

ORDINANCE NO. 787

**CITY OF MILLBRAE, COUNTY OF SAN MATEO
STATE OF CALIFORNIA**

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILLBRAE
ADDING ARTICLE XXXIII AFFORDABLE HOUSING ON-SITE AND IN-LIEU FEE
REQUIREMENTS AND ARTICLE XXXIV AFFORDABLE HOUSING COMMERCIAL
LINKAGE IMPACT FEE TO THE CITY OF MILLBRAE MUNICIPAL CODE TITLE
10 PLANNING AND ZONING, CHAPTER 10.05 ZONING ESTABLISHING
REGULATIONS FOR AFFORDABLE HOUSING AND ESTABLISHING AN
AFFORDABLE HOUSING IN-LIEU FEE AND COMMERCIAL LINKAGE IMPACT
FEE**

WHEREAS, California Government Code Section 65580(d) states that all cities have a responsibility to use the powers vested in them to facilitate the improvement and development of housing and to make adequate provision for the housing needs of all economic segments of the community; and

WHEREAS, Housing Element Program HIP-29 provides that the City will adopt an inclusionary housing ordinance and affordable housing impact fee that requires developers to provide below market rate housing or pay a fee and Housing Element Program HIP-33 provides that the City will study the possibility of adopting a commercial linkage fee to help fund affordable housing; and

WHEREAS, the provision of safe and stable housing for households at all income levels is essential for the public welfare of the City. Housing in Millbrae 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 extremely low, very low, low, or moderate income households; and

WHEREAS, in order to meet the needs of very low, low, and moderate households, dwelling units will need to house a variety of household types, incomes, and age groups; and

WHEREAS, the affordable housing ordinance codified in this section will substantially advance the City's legitimate interest in providing additional housing affordable to all income levels and dispersed throughout the City by requiring construction of very low income, low income, and moderate-income housing; and

WHEREAS, new market-rate housing creates a demand for affordable housing, because new residents of that housing purchase goods and utilize services in the community, increasing local employment and attracting employees, of whom a quantifiable number will have very low, low, or moderate incomes and cannot afford market-rate housing, as demonstrated in the

Affordable Housing Fractional In Lieu Fee Nexus Study, dated May 2021, prepared by Harris and Associates; and

WHEREAS, because nonresidential projects also attract employees, of whom a quantifiable number will have very low, low, or moderate incomes, new nonresidential projects similarly increase the demand for and exacerbate the shortage of housing available for people at these income levels, as demonstrated in the Commercial Linkage Fee Nexus Study dated May 2021, prepared by Harris and Associates; and

WHEREAS, new construction of market-rate housing and nonresidential projects that does not include affordable units also aggravates the existing shortage of affordable housing by absorbing the supply of available land; and

WHEREAS, to ensure that the fractional affordable housing in-lieu fee and commercial linkage fee recommended by this resolution does not exceed the actual affordable housing impacts attributable to the development projects on which the fee is imposed, the City Council has considered the reports from Harris & Associates; and

WHEREAS, the Harris and Associates reports used widely used, appropriate methodology to determine the maximum amount needed to fully mitigate the burdens created by residential and non-residential development and demonstrate that there is a reasonable relationship between the need for affordable housing and the impacts of the development described in the Harris & Associates reports for which the corresponding fee is charged, and that there is also a reasonable relationship between the fee's use and the type of development for which the fee is charged; and

WHEREAS, the Harris and Associates reports include an economic feasibility analysis that determined the fees as recommended would be feasible; and

WHEREAS, based on the findings above, the City desires to further the public health, safety and welfare by requiring residential and nonresidential projects in the City to mitigate their impact on the need for affordable housing in the City.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MILLBRAE, CALIFORNIA, ORDAINS that:

SECTION 1 The Millbrae Zoning Ordinance is amended by adding a new Article XXXIII and new Article XXXIV as follows:

Title 10 Planning and Zoning

Chapter 10.05 Zoning

Article XXXIII. Affordable Housing On-Site and In-Lieu Fee Requirements

Sections:

- 10.05.3300 Purpose and Intent
- 10.05.3310 Definitions
- 10.05.3320 Administration
- 10.05.3330 Exemptions
- 10.05.3340 Inclusionary Housing Requirements Affordable Housing
- 10.05.3350 Requirements for Affordable Housing In-Lieu Fee
- 10.05.3360 Affordable Housing Fund
- 10.05.3370 Waiver
- 10.05.3380 Enforcement

10.05.3300 Purpose and Intent

The purpose of this Article is to establish requirements for the provision of inclusionary affordable housing designated as deed restricted for very low, low, and moderate income households in conjunction with new development projects in the City of Millbrae. These requirements will mitigate the impacts of residential projects on the need for affordable housing by increasing the supply of affordable housing to a broad range of households with varying income levels within the City and will implement the City of Millbrae Housing Element. This Article will also establish the requirement for an affordable housing in-lieu fee on residential development projects consisting of four (4) to nine (9) units, or when the calculation of the affordable units in development projects of ten (10) or more units results in a fractional unit of less than 0.5. The fee is to be contributed to the City's Affordable Housing Fund and used to fund the development of affordable housing and related programs in the City of Millbrae.

