



# CITY OF CUPERTINO

## AGENDA

### PLANNING COMMISSION

**This will be a teleconference meeting with no physical location**

**Tuesday, September 14, 2021**

**6:45 PM**

**Teleconference Meeting**

#### **TELECONFERENCE / PUBLIC PARTICIPATION INFORMATION TO HELP STOP THE SPREAD OF COVID-19**

**In accordance with Governor Newsom's Executive Order No-29-20, this will be a teleconference meeting without a physical location to help stop the spread of COVID-19.**

**Members of the public wishing to observe the meeting may do so in one of the following ways:**

- 1) Tune to Comcast Channel 26 and AT&T U-Verse Channel 99 on your TV.**
- 2) The meeting will also be streamed live on and online at [www.Cupertino.org/youtube](http://www.Cupertino.org/youtube) and [www.Cupertino.org/webcast](http://www.Cupertino.org/webcast)**

**Members of the public wishing comment on an item on the agenda may do so in the following ways:**

- 1) E-mail comments by 5:00 p.m. on Tuesday, September 14th to the Commission at [planningcommission@cupertino.org](mailto:planningcommission@cupertino.org). These e-mail comments will be received by the Commission members before the meeting and posted to the City's website after the meeting.**
- 2) E-mail comments during the times for public comment during the meeting to the Commission at [planningcommission@cupertino.org](mailto:planningcommission@cupertino.org). The staff liaison will read the emails into the record, and display any attachments on the screen, for up to 3 minutes (subject to the Chair's discretion to shorten time for public comments). Members of the public that wish to share a document must email [planningcommission@cupertino.org](mailto:planningcommission@cupertino.org) prior to speaking.**

#### **3) Teleconferencing Instructions**

**Members of the public may observe the teleconference meeting or provide oral public comments as follows:**

Oral public comments will be accepted during the teleconference meeting. Comments may be made during “oral communications” for matters not on the agenda, and during the public comment period for each agenda item.

To address the Commission, click on the link below to register in advance and access the meeting:

**Online**

Please click the link below to join the webinar:  
[https://cityofcupertino.zoom.us/webinar/register/WN\\_eg4AKaBgTxeLiUoUBkIcYQ](https://cityofcupertino.zoom.us/webinar/register/WN_eg4AKaBgTxeLiUoUBkIcYQ)

**Phone**

Dial 669-900-6833 and enter Webinar ID: 988 4965 3412 (Type \*9 to raise hand to speak)  
Unregistered participants will be called on by the last four digits of their phone number.

Or an H.323/SIP room system: H.323:

162.255.37.11 (US West)

162.255.36.11 (US East)

Meeting ID: 988 4965 3412

SIP: 98849653412@zoomcrc.com

After registering, you will receive a confirmation email containing information about joining the webinar.

Please read the following instructions carefully:

1. You can directly download the teleconference software or connect to the meeting in your internet browser. If you are using your browser, make sure you are using a current and up-to-date browser: Chrome 30+, Firefox 27+, Microsoft Edge 12+, Safari 7+. Certain functionality may be disabled in older browsers, including Internet Explorer.
  2. You will be asked to enter an email address and a name, followed by an email with instructions on how to connect to the meeting. Your email address will not be disclosed to the public. If you wish to make an oral public comment but do not wish to provide your name, you may enter “Cupertino Resident” or similar designation.
  3. When the Chair calls for the item on which you wish to speak, click on “raise hand.” Speakers will be notified shortly before they are called to speak.
  4. When called, please limit your remarks to the time allotted and the specific agenda topic.
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In compliance with the Americans with Disabilities Act (ADA), anyone who is planning to attend this teleconference meeting who is visually or hearing impaired or has any disability that needs special assistance should call the City Clerk's Office at 408-777-3223, at least 48 hours in advance of the meeting to arrange for assistance. In addition, upon request, in advance, by a person with a disability, meeting agendas and writings distributed for the meeting that are public records will be made available in the appropriate alternative format.

## ROLL CALL

## APPROVAL OF MINUTES

1. Subject: Draft Minutes of June 22, 2021  
Recommended Action: Approve or modify the Draft Minutes of June 22, 2021  
[1. Draft Minutes 6-22-21](#)
2. Subject: Draft Minutes of August 10, 2021  
Recommended Action: Approve or modify the Draft Minutes of August 10, 2021  
[1. Draft Minutes 8-10-21](#)
3. Subject: Draft Minutes of August 24, 2021  
Recommended Action: Approve or modify the Draft Minutes of August 24, 2021  
[1. Draft Minutes 8-24-21](#)

## POSTPONEMENTS

## ORAL COMMUNICATIONS

*This portion of the meeting is reserved for persons wishing to address the Commission on any matter within the jurisdiction of the Commission and not on the agenda. Speakers are limited to three (3) minutes. In most cases, State law will prohibit the Commission from making any decisions with respect to a matter not on the agenda.*

## WRITTEN COMMUNICATIONS

## CONSENT CALENDAR

*Unless there are separate discussions and/or actions requested by council, staff or a member of the public, it is requested that items under the Consent Calendar be acted on simultaneously.*

## PUBLIC HEARINGS

4. Subject: Consider amendments to Cupertino Municipal Code Sections 19.56.030 (Table 19.56.030), 19.56.030F, 19.56.040, and Table 19.56.040A and the addition of Section 19.56.080 (Density Bonus Ordinance) to allow density bonuses and other incentives as provided by state law and also to add a subsection in Section 19.56.040 providing additional incentives for affordable housing and a new Section 19.56.080 providing that the Density Bonus Ordinance will be interpreted consistent with state density bonus law. (Application No: MCA-2021-003; Applicant: City of Cupertino; Location: Citywide.)

