greater extent than compliance with the requirements of Section 17.18.030.

B. Land Dedication. An applicant may dedicate land without cost to the city in lieu of constructing the inclusionary units required by this chapter with the approval of the planning commission and city council. Land dedication may be approved only if:

1. Dedication of the land is secured by a requirement that none of the related market rate units may receive final inspections for occupancy until after the land has been dedicated to the city, or secured through some other fashion to the satisfaction of the city attorney;
2. The land to be provided is fully improved, with infrastructure, adjacent utilities, grading and fees paid, and with no hazardous material or other constraints on residential development;
3. The land is large enough to construct at least one hundred twenty percent of the number of inclusionary units required, at a density equivalent to that of the associated market rate project; and
4. The planning commission and city council find that providing land for dedication is a desirable way of meeting the inclusionary housing requirement for the project.

C. Rental Units in For-Sale Projects. A project otherwise consisting only of for-sale units may request permission from the planning commission and city council to construct required inclusionary units as rental units, under the following circumstances:

1. The residential development project consists of for-sale units on lots whose average size is ten thousand square feet or more;
2. The average number of bedrooms per rental unit shall be the same as the average number of bedrooms per market rate unit in the development;
3. Affordability of the units shall be the same as for rental projects, as set forth in Section 17.80.030(C)(1);
4. Approval for rental units is secured concurrently with or prior to approval of the market rate portion of the development, and completion of the rental units is secured by a requirement that final inspections for occupancy for the related market rate units be completed after those for the inclusionary units; and
5. The planning commission and city council find that inclusion of rental units in the project is a desirable way of meeting the inclusionary housing requirement for the project.

D. In-Lieu Fee. An applicant may pay an in-lieu fee, the timing and amount of which shall be set by resolution of the city council, rather than constructing inclusionary units only under the following circumstances:

1. The applicant demonstrates, to the satisfaction of the planning commission and city council, that because of the unique circumstances of the proposed development, building the inclusionary units would not be practically feasible. The applicant shall furnish a report identifying the unique conditions affecting the development of inclusionary units and provide sufficient independent data, including appropriate financial information, to support the applicant's claim that it is not feasible to construct the inclusionary units. Reduced financial profit shall not be considered grounds for declaring construction of the units to be infeasible;
2. Upon request from the developer, the community development director may allow payment of an in-lieu fee for any proposed residential development project with five or six units; or
3. When the residential development project consists of for-sale units on lots whose average size is ten thousand square feet or more, and the planning commission and city council find that payment of an in-lieu fee is a desirable way of meeting the inclusionary housing requirement for the project. (Ord. 404 § 5 (part), 2004)

#### 17.18.060 Continued affordability.

A. The city council shall adopt a resolution setting forth provisions for continued affordability of below market rate units provided through the inclusionary housing program. These provisions will ensure that inclusionary housing provided by this chapter remains affordable to very low, low, and moderate income households over time, and may include:

1. Requiring resale restrictions, deeds of trust, or affordability agreements to be recorded against the property for a specified length of time that would limit the sales price or rent;

2. Requiring review of income information for prospective owners or tenants of inclusionary units by current owners and/or property managers, with certification by the community development director;
  3. Establishing provisions addressing city policy for tenants whose household income increases after occupying an inclusionary unit;
  4. Other provisions as necessary to ensure the continued affordability of the inclusionary units.
- B. The city council may update the resolution from time to time as necessary. (Ord. 404 § 5 (part), 2004)

#### 17.18.070 Administrative relief.

Any developer subject to the requirements of this chapter may request a reduction, adjustment, or waiver based upon the absence of any reasonable relationship or nexus between the impact of the development and the amount of the inclusionary housing requirement as set forth in this chapter. This request, together with appropriate supporting information, must be made when applying for first approval for the residential project, and/or as part of any appeal which the city provides as part of the process for the first approval. Failure to do so shall constitute a failure to exhaust administrative remedies. (Ord. 404 § 5 (part), 2004)

#### 17.18.080 Nonresidential development housing impact fee.

A. Application. A housing impact fee is hereby imposed on all developers of nonresidential development projects.

B. Calculation of Housing Impact Fee.

1. The housing impact fee for nonresidential development projects shall be charged on a per square foot basis for all new gross floor area, including all additions where floor area is increased. The amount and calculation for each such fee shall be established by resolution of the city council. Gross floor area is determined by calculating the combined area for all floors in accordance with the definition of “gross square floor area” contained in Section 17.18.020. If the nonresidential development project is in whole or in part a replacement for space previously on the site, but demolished within one year prior to the filing of the application for the new construction or remodel, credit shall be given for the space demolished or to be demolished at the rate applicable to the prior use of that space.