10.05.3310 Definitions

- A. "Affordable Housing Agreement" means the agreement between the City and an applicant governing how the applicant will comply the requirements of this Article and the Affordable Housing Requirements and Program Regulations, adopted by the City Council.
- B. "Affordable Housing Fund" means the fund designated by the City to maintain and account for all monies received pursuant to this Article.
- C. "Affordable Housing In-Lieu Fees" means the fee paid by developers of residential development projects to mitigate the impacts that such developments have on the demand

for affordable housing, which may be paid for fractional unit requirements and by developers of residential development projects with four (4) to nine (9) units.

- D. "Affordable Housing Requirements and Program Regulations" means the requirements adopted by the City Council for implementation and administration of this Article.
- E. "Affordable Rent" means the total monthly housing expenses for a rental affordable unit not exceeding the rents specified by Section 50053 of the California Health and Safety Code and California Code of Regulations Title 25, Sections 6910-6924. The City may permit alternative criteria, when necessary, to be consistent with pertinent state and federal statutes and regulations governing publicly assisted rental housing. As used in this Article, "affordable rent" shall include the total of monthly payments by the tenant for all of the following:
 - 1. Use and occupancy of the affordable unit and land and all facilities associated with the affordable unit, including but not limited to parking (whether unbundled or not), bicycle storage, storage lockers, and use of all common areas;
 - 2. Any additional separately charged fees or service charges assessed by the owner, other than security deposits;
 - 3. An allowance for utilities paid by the tenant as established by the San Mateo County Housing Authority which may be updated from time to time, including garbage collection, sewer, water, electricity, gas, and other heating, cooking, and refrigeration fuel, but not telephone service, cable TV or WiFi/internet; and
 - 4. Any other interest, taxes, fees or charges for use of the land or affordable unit or associated facilities and assessed by a public or private entity other than the owner, and paid by the tenant.
- F. "Affordable Ownership Cost" means the maximum purchase price that will be affordable to the specified households at the specified income levels, calculated in accordance with Health and Safety Code Section 50052.5. The affordable sales price shall include a reasonable down payment, and monthly housing payments (including interest, principal, mortgage insurance, property taxes, homeowners insurance, homeowners' association dues, property maintenance and repairs, and a reasonable allowance for utilities), all as determined by the City.
- G. "Affordable Unit" means a residential dwelling unit in a residential development project that is occupied by, or available to, moderate, low, very low or extremely low income households at an Affordable Rent or an Affordable Ownership Cost as required by this Article.
- H. "Area Median income" means the median income applicable to San Mateo County, adjusted for household size, as published periodically in the California Code of Regulations, Title 25, Section 6932, or its successor provision, or as established by the City of Millbrae in the event that such median income figures are no longer published periodically in the California Code of Regulations.
- I. "Building Permit" includes full structural building permits as well as other related permits such as grading, shoring, garage or foundation-only permits.
- J. "Common Ownership or Control" means property owned or controlled by the same person, persons, or entity, or by separate entities in which any shareholder, partner, member, or family member of an investor of the entity owns 10% or more of the interest in the property.