Recommended Action: That the Planning Commission adopt the draft resolution (Attachment 1) recommending that the City Council:

1. Find the actions exempt from CEQA; and
2. Adopt amendments to Cupertino Municipal Code Sections 19.56.030 (Table 19.56.030) 19.56.030F, and Table 19.56.040A to allow for density bonuses and other incentives as provided by state law; and to add a new Section 19.56.080 providing that the Density Bonus Ordinance will be interpreted consistent with state density bonus law.

Note that the language providing additional incentives is not being proposed at this time.

[Staff Report](#)

[1 - Draft Resolution](#)

[2 - HCD Letter to Cupertino Regarding AB 2345 05 03 21 not opened until 05 06 21](#)

[3 - Incentives for Affordable Housing](#)

[4 - Neighboring Cities Incentives and Waivers](#)

## OLD BUSINESS

## NEW BUSINESS

## STAFF AND COMMISSION REPORTS

## FUTURE AGENDA SETTING

## ADJOURNMENT

*If you challenge the action of the Planning Commission in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this agenda, or in written correspondence delivered to the City of Cupertino at, or prior to, the public hearing. In the event an action taken by the Planning Commission is deemed objectionable, the matter may be officially appealed to the City Council in writing within fourteen (14) days of the date of the Commission's decision. Said appeal is filed with the City Clerk (Ordinance 632).*

*In compliance with the Americans with Disabilities Act (ADA), anyone who is planning to attend this teleconference meeting who is visually or hearing impaired or has any disability that needs special assistance should call the City Clerk's Office at 408-777-3223, at least 48 hours in advance of the*

*meeting to arrange for assistance. In addition, upon request, in advance, by a person with a disability, meeting agendas and writings distributed for the meeting that are public records will be made available in the appropriate alternative format.*

*Any writings or documents provided to a majority of the Planning Commission after publication of the packet will be made available for public inspection in the Community Development Department located at City Hall, 10300 Torre Avenue, Cupertino, California 95014, during normal business hours; and in Planning packet archives linked from the agenda/minutes page on the Cupertino web site.*

*IMPORTANT NOTICE: Please be advised that pursuant to Cupertino Municipal Code section 2.08.100 written communications sent to the Cupertino City Council, Commissioners or City staff concerning a matter on the agenda are included as supplemental material to the agendized item. These written communications are accessible to the public through the City's website and kept in packet archives. Do not include any personal or private information in written communications to the City that you do not wish to make public, as written communications are considered public records and will be made publicly available on the City website.*

*Members of the public are entitled to address the Planning Commission concerning any item that is described in the notice or agenda for this meeting, before or during consideration of that item. If you wish to address the Planning Commission on any issue that is on this agenda, please complete a speaker request card located in front of the Commission, and deliver it to the City Staff prior to discussion of the item. When you are called, proceed to the podium and the Chair will recognize you. If you wish to address the Planning Commission on any other item not on the agenda, you may do so by during the public comment portion of the meeting following the same procedure described above. Please limit your comments to three (3) minutes or less.*

*For questions on any items in the agenda, or for documents related to any of the items on the agenda, contact the Planning Department at (408) 777 3308 or [planning@cupertino.org](mailto:planning@cupertino.org).*



# CITY OF CUPERTINO

## Agenda Item

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**21-9833**

**Agenda Date: 9/14/2021**  
**Agenda #: 1.**

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Subject: Draft Minutes of June 22, 2021

Approve or modify the Draft Minutes of June 22, 2021



**CITY OF CUPERTINO  
PLANNING COMMISSION MEETING  
DRAFT MINUTES, June 22, 2021**

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**PLEDGE OF ALLEGIANCE**

At 6:45 p.m. Chairperson Wang called to order the regular Planning Commission meeting. This was a teleconference meeting with no physical location.

**ROLL CALL**

Present: Chairperson R Wang, Vice Chairperson Steven Scharf and Commissioner Sanjiv Kapil. Absent: Commissioners Vikram Saxena and Muni Madhhipatla

**APPROVAL OF MINUTES**

1. **Subject:** Draft Minutes of May 25, 2021.

**Recommended Action:** Approve or modify the Draft Minutes of May 25, 2021

Moved by Scharf and seconded by Wang to: "Approve the minutes". The motion carried 3-0-2 (Saxena and Madhhipatla absent).

**POSTPONEMENTS/REMOVAL FROM CALENDAR:** None

**ORAL COMMUNICATIONS:**

Lisa Warren asked the Commission to hold off on making big decisions until a new City Manager and City Attorney are hired.

Rhoda Fry spoke about the outcome of Santa Clara Board Supervisor meeting and the upcoming Santa Clara County Planning Commission meeting to discuss the Stevens Creek quarry.