2. In calculating the fees, city staff shall use those fees in effect by resolution of the city council at the time of the issuance of the building permit, or if no building permit is required, at the time of issuance of a use or other discretionary permit.

C. Time of Payment. The time for payment of the nonresidential development housing impact fee shall be established by the city council resolution which sets the amount of the fee, and shall conform to the requirements of Government Code Section 66007.

D. Alternative to Payment of Housing Impact Fee. As an alternative to payment of the housing impact fee, a developer of nonresidential development project may submit a request to mitigate the impacts of such development through the construction of residential units, the dedication of land, or the provision of other resources. Such requests may be granted at the sole discretion of the city council, if the city council determines that such alternative will further affordable housing opportunities in the city to an equal or greater extent than payment of the housing impact fee.

E. Fee Adjustment, Reduction or Waiver. An adjustment, reduction, or waiver of the nonresidential housing impact fee may be granted upon request by the city council for any project which falls into one or more of the following categories:

1. Projects for specific uses involving no employees or less than one employee per two thousand square feet of gross floor area;
  - a. In order to qualify for this exemption, the building must be designed and built such that it cannot be converted to a use capable of housing a larger number of employees except by major reconstruction. The burden of proof shall be on the applicant.
  - b. If a waiver is granted, a “Notice of Conditional Waiver of Housing Impact Fee” shall be recorded in the Alameda County office of the recorder. If a subsequent change in the use or structure of the building occurs which involves additional employees, the waiver granted herein shall be deemed revoked, subject to a hearing before the zoning administrator who shall make a recommendation on the revocation to the city council. The decision of the city council shall be final.
2. Projects operated by nonprofit organizations which provide food storage, meal service, and/or temporary shelter to the homeless;
3. Projects for any of the following uses:
  - a. Public and private elementary or secondary schools, or universities,
  - b. Public libraries, art galleries, museums, and other nonrecreational public facilities,
  - c. Public recreational facilities,
  - d. Churches and other religious institutions,
  - e. Private clubs and lodges,
  - f. Nonprofit youth clubs,
  - g. Philanthropic and charitable institutions,
  - h. Community service organizations,
  - i. Child care centers with eight or fewer children,
  - j. Temporary seasonal sales lots,
  - k. Public utility yards;
4. A project to the extent it has received a vested right to proceed without payment of housing impact fees pursuant to state law; or
5. Projects for which, upon the basis of facts presented by the applicant, there is an absence of any reasonable relationship or nexus between the impact of the development and the need for housing.

F. Exemptions. This fee shall not apply to developers of nonresidential projects which fall within one or more of the following categories:

1. Projects located on property owned by the state of California, the United States of America, or any of its agencies and used exclusively for governmental or educational purposes;

2. Any structure proposed to repair or replace a building that was damaged or destroyed by fire or other calamity, so long as the square footage of the building remains the same and construction of the replacement building begins within one year;
  3. Projects that are the subject of development agreements currently in effect with the city, approved prior to the effective date of this chapter where such agreements expressly preclude the city from requiring compliance with this type of housing fee program; or
  4. The nonresidential uses are set forth either in a building permit application accepted as complete by the city prior to five p.m. on August 10, 2004, or in a use permit or similar discretionary approval approved prior to five p.m. on August 10, 2004; however, any extension or modification of such approval or permit after such date shall not be exempt.
- G. Processing Requirements.