- K. "Decision Making Authority" means the City staff person or body authorized to approve or deny an application for a planning entitlement or building permit for a development project.
- L. "Developer" means the person(s) or legal entity(ies), who also may be the property owner(s), who is seeking development project entitlements or permits from the City or developing a particular development project in the City.
- M. "Extremely Low Income Households" means households with incomes no greater than the maximum income for extremely low income households applicable to San Mateo County as defined in California Health and Safety Code Section 50106, published annually by the City for each household size, by the California Department of Housing and Community Development (HCD) in California Code of Regulations Title 25, Section 6932 (or its successor provision).
- N. "For-Sale Unit" means a residential dwelling unit that may be sold individually in conformance with the Subdivision Map Act including condominiums. For-sale units also include units that are converted from rental units to for-sale units.
- O. "Household" means one person living alone or two or more persons sharing residency in one dwelling unit.
- P. "Inclusionary Unit" is an Affordable Unit required by this Article.
- Q. "Low Income Households" means households with incomes no greater than the maximum income for low income households applicable to San Mateo County as defined in California Health and Safety Section 50079.5 and published annually for each household size, by the California Department of Housing and Community Development (HCD) in California Code of Regulations Title 25, Section 6932 (or its successor provision).
- R. "Market Rate Unit" means a dwelling unit in a residential development project which is not an Affordable Unit.
- S. "Moderate Income Households" means households with incomes no greater than the maximum income limits for moderate income households in San Mateo County, as defined in California Health and Safety Code Section 50093 and published annually for each household size by the California Department of Housing and Community Development (HCD) in California Code of Regulations Title 25, Section 6932 (or its successor provision).
- T. "Planning Entitlement" means any discretionary approval of a development project, including, without limitation, a general or specific plan adoption or amendment, rezoning, tentative subdivision map, parcel map, conditional use permit, variances, or design review.
- U. "Rental Unit" means a dwelling unit that is intended to be offered for rent or lease and that cannot be sold individually in conformance with the Subdivision Map Act.
- V. "Residential Development Project" means an application for a planning permit or building permit at one location to create one or more additional dwelling units, convert nonresidential uses to dwelling units, subdivide a parcel to create one or more separately transferable parcels intended for residential development, or implement a condominium conversion, including development constructed at one time and in phases. "One location" includes all adjacent parcels of land under common ownership or control, the property lines of which are contiguous at any point, or the property lines of which are separated

only by a public or private street, road, or other public or private right-of-way, or separated only by the lands owned or controlled by the developer.

W. "Very Low Income Households" means households with incomes no greater than the maximum income limit for very low income households applicable to San Mateo County, as defined in California Health and Safety Code Section 50105 and published annually for each household size by the California Department of Housing and Community Development (HCD) in California Code of Regulations Title 25, Section 6932 (or its successor provision).

10.05.3320 Administration

- A. The City Council shall adopt and may amend from time to time by resolution the Affordable Housing Requirements and Program Regulations consistent with the provisions of this Article and the Housing Element for the purpose of carrying out the administration of this Article. A copy of the Affordable Housing Requirements and Program Regulations shall be on file and available for public examination in the office of the city clerk and posted on the City's website.
- B. The Community Development Director or designee is responsible for administering this Article. As part of the administration of this Article, the Director may:
 1. Interpret the provisions of this Article and the Affordable Housing Requirements and Program Regulations.
 2. Develop, publish and from time to time update or amend operational procedures and requirements, such as rules for determining the number of required Inclusionary Units, pricing (based on County and State guidelines), tenant eligibility, occupancy requirements, application processes, waitlist management, income verification requirements, annual recertification, rejection of ineligible applicants and eligibility termination.

10.05.3330 Exemptions

The following residential development projects are exempt from the provisions of this Article:

- A. Residential development projects which are developed in accordance with the terms of a development agreement adopted by ordinance pursuant to the authority and provisions of California Government Code Section 65864 et seq., and that is executed prior to the effective date of the ordinance codified in this chapter, provided that such residential development projects shall comply with any affordable housing requirements included in the development agreement or any predecessor ordinance in effect on the date the development agreement was executed.
- B. Residential development projects exempted by California Government Code Section 66474.2 or 66498.1, provided that such residential development projects shall comply with any predecessor ordinance, resolution, or policy in effect on the date the application for the development was deemed substantially complete.
- C. Residential development projects exempted by California Government Code Section 65589.5(o) or successor provision, provided that such residential developments shall

comply with any predecessor ordinance, resolution, or policy in effect on the date that a preliminary application for the development containing all of the information required by Government Code Section 65941.1 was submitted to the City.

- D. Any structure proposed to repair or replace a building that was damaged or destroyed by fire or other calamity, so long as the total number of units, square footage and land use of the building remains the same, and construction of the replacement building begins within one (1) year of the damage's occurrence.
- E. Residential development project consisting of three or fewer net new residential dwelling units, Accessory Dwelling Units, or Junior Accessory Dwelling Units.
- F. Residential development projects for which a complete City of Millbrae housing development preliminary application has been filed no later than the effective date of this Article, provided that such residential developments shall comply with any predecessor ordinance, resolution, or policy in effect on the date the application for the development was deemed complete.
- G. Residential development projects for which an application for a City of Millbrae housing development planning entitlement has been deemed complete no later than the effective date of this Article, provided that such residential developments shall comply with any predecessor ordinance, resolution, or policy in effect on the date the application for the development was deemed complete.
- H. Residential development projects not subject to a planning entitlement where a complete and adequate building permit application for the vertical (including the "structural" or "above ground" construction) has been submitted the City no later than the effective date of this Article.