**WRITTEN COMMUNICATIONS:** None

**CONSENT CALENDAR:** None

**PUBLIC HEARINGS:**

2. **Subject:** Vesting Tentative Map to replace a previously approved Vesting Tentative Map (TM-2018-03) for the Westport Cupertino development project to create a separate parcel for the age restricted senior below market rate building. City approval would be a

Vesting Tentative Map; (Application No(s): TM-2021-002; Applicant(s): KT Urban (Mark Tersini); Location: 21267 Stevens Creek Boulevard; APN #326-27-042, -043

**Recommended Action:** That the Planning Commission the public hearing and recommend that the City Council find: 1) Approve the application per the Draft Resolution. *Tentative City Council hearing date: July 20, 2021*

Senior Planner Gian Martire gave a presentation and answered questions from the Commissioners.

The Applicant Mark Tersini addressed and answered questions from the Commissioners.

Chair Wang opened the public comment period and the following individual(s) spoke:

- Peggy Griffin
- Jennifer Griffin
- Lisa Warren
- Larry Dean
- Rhoda Fry

Chair Wang closed the public comment period.

The Planning Commission discussed the following:

- Legal review on the conformance of the parcellation of Building 2 with the General Plan, as well as a justification its decoupling from the Parcel B.
- Removing the requirement for the developer to provide a Class IV bike lane on the southern side of Stevens Creek Boulevard, adjacent to De Anza College.

Wang moved and Scharf seconded to continue this item to a date uncertain.  
The motion carried 3-0-2.

**3. Subject:** Consider an appeal of the Community Development Director's approval of a Two-Story Permit to allow for a new 2,922 square-foot two-story home with a 746 square-foot attached accessory dwelling unit and a Minor Residential Permit to allow for a new second-story balcony. (Application Nos.: R-2020-035, RM-2020-023; Applicant: Smart Lily, LLC.; Property Owners: Tariqul Khan and Chaman Hafiz; Appellants: Jitesh Vadhia and Chih-Lung Lin; Location: 1506 Primrose Way; APN #366-15-018)

**Recommended Action:** That the Planning Commission adopt the draft resolutions (Attachments 1 and 2) to:

1. Find that the proposed actions are exempt from CEQA; and



2. Deny the appeal and uphold the Director's decision to approve the Two-Story Permit (R-2020-035) and the Minor Residential Permit (RM-2020-023).

Associate Planner Erika Poveda gave a presentation and answered questions from the Commissioners.

Appellants Chih-Lung Lin and Jitesh Vadhia addressed and answered questions from the Commissioners.

Applicants Tariqul Khan and Chaman Hafiz gave a presentation and answered questions from the Commissioners.

Chair Wang opened the public comment period and the following individual(s) spoke:

Lisa Warren

Winston Shiah

Jennifer Griffin

Aliya Shafquat

Rayman

Rima Narayan

Leon Xiao

Jon Freel

Jitesh Vadhia read a letter on behalf of Joan and Greg Malensky

Chair Wang closed the public comment period

The Commission discussed balcony issues and a potential ordinance amendment related to balconies.

Vice Chair Scharf discussed modifying the balcony with the applicants.

Chair Wang asked staff about privacy screening and height of existing foliage.

Commissioner Kapil suggested to relocate the balcony to the side of the house.

Chair Wang moved and Vice Chair Scharf seconded to deny the appeal and uphold the Director's decision to approve the Two-Story Permit (R-2020-035) and the Minor Residential Permit (RM-2020-023).

The motion carried 2-1-2.

**OLD BUSINESS:** None

**NEW BUSINESS:** None

**REPORT OF THE DIRECTOR OF COMMUNITY DEVELOPMENT:** None

**REPORT OF THE PLANNING COMMISSION:**

Vice Chair Scharf attended the California Alliance of Local Electeds (CALE) meetings.

**FUTURE AGENDA SETTING**

Vice Chair Scharf would like to discuss an amendment to the City's regulations regarding balconies.

Chair Wang would like to discuss restrictions on 5G antennas based on aesthetics.

**ADJOURNMENT:**

The meeting was adjourned at 8:45 pm to the next Planning Commission meeting on July 13, 2021, at 6:45 p.m.

Respectfully Submitted:

\_\_\_\_\_/s/Abby Ayende  
Abby Ayende, Management Analyst



# CITY OF CUPERTINO

## Agenda Item

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**21-9835**

**Agenda Date: 9/14/2021**  
**Agenda #: 2.**

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Subject: Draft Minutes of August 10, 2021

Approve or modify the Draft Minutes of August 10, 2021



**CITY OF CUPERTINO  
PLANNING COMMISSION MEETING  
DRAFT MINUTES, AUGUST 10, 2021**

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**PLEDGE OF ALLEGIANCE**

At 6:45 p.m. Chairperson Wang called to order the regular Planning Commission meeting. This was a teleconference meeting with no physical location.

**ROLL CALL**

Present: Chairperson Wang, Vice Chairperson Steven Scharf, Commissioner Vikram Saxena and Commissioner Muni Madhhipatla Absent: Commissioner Kapil

**APPROVAL OF MINUTES**

1. **Subject:** Draft Minutes of June 22, 2021.

