Brownstein

City of Denver Proposes Policy for New Affordable Housing Requirements

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Earlier this month, the city of Denver ("City") published the "Expanding Housing Affordability Proposed Policy Approach" ("**Proposed Policy**"). The Proposed Policy is in response to the passage of HB21-1117, which overturned a Colorado Supreme Court case commonly known as the *Telluride* decision. HB21-1117 expands the ability of local Colorado governments to promote and require construction of and funding for new affordable housing units. The Proposed Policy offers guidance on future policies and requirements related to affordable housing, which the City may adopt as soon as the first quarter of 2022.

Key recommendations in the Proposed Policy are: (a) increases to the existing **Linkage Fee**; (b) **Mandatory Inclusionary Housing Requirements**, with alternatives including a two-tiered Fee-in-Lieu structure and the potential for negotiated agreements with the HOST Executive Director; and (c) **Incentives** aimed at promoting the construction of affordable housing units, rather than paying the Fee-in-Lieu.

Updates To The Linkage Fee

Under the City's current Linkage Fee Ordinance, developers can either elect to pay a linkage fee based on the commercial and residential square footage within a development, assessed on new gross floor area only (subject to certain exclusions), or elect to build affordable housing units on the subject property or within a one-quarter mile radius of the subject property.

Under the Proposed Policy, the Linkage Fee only applies to new commercial development, industrial development; and residential development of one to seven units ("**Low Density Residential**"). Additional proposed changes to the Linkage Fee include:

- For Low Density Residential development, the Linkage Fee will vary depending on the square footage of the dwelling units within the development; and
- For commercial development, the Linkage Fee will differ depending on whether the development is within a "**High-Cost Market**," defined as neighborhoods with the highest rents and land values in the City which currently include the Central Business District, Union Station, Golden Triangle/Civic Center and Cherry Creek, or a "**Typical-Cost Market**," defined as all areas of the City other than the High-Cost Markets.

The proposed Linkage Fee is as follows:

DEVELOPMENT TYPE	TYPICAL-COST MARKET	HIGH-COST MARKET
Single-Unit, Two-Unit or Multi-Unit Residential Development of 1,400 sf or less per unit	$4 per/sf	
Single-Unit, Two-Unit or Multi-Unit Residential Development of more than 1,400 sf per unit	$6 per/sf	
Commercial Sales, Services and Repair	$6 per/sf	$8 per/sf
Industrial, Manufacturing, Wholesale and Agricultural	$4 per/sf	

Mandatory Inclusionary Housing Requirements

Under the Proposed Policy, all new residential development of eight or more units, including both rental and ownership projects ("**High Density Residential**"), must comply with the proposed Mandatory Inclusionary Housing Requirements, which require construction of a certain amount of affordable housing units on-site, subject to certain exceptions (such as projects on property subject to an existing affordable housing plan or other preexisting contractual commitment or covenant to construct affordable housing executed after Dec. 30, 2016, projects with an affordable housing obligation under a development agreement tied to the site's zoning, or reconstruction of structures destroyed due to natural or manmade involuntary disasters, to name a few).

For mixed-use projects with High-Density Residential, the residential portion of the development must comply with the Mandatory Inclusionary Housing Requirements, and the commercial portion is subject to the Linkage Fee.

On-Site Unit Creation – Build Options

High-Density Residential developments subject to the Mandatory Inclusionary Housing Requirements must comply with one of two on-site build options ("**On-Site Build Options**") applicable to the particular development. The requirements differ based on whether the development is in a High-Cost Market or Typical-Cost Market and whether the units in the project are for rent or for sale:

	High-Cost Market	Typical-Cost Market
Option 1	Rental: 10% of total units up to 60% AMI Ownership: 12% of total units up to 80% AMI	Rental: 8% of total units up to 60% AMI Ownership: 10% of total units up to 80% AMI
Option 2	Rental: 15% of total units averaging 70% AMI Ownership: 18% of total units averaging 90% AMI	Rental: 12% of total units averaging up to 70% AMI Ownership: 15% of total units averaging up to 90% AMI

In order to ensure the sustainability of the City's affordable housing programs, the Proposed Policy recommends a 99-year length of affordability for both rental and ownership developments through long-term affordability restrictions (e.g., recordation of an affordability covenant).