1. Each discretionary permit for a project subject to this section shall contain an express condition requiring compliance with this section.
2. No application for building permits or discretionary permits for any project subject to this section shall be deemed complete unless the application contains the items listed below. The community development director may require similar information for completeness of other city permits or licenses as necessary or convenient to implement this section:
  - a. A statement of the number of gross square feet in a nonresidential development project to be constructed, added, or placed that are subject to the requirements of this section, together with documentation sufficient to support the application;
  - b. The intended use or uses for the nonresidential development project by gross square feet; and
  - c. A statement of any exemptions applicable to the project. (Ord. 404 § 5 (part), 2004)

#### 17.18.090 Housing fund.

There is hereby established the City of Newark affordable housing fund (the "Housing Fund"). Separate accounts within such housing fund may be created from time to time to avoid co-mingling as required by law or as deemed appropriate to further the purposes of the fund.

A. Administration. The housing fund shall be administered by the community development director, who shall have the authority to govern the housing fund consistent with this chapter, and to prescribe procedures for said purpose, subject to approval by the council.

B. Advisory Committee. The community development advisory committee shall review the status of the fund annually. As appropriate, the committee may define and prioritize recommended uses of the monies in the housing fund, subject to approval by the city council.

C. Purpose and Use of Funds.

1. Monies deposited in the housing fund, along with any interest earnings on such monies, shall be used solely to increase and improve the supply of housing affordable to households of very low, low, and moderate incomes; including, but not limited to, acquisition of property and property rights, cost of construction, including costs

associated with planning, administration, and design, as well as actual building or installation, as well as any other costs associated with the construction or financing of affordable housing; and reimbursement to the city for such costs if funds were advanced by the city from other sources. To the maximum extent possible, all monies should be used to provide for additional affordable housing and services. Monies may also be used to cover reasonable administrative expenses not reimbursed through processing fees, including reasonable consultant and legal expenses related to the establishment and/or administration of the housing fund and reasonable expenses for administering the process of calculating, collecting, and accounting for housing fees authorized by this section.

2. Monies in the housing fund may be disbursed, hypothecated, collateralized or otherwise employed for these purposes from time to time as the community development director and city council determine is appropriate to accomplish the purposes of the housing fund. The housing fund monies may be extended for the benefit of rental or owner occupied housing or housing services.

3. Expenditures by the community development director from the housing fund shall be controlled, authorized, and paid in accordance with general city budgetary policies. Execution of contracts related to the use or administration of housing fund monies shall be in accordance with standard city policy. (Ord. 404 § 5 (part), 2004)

#### 17.18.100 Severance.

Should any part of this chapter be declared by a final decision of a court or tribunal of competent jurisdiction to be unconstitutional, invalid, or beyond the authority of the city, such decision shall not affect the validity of the remainder of the ordinance codified in this chapter. The remainder of the ordinance shall continue in full force and effect, provided that the remainder of the ordinance, absent of the unexcised portion, can be reasonably interpreted to give effect to the intentions of the city council. (Ord. 404 § 5 (part), 2004)

#### 17.18.110 Enforcement.

A. Residential Development Inclusionary Housing Program. No person shall sell or rent an inclusionary unit at a price or rent exceeding the maximum allowed under this chapter, or to a household not qualified under this chapter. Said sale or rental shall constitute a public nuisance and shall be punishable as a misdemeanor. Each month that such unit is occupied in violation of this chapter shall constitute a separate violation.

The city attorney shall be authorized to enforce the provision of this chapter and all regulatory agreements and resale controls placed on affordable units, by administrative or civil action or any other proceeding or method permitted by law. Failure of any official or agency to fulfill the requirements of this chapter shall not excuse any applicant, developer, or owner from the requirements of this chapter.

B. Nonresidential Development Project Housing Impact Fee. Payment of the housing impact fee is the joint and several obligations of the applicant and/or the property owner for the subject nonresidential development project. In the event of administrative error, the city shall provide the applicant with a written notice and the applicant shall be required to pay the fees within thirty days. The city may institute any appropriate legal actions or proceedings necessary to ensure compliance herewith, including, but not limited to, actions to revoke, deny, or suspend any permit or development approval. (Ord. 404 § 5 (part), 2004)