**Recommended Action:** Approve or modify the Draft Minutes of June 22, 2021

The approval of Minutes was postponed to the next meeting due to a lack of a quorum.

2. **Subject:** Draft Minutes of July 27, 2021.

**Recommended Action:** Approve or modify the Draft Minutes of July 27, 2021

Moved by Scharf and seconded by Madhhipatla to: "Approve the minutes". The motion carried 3-1-1.

**POSTPONEMENTS/REMOVAL FROM CALENDAR:** None

**ORAL COMMUNICATIONS:**

Jennifer Griffin spoke about her concerns regarding SB9, SB10 and AB1401.

**WRITTEN COMMUNICATIONS:** None

**CONSENT CALENDAR:** None

**PUBLIC HEARINGS:**

3. Consider amendments to Cupertino Municipal Code Sections 19.56.030 (Table 19.56.030), 19.56.030F, 19.56.040, and Table 19.56.040A and the addition of Section

19.56.080 (Density Bonus Ordinance) to allow density bonuses and other incentives as provided by state law and also to add a subsection in Section 19.56.040 providing additional incentives for affordable housing and a new Section 19.56.080 providing that the Density Bonus Ordinance will be interpreted consistent with state density bonus law. (Application No: MCA-2021-003; Applicant: City of Cupertino; Location: Citywide.)

**Recommended Action:** That the Planning Commission adopt the draft resolution recommending that the City Council:

1. Find the actions exempt from CEQA; and
2. Adopt amendments to Cupertino Municipal Code Sections 19.56.030 (Table 19.56.030) 19.56.030F, and Table 19.56.040A to allow for density bonuses and other incentives as provided by state law; to add a new subsection in Section 19.56.040 providing additional incentives for affordable housing; and to add a new Section 19.56.080 providing that the Density Bonus Ordinance will be interpreted consistent with state density bonus law.

Planning Manager Piu Ghosh gave a presentation and answered questions from the Commissioners.

City Attorney Christopher Jensen answered questions from the Commissioners regarding BMR requirements, AB 2345 and HCD's request.

Chair Wang opened the public comment period and the following individual(s) spoke:

- Peggy Griffin
- Jennifer Griffin
- Lisa Warren
- Jean Bedord

Chair Wang closed the public comment period.

Commissioner Madhhipatla spoke about the affordable housing shortage and would like to amend City ordinances to be more family inclusive and less discriminatory to families. Vice Chair Scharf would like to strike Section 3 no. 4 of the proposed draft ordinance.

Chair requested a comparison table to understand the other density bonus incentives/concessions from other cities.

Scharf moved and Saxena seconded to adopt draft resolution with Section 3 no. 4 of the Draft Ordinance removed. The motion failed 2-2-1 (Kapil -absent).

**OLD BUSINESS:** None

**NEW BUSINESS:** None

**REPORT OF THE DIRECTOR OF COMMUNITY DEVELOPMENT:** None

**REPORT OF THE PLANNING COMMISSION:**

Chair Wang attended the California Alliance of Local Electeds (CALE) meetings.

**FUTURE AGENDA SETTING:**

Commissioner Saxena would like to understand school funding formula and how single-family vs multifamily; rental vs ownership contributes to school density.

Vice Chair Scharf to discuss modifying inclusionary housing program to ensure there are enough requirements to offset the number of concessions taken.

Chair Wang proposed a series of study sessions on healthy villages and 5G ordinance for esthetics.

**ADJOURNMENT:**

The meeting was adjourned at 8:54 pm to the next Planning Commission meeting on August 10, 2021, at 6:45 p.m.

Respectfully Submitted:

\_\_\_\_\_/s/Abby Ayende  
Abby Ayende, Management Analyst



# CITY OF CUPERTINO

## Agenda Item

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**21-9834**

**Agenda Date: 9/14/2021**  
**Agenda #: 3.**

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Subject: Draft Minutes of August 24, 2021

Approve or modify the Draft Minutes of August 24, 2021



**CITY OF CUPERTINO  
PLANNING COMMISSION MEETING  
DRAFT MINUTES, AUGUST 24, 2021**

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**PLEDGE OF ALLEGIANCE**

At 6:45 p.m. Vice Chairperson Scharf called to order the regular Planning Commission meeting. This was a teleconference meeting with no physical location.

**ROLL CALL**

Present: Vice Chairperson Steven Scharf, Commissioner Vikram Saxena Commissioner Kapil and Commissioner Muni Madhhipatla Absent: Chairperson Wang

**APPROVAL OF MINUTES:** None

**POSTPONEMENTS/REMOVAL FROM CALENDAR:** None

**ORAL COMMUNICATIONS:**

Jennifer Griffin spoke about the housing bills.

Connie Cunningham spoke about the Housing Element and adding more housing for all.

**WRITTEN COMMUNICATIONS:** None

**CONSENT CALENDAR:** None

**STUDY SESSION:**

1. Subject: Study Session to provide an update on the Pre-Approved Accessory Dwelling Unit Program and Accessory Dwelling Unit implementation.

Recommended Action: That the Planning Commission receive the presentation and provide comments.

1. Steps to a Completed ADU Handout
2. ADU FAQs handout

Senior Planner Gian Martire gave a presentation.