10.05.3340 Inclusionary Housing Requirements

- A. Developers of residential development projects must comply with the requirements set forth in this Article and in the Affordable Housing Requirements and Program Regulations. Residential development projects (including mixed-use projects containing residential units) of ten (10) or more units shall provide on-site Inclusionary Units in compliance with the percentages and specific income levels contained in the Affordable Housing Requirements and Program Regulations, unless otherwise exempted under this Article or in the Affordable Housing Requirements and Program Regulations. Residential development projects comprised of rental units may utilize alternative means of compliance as provided in the Affordable Housing Requirements and Program Regulations. To the extent permitted by law, the City's objective is to obtain actual Inclusionary Units within each development rather than off-site units or land dedication.
- B. Inclusionary Units that satisfy the requirements of this Article may be counted toward the number of affordable units required to qualify for a density bonus under California Government Code Sections 65915-65918. To be eligible, the affordable units shall meet all of the applicable requirements of California Government Code Section 65915 and the requirements for Inclusionary Units adopted in this Article and in the Affordable Housing Requirements and Program Regulations.
- C. An affordable housing agreement acceptable to the City Attorney shall be recorded against the residential development project before approval of any final or parcel map, or issuance

of any building permit for the residential development project, whichever occurs first. The affordable housing agreement shall comply with the Affordable Housing Requirements and Program Regulations

10.05.3350 Requirements for Affordable Housing In-Lieu Fee

- A. An Affordable Housing In-Lieu Fee to be paid to the City's Affordable Housing Fund may be imposed on residential development projects (including mixed-use projects containing residential units) as established by resolution adopted by the City Council, and may be amended from time to time by the Council.
- B. Payment of the Affordable Housing In-Lieu Fee shall be added as a condition of approval for any residential development projects required to pay the Affordable Housing In-Lieu Fee.
- C. For mixed use projects, any applicable Affordable Housing In-Lieu Fee will be imposed on that portion of the project that consists of new residential development; the Affordable Housing Commercial Linkage Impact Fee in Article XXXIV will apply to the commercial portion of a mixed use project.
- D. Timing of Payment. All fees shall be paid prior to issuance of the first building permit for the project. The fees shall be calculated based on the fee in effect as established by City Council resolution at the time the fee is paid, unless otherwise required by state law. A developer may pay all or a portion of the fee owed at any time prior to issuance of the building permit, at the rate in effect at the time payment is made. For phased projects, the amount due shall be paid on a pro rata basis based on the ratio of the square footage of the phase being constructed to the entire square footage of the approved development, and each portion shall be paid prior to the issuance of any building permit for each phase.
- E. On July 1st of each year after the enactment of the Affordable Housing In-Lieu Fee, the fee shall be automatically adjusted in accordance with the change in the Engineering Construction Cost Index for San Francisco, California, as most recently published by Engineering News-Record, for the elapsed time period from the previous July 1st.

10.05.3360 Affordable Housing Fund

An Affordable Housing Fund is established to receive all housing impact fees and other funds collected under this Article and Article XXXIV which shall be deposited into the City's Affordable Housing Fund.

- A. All Affordable Housing In-Lieu Fees collected under this Article shall be deposited into the City's Affordable Housing Fund. The monies in the Affordable Housing Fund and all earnings from investment of the monies in the Affordable Housing Fund shall be expended exclusively to increase and improve the supply of housing affordable to extremely low income, very low income, lower income, and moderate income households in the City, consistent with the goals and policies contained in the City's Housing Element and Affordable Housing Requirements and Program Regulations, and for administration and compliance monitoring of the affordable housing program.
- B. The fund shall be administered by the Finance Director, who may develop procedures to

implement the purposes of the fund consistent with the requirements of this Article and subject to any adopted budget of the City and generally applicable accounting and procurement processes.