Alternative Compliance Options

HB21-1117 requires the City to offer at least one alternative to construction of on-site affordable housing units. As such, the Proposed Policy recommends as alternatives: (1) payment of a Fee-In-Lieu; and (2) the option for developers to negotiate an alternative with the City.

Fee-In-Lieu: As one alternative to constructing on-site affordable housing units, a project can elect to pay a Fee-in-Lieu, which is calculated based on the number of affordable units required under the applicable On-Site Build Option 1 outlined in the chart above. The initial proposed Fee-In-Lieu per unit is as follows:

	High-Cost Market	Typical Cost
Rental	$311,000 per affordable unit required (which is 10% of total units)	$268,000 per affordable unit required (which is 8% of total units)
Ownership	$478,000 per affordable unit required (which is 12% of total units)	$408,000 per affordable unit required (which is 10% of total units)

Negotiated Alternatives: As a second alternative to constructing on-site affordable units, a project can elect to negotiate an alternative with the City. Under the Proposed Policy, negotiated alternatives are intended to be available for situations where another option may further the City's affordable housing goals more effectively than the other compliance options. Negotiated alternatives will broadly fall into one of the two following categories:

1. "High-Impact" Developments: Large-scale and/or highly complicated developments that require additional consideration from the City. For these developments, a more tailored compliance option may prove more beneficial to the City's affordable housing goals.
2. Discretionary Agreements: Negotiated agreements at the sole discretion of the HOST Executive Director in unique circumstances where the HOST determines that an alternative compliance option is more valuable and appropriate given a specific neighborhood's needs.

Incentives

In its Proposed Policy, City staff recommends certain incentives aimed at promoting on-site construction of affordable housing units. The proposed incentives only apply to developments that comply with the On-Site Build Options (not those paying the Fee-in-Lieu), and include:

1. Base Incentives:
    - Building permit fee reduction in the amount of $6,500/affordable unit at 60% AMI in a Typical-Cost Market or in the amount of $7,500/affordable unit at 60% AMI in a

  - High-Cost Market (provided that the total fee reduction will not exceed 50% of the commercial construction permit fee); and
  - Reduced minimum parking requirement for all residential units to 0.5 spaces/unit.
2. Enhanced Incentives:
  - Increases in permitted building height;
  - Parking exemptions; and
  - Expedited permit and plan reviews.

Enhanced Incentives are only available to projects that, at a minimum, increase the percentage of on-site affordable units by at least 2%–3% above the applicable On-Site Build Option's required percentage. Height bonuses only apply to areas that are zoned within Mixed-Use Commercial Zone Districts or Multi-Unit zoning with permitted maximum base heights of three or more stories, and the proposed parking exemptions only apply to sites with Mixed Use Commercial Zone Districts of three or more stories or Multi Unit Zoning of three or more stories that are also in proximity to multimodal transportation.

What's Next?

The City expects to conclude its Expanding Housing Affordability project in spring 2022 and may approve binding legislation with new affordable housing requirements shortly thereafter. The Proposed Policy recommends that, with respect to projects subject to Site Development Plan review, all projects with applications for concept site development plan review submitted by June 30, 2022, and final SDPs approved by Aug. 30, 2023, should remain subject only to existing affordable housing requirements and will not need to comply with the Proposed Policy. City staff may consider a longer window for Large Development Review, Design Review and/or other processes such as subdivision. All other projects subject to SDP review will need to comply with the new affordable housing requirements.

For more on HB21-1117, check out our Brownstein Client Alert from May 24, 2021.

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