Vice Chair Scharf opened the public comment period and the following individual(s) spoke:

- Lisa Warren
- Jennifer Griffin
- Connie Cunningham

Vice Chair Scharf closed the public comment period.

Senior Planner Gian Martire and Planning Manager Piu Ghosh answered questions from the Commissioners.

**PUBLIC HEARING:** None

**OLD BUSINESS:** None

**NEW BUSINESS:** None

**REPORT OF THE DIRECTOR OF COMMUNITY DEVELOPMENT:** None

**REPORT OF THE PLANNING COMMISSION:**

Commissioner Kapil stated that the last ERC meeting was cancelled.

Commissioner Madhhipatla attended the League of California Cities meeting and SB9 was discussed.

Vice Chair Sharf spoke about his call with Assembly Evan Lowe's staff regarding SB10 and SB35 Vallco project.

**FUTURE AGENDA SETTING:** None

**ADJOURNMENT:**

The meeting was adjourned at 7:50 pm to the next Planning Commission meeting on September 14, 2021, at 6:45 p.m.

Respectfully Submitted:

\_\_\_\_\_/s/Abby Ayende  
Abby Ayende, Management Analyst



# CITY OF CUPERTINO

## Agenda Item

21-9796

**Agenda Date: 9/14/2021**  
**Agenda #: 4.**

Subject: Consider amendments to Cupertino Municipal Code Sections 19.56.030 (Table 19.56.030), 19.56.030F, 19.56.040, and Table 19.56.040A and the addition of Section 19.56.080 (Density Bonus Ordinance) to allow density bonuses and other incentives as provided by state law and also to add a subsection in Section 19.56.040 providing additional incentives for affordable housing and a new Section 19.56.080 providing that the Density Bonus Ordinance will be interpreted consistent with state density bonus law. (Application No: MCA-2021-003; Applicant: City of Cupertino; Location: Citywide.)

That the Planning Commission adopt the draft resolution (Attachment 1) recommending that the City Council:

1. Find the actions exempt from CEQA; and
2. Adopt amendments to Cupertino Municipal Code Sections 19.56.030 (Table 19.56.030) 19.56.030F, and Table 19.56.040A to allow for density bonuses and other incentives as provided by state law; and to add a new Section 19.56.080 providing that the Density Bonus Ordinance will be interpreted consistent with state density bonus law.

*Note that the language providing additional incentives is not being proposed at this time.*



## COMMUNITY DEVELOPMENT DEPARTMENT

CITY HALL  
10300 TORRE AVENUE • CUPERTINO, CA  
95014-3255 TELEPHONE: (408) 777-3308 • FAX: (408) 777-3333  
CUPERTINO.ORG

## PLANNING COMMISSION STAFF REPORT

Meeting: September 14, 2021

### **Subject**

Consider amendments to Cupertino Municipal Code Sections 19.56.030 (Table 19.56.030), 19.56.030F, 19.56.040, and Table 19.56.040A and the addition of Section 19.56.080 (Density Bonus Ordinance) to allow density bonuses and other incentives as provided by state law and also to add a subsection in Section 19.56.040 providing additional incentives for affordable housing and a new Section 19.56.080 providing that the Density Bonus Ordinance will be interpreted consistent with state density bonus law. (Application No: MCA-2021-003; Applicant: City of Cupertino; Location: Citywide.)

### **Recommended Action**

That the Planning Commission adopt the draft resolution (Attachment 1) recommending that the City Council:

1. Find the actions exempt from CEQA; and
2. Adopt amendments to Cupertino Municipal Code Sections 19.56.030 (Table 19.56.030) 19.56.030F, and Table 19.56.040A to allow for density bonuses and other incentives as provided by state law; and to add a new Section 19.56.080 providing that the Density Bonus Ordinance will be interpreted consistent with state density bonus law.

*Note that the language providing additional incentives is not being proposed at this time.*

### **Discussion**

#### *Background*

Under Government Code Section 65915, a housing development is eligible for a density bonus based on the percentage of very low, low, or moderate-income units provided in the development. The City's FY2019/2020 Work Program includes an item to incentivize affordable housing production, in part by updating the City's density bonus ordinance.

In the 2020 legislative session, AB 2345 was adopted, which increased the maximum density bonus for projects that are not 100 percent affordable from 35 percent to 50 percent in exchange for a 4 to 5 percent increase in affordability (Government Code §

65915(f).<sup>1</sup>) However, the statute provided that if the City were to adopt its own "housing program" or ordinance, or both, to incentivize the development of affordable housing by allowing bonuses that exceed 35 percent, the City could enforce its own program and ordinance rather than the bonus program and the incentives and concession requirements imposed by AB 2345. (§ 65915(s).)

On December 15, 2020, the City Council, by Resolution No. 20-141, adopted a housing program to allow density bonuses up to 40 percent and initiated a zoning code amendment to incorporate those changes into the City's density bonus ordinance. The housing program adopted by the City Council allows increased density for the same proportional increases in affordability as did § 65915 (Density Bonus Law) before AB 2345 was enacted: 2.5 percent for every 1 percent increase in very low-income units; 1.5 percent increase for every 1 percent increase in low-income units, and 1 percent increase for every 1 percent increase in moderate-income units, up to a 40 percent maximum density bonus.