10.05.3370 Waiver

- A. As part of an application for a planning entitlement, a developer may request that the requirements of this Article be waived or modified by the decision-making body, based upon a showing that applying the requirements of this Article would result in an unconstitutional taking of property or would result in any other unconstitutional result.
 1. Any request for a waiver or modification of the provisions of this Article shall be submitted concurrently with the planning entitlement application(s). The developer shall set forth in detail, the factual and legal basis for the claim, including all supporting technical documentation.
 2. Any request for a waiver or modification based on this section shall be reviewed and considered at the same time as the planning entitlement application(s). The City Council may, from time to time, establish by resolution, a processing fee for review of any request for modification.
- B. The waiver or modification may be approved only to the extent necessary to avoid an unconstitutional result, based upon legal advice provided by or at the behest of the City Attorney, after the adoption of written findings based on legal analysis and the evidence. If a waiver or modification is granted, any change in the project shall invalidate the waiver or modification, and a new application shall be required for a waiver or modification pursuant to this section.

10.05.3380 Enforcement

- A. The City Attorney is authorized to enforce the provisions of this Article and all affordable housing agreements, regulatory agreements, and all other covenants or restrictions placed on Inclusionary Units, by civil action and any other proceeding or method permitted by law. Failure or refusal to comply with the Affordable Housing Requirements and Program Regulations promulgated under this Article shall be deemed a violation of this Article.
- B. Failure of any official or agency to fulfill the requirements of this Article shall not excuse any developer or owner from the requirements of this Article. No permit, license, map, or other approval or entitlement for a residential project shall be issued, including without limitation, a final inspection or certificate of occupancy, until all applicable requirements of this section have been satisfied.
- C. The remedies provided for in this Article shall be cumulative and not exclusive and shall not preclude the City from any other remedy or relief to which it otherwise would be entitled under law or equity.

Article XXXIV. Affordable Housing Commercial Linkage Impact Fee

Sections:

- 10.05.3400 Purpose and Intent
- 10.05.3410 Definitions
- 10.05.3420 Administration
- 10.05.3430 Exemptions
- 10.05.3440 Requirements for Affordable Housing Commercial Linkage Impact Fee
- 10.05.3450 Alternatives to the Payment of the Affordable Housing Commercial Linkage Impact Fee
- 10.05.3460 Impact Fee Waiver or Modification
- 10.05.3470 Enforcement

10.05.3400 Purpose and Intent

The purpose of this Article is to establish requirements for an affordable housing commercial linkage impact fee applicable to new commercial development projects to address the impacts of their projects on the demand for affordable housing by contributing to the supply of housing for households with extremely low, very low, low, and moderate incomes. These requirements will increase the supply of affordable housing to a broad range of households with varying income levels within the City and will help implement the City of Millbrae Housing Element by creating a fiscal mechanism to meet the demand for additional affordable housing created by new commercial development.

10.05.3410 Definitions

- A. "Affordable Housing Commercial Linkage Impact Fee" means the fee paid by developers of commercial development projects to mitigate the impacts that such developments have on the demand for affordable housing in the City.
- B. "Affordable Housing Fund" means the fund designated by the City to maintain and account for all monies received pursuant to this Article.
- C. "Affordable Unit" means a residential dwelling unit in a residential development project or mixed-use development project that is occupied by, or available to, moderate, low, very low or extremely low income households at an Affordable Rent or an Affordable Ownership Cost, as those terms are defined in and as required by Article XXXIII.
- D. "Building Permit" includes full structural building permits as well as other related permits such as grading, shoring, garage or foundation-only permits.
- E. "Commercial" includes non-residential or non-public or non-quasi-public uses including but not limited to:
 1. Hotel Uses includes full-service hotels, limited-service hotels, motels, and other short-term lodging designed for stays of under 30 days.
 2. Retail, Restaurants and Service Uses including but not limited to retail stores, commercial recreation and entertainment uses, eating and drinking establishments, personal services such as nail salons and dry cleaners, fitness facilities, gyms, service stations, auto sales, and other stores.

3. Office Uses including but not limited to a range of offices including general offices, and those specialized for accounting, medical, legal, life sciences, laboratory, technology, biotechnology, or research and development uses.
4. Other commercial uses determined to be sufficiently similar by the Community Development Director pursuant to Section 10.50.0400

F. "Commercial development project" means an application for a planning permit or building permit that includes the new construction of gross square feet of space for commercial use or the conversion of residential use to commercial use. This includes mixed-use development projects which include both a commercial and a residential component. The conversion of an existing non-commercial space to commercial space is included.

G. "Decision Making Authority" means the City staff person or body authorized to take final action, subject to appeal, on an application for a planning entitlement or building permit for a development project.

H. "Developer" means the person(s) or legal entity(ies), who also may be the property owner(s), who is seeking development project entitlements or permits from the City or developing a particular development project in the City.

I. "Planning Entitlement" means any discretionary approval of a development project, including, without limitation, a general or specific plan adoption or amendment, rezoning, tentative subdivision map, parcel map, conditional use permit, variances, or design review.