These zoning changes were presented to the Planning Commission and the City Council in early 2021. The Planning Commission reviewed the proposed changes at its February 23, 2021 regular meeting and adopted Resolution No. 6919 by a 4-1 vote (Kapil – no) recommending that the Council adopt the proposed changes. The Council considered the proposed changes and agreed that the proposed amendments would implement the December 2020 Council-adopted housing program. The Council introduced Ordinance No. 21- 2226 on April 20, 2021 and adopted the amendments on May 4, 2021.

At the meeting on April 20, 2021, the City Council also requested that staff consider presenting additional ordinance amendments to allow increased density bonuses of up to 50 percent for higher levels of affordability and review other incentives to develop affordable housing. The Department of Housing and Community Development (HCD) by letter dated May 3, 2021 (Attachment 2) also expressed concern that the adopted program and ordinance did not create a “program” and provided insufficient incentives. Due to an error in communications, the letter was not provided to the Council, public, or planning staff in advance of the ordinance adoption.

The proposed amendments were previously discussed by the Planning Commission on August 10, 2021 at its regular meeting. A motion to approve the proposed amendments failed on a 2-2-1 (Kapil absent) vote. Prior to the vote, the Commission requested information regarding incentives and waivers that developers have requested and received in neighboring jurisdictions.

<sup>1</sup> All further references are to the Government Code.

### *Proposed Amendments*

To amend the City's Density Bonus program, staff recommends that that proportional increases in affordability conform to those required by AB 2345. This would allow a 2.5 percent bonus for a 1 percent increase in very-low income units, 1.5 percent bonus for 1 percent increase in low income units and 1 percent bonus for 1 percent increase in moderate-income units, up to a maximum density bonus of 35 percent. For increases in affordability exceeding 11 percent very low income, 20 percent low income, or 40 percent moderate income, an additional 3.75 percent bonus would be allowed for each 1 percent increase in affordability. The ordinance would also reference changes made in state density bonus law that allow bonuses of either 80 percent or an unlimited amount for 100 percent affordable projects. The zoning code would be amended by editing current Table 19.56.030 in the zoning ordinance as follows.

**Table 19.56.030: Density Bonus Calculations**

Income Level of unit	Proportion of Total Affordable Dwelling Units	Maximum Density Bonus
Very Low Income	5%	20%
	6% - <del>12</del> <u>11</u> % <sup>(1)</sup>	22.5% - <del>37.5</del> <u>35</u> %
	<u>12% - 14%</u> <sup>(2)</sup>	<u>38.75% - 46.25%</u>
	<del>13</del> <u>15</u> % or more	<del>40</del> <u>50</u> %
Low Income	10%	20%
	11% - <del>22</del> <u>20</u> % <sup>(23)</sup>	21.5% - <del>38</del> <u>35</u> %
	<u>21% - 23%</u> <sup>(4)</sup>	<u>38.75% - 46.25%</u>
	<del>23</del> <u>24</u> % or more	<del>40</del> <u>50</u> %
Moderate Income (Common interest developments)	10%	5%
	11% - <del>44</del> <u>40</u> % <sup>(35)</sup>	6% - <del>39</del> <u>35</u> %
	<u>41% - 43%</u> <sup>(6)</sup>	<u>38.75% - 46.25%</u>
	<del>45</del> <u>44</u> % or above	<del>40</del> <u>50</u> %
<b><u>Affordable Housing Development</u></b>	<b><u>100%</u><sup>(7)</sup></b>	<b><u>80% or as specified in Government Code Section 65915</u></b>

<sup>(1)</sup> For each 1% increase over 5% of the target units, the density bonus shall be increased by 2.5%, up to a maximum of ~~40~~35%.

<sup>(2)</sup> **For each 1% increase over 11% of the target units, the density bonus shall be increased by 3.75%, up to a maximum of 50%.**

<sup>(23)</sup> For each 1% increase over 10% of the target units, the density bonus shall be increased by 1.5%, up to a maximum of ~~40~~35%.

- (4) For each 1% increase over 20% of the target units, the density bonus shall be increased by 3.75%, up to a maximum of 50%.
- (35) For each 1% increase over 10% of the target units, the density bonus shall be increased by 1%, up to a maximum of ~~40~~35%.
- (6) For each 1% increase over 40% of the target units, the density bonus shall be increased by 3.75%, up to a maximum of 50%.
- (7) Must meet the requirements of Government Code Section 65915(b)(1)(G) or successor provision.

Other conforming changes would be made in Section 19.56.030F to show a maximum density bonus of 50 percent for projects that are not 100 percent affordable.