10.05.3420 Administration

- A. The City Council may adopt and may amend from time to time by resolution the affordable housing commercial linkage impact fees consistent with the provisions of this Article. A copy of the affordable housing commercial linkage impact fees shall be on file and available for public examination in the office of the city clerk and posted on the City's website.
- B. The Director of Community Development or their designee is responsible for administering this Article and establishing rules and regulations for this purpose. All such rules and regulations must be in written form and posted on the City's website or otherwise made publicly available. As part of the administration of this Article, the Director may interpret the provisions of this Article.

10.05.3430 Exemptions

The following commercial development projects are exempt from the provisions of this Article:

- A. City buildings and facilities and those public facilities entitled to an exemption under law.
- B. Commercial development projects which are developed in accordance with the terms of a development agreement adopted by ordinance pursuant to the authority and provisions of California Government Code Section 65864 et seq., and that is executed prior to the effective date of the ordinance codified in this chapter, provided that such commercial development projects shall comply with any affordable housing requirements included in the development agreement or any predecessor ordinance in effect on the date the development agreement was executed.

- C. Commercial development projects exempted by California Government Code Section 66474.2 or 66498.1, provided that such commercial development projects shall comply with any predecessor ordinance, resolution, or policy in effect on the date the application for the development was deemed substantially complete.
- D. Commercial development projects on property eligible for the California Property Tax Welfare Exemption that is (i) used exclusively for charitable purposes and (ii) owned or held in trust by a nonprofit corporation operating for charitable purposes with a current tax-exempt letter from the Internal Revenue Service or the Franchise Tax Board.
- E. Any structure proposed to repair or replace a commercial building that was damaged or destroyed by fire or other calamity, so long as the square footage and land use of the building remains the same, and construction of the replacement building begins within one (1) year of the damage's occurrence.
- F. Commercial development projects for which an application for a City of Millbrae planning entitlement has been deemed complete no later than the effective date of this Article, provided that such commercial developments shall comply with any predecessor ordinance, resolution, or policy in effect on the date the application for the development was deemed complete.
- G. Commercial development projects not subject to a planning entitlement where a complete and adequate building permit application for the vertical (including the "structural" or "above ground" construction) has been submitted to the City no later than the effective date of this Article.

10.05.3440 Requirements for Affordable Housing Commercial Linkage Impact Fee

- A. An affordable housing commercial linkage impact fee to be paid to the City's Affordable Housing Fund is hereby imposed on all commercial development projects, including mixed use projects, regardless of zoning designation of the project site, unless otherwise exempted under this Article or by resolution of the City Council.
- B. All affordable housing commercial linkage impact fees collected under this Article shall be deposited into the City's Affordable Housing Fund, which shall be established as provided in Section 10.05.3360 Affordable Housing Fund.
- C. Payment of the affordable housing commercial linkage impact fee shall be required as a condition of approval for all development projects subject to this Article.
- D. For mixed use projects, the affordable housing commercial linkage impact fee is imposed on that portion of the project that consists of new commercial development; while the Inclusionary Unit requirement imposed by Article XXXIII, including any applicable affordable housing in-lieu fees for residential projects, will apply to the residential portion of a mixed use project.
- E. The amount of the affordable housing commercial linkage impact fee, as further described in the fee resolution, is imposed on a per square foot basis for net new gross floor area, except for visitor accommodations, as defined in Section 10.05.0410, where the fee is based on a per room basis. The formula below shall be used in calculating the amount of the commercial linkage fee:
 1. All affordable housing commercial linkage impact fees for commercial development projects, including new construction and conversion of a residential

use to a commercial use, shall be calculated using the gross floor area of net new nonresidential space as specified in Millbrae Municipal Code Section 10.05.0200, except for visitor accommodations where the fee is based on a per room basis, excluding structured or below ground parking and non-habitable accessory structures.