Table 19.56.040A would similarly be updated to reflect the changes made by AB 2345 and additional incentives available for 100 percent affordable projects, as follows:

**Table 19.56.040A: Incentives or Concessions Calculations:**

Unit Type	Percent of Affordable Units	Number of Incentives/Concessions
Very Low Income Units	5% or greater	1
	10% or greater	2
	15% or greater	3
Low Income Units	10% or greater	1
	<del>20</del> <u>17</u> % or greater	2
	<del>30</del> <u>24</u> % or greater	3
Moderate Income Units	10% or greater	1
	20% or greater	2
	30% or greater	3
<b><u>Affordable Housing Development</u></b>	<b><u>100%*</u></b>	<b><u>4</u></b>

**\*Must meet the requirements of Government Code Section 65915(b)(1)(G) or successor provision.**

Finally, because state density bonus law (Government Code Section 65915 et seq.) is amended by the Legislature nearly every year (additional amendments are proposed this year), making it difficult to keep the City's ordinance up to date, a provision is proposed to be added as Section 19.56.080 stating that the ordinance will be interpreted to be consistent with state density bonus law, as follows:

**If any portion of this Chapter 19.56 conflicts with State Density Bonus Law (Government Code Section 65915 et seq.) or other applicable state law, state law shall supersede this Chapter. Any ambiguities in this section shall be interpreted to be consistent with State Density Bonus Law. All code references in this Chapter include all successor provisions.**

For instance, although the City's ordinance currently does not include the bonuses and incentives available for 100 percent affordable housing projects, the City would have followed state law in allowing 80 percent or larger bonuses for these projects. The purpose of this provision is to clarify that that is the City's policy.

*Changes between the draft ordinance language presented on August 10 and September 14:* The previously proposed new subsection D in Section 19.56.040 has been removed from the draft section due to the concerns previously expressed by the Planning Commission. This section was previously proposed to codify certain additional incentives that the City currently offers to incentivize the development of affordable housing. These incentives are already addressed in the City's policy documents.

#### *Analysis*

The purpose of the City's housing and density bonus programs is to incentivize the development of affordable housing within the City. The Hausrath Economics Group (HEG) confirmed that program adopted by the City Council in December and by ordinance in May would incentivize the development of affordable housing. That program also conformed with the recommendations of the California Rural Legal Assistance Foundation and the Western Center on Law & Poverty provided during hearings on AB 2345, when they advocated for maintaining the density for affordability ratio following the same pattern as density bonus law prior to the passage of AB 2345. All but one of the developers of Cupertino's housing element sites have applied for density bonuses using the incentives provided prior to the passage of AB 2345, including the developers of Vallco, Marina, Veranda, and Westport. The City has consistently approved these density bonus projects.

The City also continues to offer a host of incentives to incentivize affordable housing within the City. (See Attachment 3.) Many of the affordable housing incentives are implemented through other parts of the Municipal Code (flexible zoning standards through the Planned Development Zoning District Ordinance, Below Market Rate (BMR) Housing Program through Chapter 19.172 of the Municipal Code and associated administration and other manuals) or General Plan programs.

Despite these incentives, HCD has continued to assert that the City's current density bonus program does not comply with AB 2345. Based on the analysis by HEG and the experience of the City of San Diego, which previously adopted the AB 2345 program,

developers are most likely to use the program by providing very low income housing. For this type of housing proposal, the AB 2345 maximum bonus of 50 percent for 15 percent very low income units is not much different from the City's existing density-for-affordability ratio which would require 17 percent very low income units for a 50 percent density bonus.

The Commission was hesitant to adopt this ordinance amendment and wished to review the list of proposed and approved waivers and incentives in density bonus projects from neighboring jurisdictions. This list has been prepared by the City Manager's office and attached as Attachment 4 for the Planning Commission's review. Information was requested from the cities of Campbell, Los Altos, Saratoga, Sunnyvale, Mountain View, Palo Alto and Santa Clara. Information received has been presented in the attachment. The bulk of the incentives and waivers are related to increases in height, floor area ratio and lot coverage, and reductions in setbacks from property line and/or between buildings on site, parking standards and common and/or private open spaces.

Adoption of the proposed ordinance amendments will advance the Affordable Housing Strategies item on the Council's FY 20/21 Work Program and conform to the City Council's direction to increase the maximum bonus to 50 percent. In addition, as part of the Affordable Housing Strategies item on the Council's FY20/21 Work Program, the staff will explore further amendments to the density bonus ordinance to incentivize the production of more affordable units than required by density bonus law and the City's affordable housing ordinance, which requires 15 percent of rental units and 20 percent of for-sale units to be affordable. The staff will also consider additional amendments to the City's density bonus ordinance to ensure that it reflects the latest amendments to state density bonus law.

### **Sustainability Impact**

No sustainability impact.

### **Fiscal Impact**

No fiscal impact.

### **California Environmental Quality Act (CEQA)**

It is not possible to predict which properties in the City, if any, may be proposed to be developed with an increased density bonus, given market conditions, building types desired, and developers' individual decisions whether or not to request bonuses; nor whether any increased development or density will result from the proposed changes, whether any development or density will result that would not already have occurred under the existing Municipal Code, nor whether any possible significant environmental impacts peculiar to the adoption of the proposed zoning code amendments would



occur. Therefore, the proposed code amendments: (1) will not result in any direct or reasonably foreseeable indirect physical change in the environment (CEQA Guidelines Section 15060(c)) and so (2) do not constitute a project under CEQA (CEQA Guidelines Section 15378).

Further, the City has been informed by the California Department of Housing and Community Development (HCD) that its existing density bonus ordinance must be modified to be consistent with AB 2345, and the ordinance amendments reflect HCD's interpretation of the requirements of state law. The proposed zoning amendments do not permit any bonuses, incentives, or waivers other than those provided by State law. The amendments can therefore be seen with certainty based on review of the facts to have no possible significant effect on the environment (CEQA Guidelines Section 15061(b)(3)). These amendments do not authorize the development of housing on any site where housing is not already permitted under the City's existing codes, and any housing development project with a density bonus component must be reviewed under CEQA.