2. In calculating the affordable housing commercial linkage impact fee, a credit shall be given for the square footage of commercial uses that were constructed with the benefit of City approvals and permits on the same parcel as the new commercial project and are demolished no more than one year prior to the issuance of a building permit for the new commercial development project.
- F. All fees shall be paid prior to issuance of the first building permit for the project, at the rate in effect at the time payment is made. The fees shall be calculated based on the fee in effect as established by resolution adopted by the city council at the time the fee is paid. For phased projects, the amount due shall be paid on a pro rata basis across the entire square footage of the approved development, and each portion shall be paid prior to the issuance of any building permit for each phase.
- G. On July 1st of each year after the enactment of the fees, the affordable housing commercial linkage impact fees shall be automatically adjusted in accordance with the change in the Engineering Construction Cost Index for San Francisco, California, as most recently published by Engineering News-Record, for the elapsed time period from the previous July 1st.
- H. Area Standard Wage Agreement. Commercial development projects where the developer voluntarily enters into an area standard wage agreement to pay “area standard wages,” which are defined as the general prevailing wage determinations for San Mateo County as made by the State of California Director of the Department of Industrial Relations, may be entitled to a partial credit of the applicable commercial linkage fee. The amount of any credit and terms of any agreement may be established by resolution of the city council.

10.05.3450 Alternatives to the Payment of the Affordable Housing Commercial Linkage Impact Fee

- A. As an alternative to compliance with the basic provisions included in Section 10.05.3440 of this Article, developers of commercial development projects may propose the construction of affordable units on-site or an alternative mitigation program proposed by the developer and the community development director, such as the provision of off-site affordable units, donation of land for the construction of affordable units, or purchase of existing units for conversion to affordable units.
 1. The City Council may adopt, by resolution, the percentage of affordable units needed to mitigate the impact of commercial development projects on the need for affordable housing.
 2. Any affordable rental or for-sale units proposed as an alternative to the payment of the affordable housing commercial linkage fee shall be subject to the requirements described in Article XXXIII and in the City's Affordable Housing Requirements and Program Regulations as adopted by resolution of the City Council.

B. If the developer seeks an alternative to the payment of the affordable housing commercial linkage impact fee, then the application for the first approval of a commercial development project for which the alternative is sought, shall include an affordable housing plan as specified in the Affordable Housing Requirements and Program Regulations that describes how the alternative will comply with the provisions of this Article. No affordable housing plan is required if the developer proposes only to pay the affordable housing commercial linkage impact fee.

1. Development projects requesting an alternative to payment of the affordable housing commercial linkage impact fee require that an affordable housing plan be submitted in conformance with this Article and the Affordable Housing Requirements and Program Regulations prior to the application being deemed complete.
2. The affordable housing plan shall be processed concurrently with all other permits required for the commercial development project. Before approving the affordable housing plan, the decision-making body shall find that the affordable housing plan conforms to this Article and the Affordable Housing Requirements and Program Regulations. A condition shall be attached to the first approval of any commercial development project to require recordation of an affordable housing agreement, as described in Article XXXIII, prior to the approval of any final or parcel map or building permit for the development project.
3. The approved affordable housing plan may be amended prior to the issuance of any building permit for the commercial development project. A request for a minor modification of an approved affordable housing plan may be granted by the Community Development Director if the modification is substantially in compliance with the original affordable housing plan and conditions of approval. Other modifications to the affordable housing plan shall be approved by the same body that approved the original affordable housing plan.
4. An affordable housing agreement, as described in Article XXXIII, acceptable to the Community Development Director or designee and City Attorney, shall be recorded against the commercial development project prior to the approval of any final subdivision or parcel map or issuance of any building permit, whichever occurs first. The affordable housing agreement shall specify the number, type, location, size, and phasing of all affordable units, provisions for income certification, and screening of potential purchasers or renters of units, and resale control mechanisms, consistent with the approved affordable housing plan, as determined by the Community Development Director or designee.

C. The decision-making body may approve, or conditionally approve, an affordable housing plan that proposes on-site construction of affordable units if the decision-making body determines, based on substantial evidence, that:

1. The proposed affordable units comply with the Affordable Housing Requirements and Program Regulations, including that the affordable units be made available for occupancy concurrently with the market-rate units or occupancy of commercial use; and
2. The affordable units will mitigate the impact of the project on the need for affordable housing as adopted by City Council resolution.

D. If a developer proposes off-site affordable housing units or any other alternative in the affordable housing plan, the decision-making body may approve such a proposal if it finds that the proposal satisfies all of the following conditions in addition to the conditions required under subsection C above:

1. Financing, or a viable financing plan, is in place for the proposed affordable units;
2. The proposed location is suitable for the proposed affordable housing, is consistent with the Housing Element, general plan, and zoning, and will not tend to cause or contribute to residential segregation; and
3. The off-site affordable units will be available for occupancy concurrently or prior to the commercial development project.

10.05.3460 Impact Fee Waiver or Modification

A. As part of an application for a planning entitlement, a developer may request that the requirements of this Article be waived or modified by the decision-making body, based upon a showing that applying the requirements of this Article would result in an unconstitutional taking of property or would result in any other unconstitutional result.

1. Any request for an impact fee waiver or modification shall be submitted concurrently with the development planning entitlement application(s). The developer shall set forth in detail, the factual and legal basis for the claim, including all supporting technical documentation.
2. Any request for a waiver or modification based on this section shall be reviewed and considered at the same time as the development planning entitlement application(s). The City Council may, from time to time, establish by resolution, a processing fee for review of any request for modification.

The waiver or modification may be approved only to the extent necessary to avoid an unconstitutional result, based upon legal advice provided by or at the behest of the City Attorney, after the adoption of written findings based on legal analysis and the evidence. If a waiver or modification is granted, any change in the project shall invalidate the waiver or modification, and a new application shall be required for a waiver or modification pursuant to this section

10.05.3470 Enforcement

- A. Payment of the affordable housing commercial linkage impact fee is the obligation of the developer of a project. 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.
- B. The City Attorney shall be authorized to enforce the provisions of this Article and any affordable housing agreements, and all other covenants or restrictions placed on affordable units, by civil action and any other proceeding or method permitted by law.
- C. Failure of any official or agency to fulfill the requirements of this Article shall not excuse any developer or owner from the requirements of this Article. No permit, license, map, or other approval or entitlement for a commercial development project shall be

issued, including, without limitation, a final inspection or certificate of occupancy, until all applicable requirements of this Article have been satisfied.

D. The remedies provided for in this Article shall be cumulative and not exclusive and shall not preclude the City from any other remedy or relief to which it otherwise would be entitled under law or equity.

SECTION 2. California Environmental Quality Act Finding.

Under Public Resources Code Section 21065 and CEQA Guidelines Section 15378, this action does not constitute a "project" within the meaning of CEQA in that it has no potential to cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, in that changing the affordability of residences has no potential for resulting in a physical change in the environment, either directly or indirectly, and therefore does not require environmental review. The authorization for and adoption of affordable housing in lieu fees and affordable housing commercial linkage impact fees is also not a project because a project does not include the creation of a governmental funding mechanism that does not involve any commitment to any specific project (CEQA Guidelines section 15378(b)(4); the proposed ordinance commits no fees to any specific project. The proposed ordinance also is exempt from environmental review pursuant to CEQA Guidelines Section 15061(b)(3) because it can be seen with certainty that there would be no possibility of a significant effect on the environment, in that the ordinance contains no provisions modifying the physical design, development, or construction of residences.

SECTION 3. Severability.

If any provision, section, subsection, sentence, clause, phrase, or word of this ordinance, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the chapter. The Millbrae city council hereby declares that it would have passed this chapter, and each provision, section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any portion of this chapter or application thereof would be subsequently declared invalid or unconstitutional.

SECTION 4. Effective Date.

This Ordinance shall be in full force and effect, and the regulations contained in this Ordinance shall be enforced, thirty (30) days after adoption.

SECTION 5. Publication.

Publication of summary. The City Clerk has caused to be published a summary of this ordinance, prepared by the City Attorney under Government Code Section 36933, subdivision (c), once, in a newspaper of general circulation printed and published in San Mateo County and circulated in the City of Millbrae, at least five days before the date of adoption. A certified copy of the full text of the ordinance was posted in the office of the City Clerk since at least five days before this date of adoption. Within 15 days after adoption of this ordinance, the City Clerk shall cause the summary

Article XXXIII. Affordable Housing On-Site and In-Lieu Fee Requirements

Article XXXIV. Affordable Housing Commercial Linkage Impact Fee

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of this ordinance to be published again with the names of those City Council members voting for and against the ordinance; and the City Clerk shall post in the office of the City Clerk a certified copy of the full text of this adopted ordinance with the names of those City Council members voting for and against the ordinance.

INTRODUCED at a regular meeting of the City Council of the City of Millbrae held on June 22, 2021.

PASSED and ADOPTED at a regular meeting of the City Council of the City of Millbrae held on July 13, 2021.


Ann Schneider

MAYOR

ATTEST:


7/21/2021

CITY CLERK

I do hereby certify that the foregoing Ordinance was duly and regularly passed and adopted by the City Council of the City of Millbrae this 13th day of July 2021, by the following vote:

AYES: COUNCILMEMBERS: Schneider, Oliva, Papan, Fung and Holober
NOES: COUNCILMEMBERS: None
ABSENT: COUNCILMEMBERS: None
ABSTAIN: COUNCILMEMBERS: None
EXCUSED: COUNCILMEMBERS: None



7/21/2021
CITY CLERK