### **Conclusion**

Staff recommends the Planning Commission adopt the draft Resolution, recommending that the City Council adopt the proposed amendments to the City's density bonus ordinance to incentivize the development of affordable housing by allowing for density bonuses and other incentives as provided by state law, providing additional City incentives for affordable housing, and providing that the City's ordinance will be interpreted consistent with state density bonus law.

### **Next Steps**

The Planning Commission's recommendation is tentatively intended to be presented to the City Council on October 5, 2021 with a second reading on October 19, 2021.

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Prepared by:

Piu Ghosh, Planning Manager

Reviewed and Approved for Submission by: Benjamin Fu, Director of Community Development

### **Attachments:**

- 1 – Draft Planning Commission Resolution and Ordinance
- 2 – Letter dated May 3, 2021 from Department of Housing and Community Development
- 3 - City Incentives for Affordable Housing
- 4 – List of Waivers and Incentives from adjacent jurisdictions

CITY OF CUPERTINO  
10300 Torre Avenue  
Cupertino, California 95014

DRAFT RESOLUTION NO.

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF CUPERTINO RECOMMENDING ADOPTION OF AN ORDINANCE BY THE CITY COUNCIL OF THE CITY OF CUPERTINO AMENDING CUPERTINO MUNICIPAL CODE SECTIONS 19.56.030A (TABLE 19.56.030), 19.56.030F, TABLE 19.56.040A AND ADDING SECTION 19.56.080 (DENSITY BONUS ORDINANCE) TO ALLOW DENSITY BONUSES AND OTHER INCENTIVES AS PROVIDED BY STATE LAW

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The Planning Commission recommends that the City Council approve the proposed amendments to the City's density bonus ordinance, Chapter 19.56 of the Cupertino Municipal Code, in substantially similar form to the Draft Ordinance attached hereto as Exhibit A.

PASSED AND ADOPTED at a Regular Meeting of the Planning Commission of the City of Cupertino the 14<sup>th</sup> day of September 2021, by the following roll call vote:

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AYES: COMMISSIONERS:  
NOES: COMMISSIONERS:  
ABSTAIN: COMMISSIONERS:  
ABSENT: COMMISSIONERS:

ATTEST:

APPROVED:

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Piu Ghosh  
Planning Manager

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Ray Wang  
Chair, Planning Commission

DRAFT ORDINANCE NO. 21-\_\_\_\_\_

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF  
CUPERTINO AMENDING CUPERTINO MUNICIPAL CODE SECTIONS  
19.56.030A (TABLE 19.56.030), 19.56.030F, TABLE 19.56.040A AND  
ADDING SECTION 19.56.080 (DENSITY BONUS ORDINANCE) TO  
ALLOW DENSITY BONUSES AND OTHER INCENTIVES AS  
PROVIDED BY STATE LAW

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SECTION I: PROJECT DESCRIPTION

Application No.: MCA-2021-003  
Applicant: City of Cupertino  
Location: Citywide

SECTION II: RECITALS

WHEREAS, Cupertino Municipal Code Chapter 19.56 implements the requirements of Government Code Section 65915 (state density bonus law) to incentivize the construction of affordable units through the provision of density bonuses and other benefits; and

WHEREAS, the California Legislature has adopted AB 2345 (Chapter 197, Statutes of 2020), which modified state density bonus law; and

WHEREAS, the City Council of the City of Cupertino on April 20, 2021 introduced, and on May 4, 2021 adopted, Ordinance No. 21-2226 to incentivize the development of affordable housing by allowing density bonuses of up to 40 percent; and

WHEREAS, the City Council of the City of Cupertino on April 20, 2021 also directed staff to return with a potential amendment to the housing program to allow a 50 percent density bonus for higher percentages of BMR housing, to be considered with other density bonus ordinance updates; and

WHEREAS, the City desires to amend Chapter 19.56 to permit density bonuses of 50 percent and concessions and incentives as provided in AB 2345; and

WHEREAS, the proposed amendments to the density bonus ordinance are consistent with the City's General Plan, and the City's police power provides the City with the authority to adopt an affordable housing program to further the public health, safety, and welfare; and

WHEREAS, on \_\_\_\_\_, 2021, at a duly and properly noticed public hearing, the Planning Commission recommended on a \_\_\_\_\_ vote that the City Council find that the

proposed code amendments: (1) will not result in any direct or reasonably foreseeable indirect physical change in the environment (CEQA Guidelines Section 15060(c)); (2) do not constitute a project under CEQA (CEQA Guidelines Section 15378); and (3) can be seen with certainty based on review of the facts to have no possible significant effect on the environment (CEQA Guidelines Section 15061(b)(3)); and

WHEREAS, on \_\_\_\_\_, 2021, at a duly and properly noticed public hearing, the Planning Commission adopted Resolution No. \_\_\_\_\_ and recommended on a \_\_\_\_\_ vote that the City Council adopt the draft density bonus ordinance presented to it, in substantially similar form to this ordinance; and

WHEREAS, all necessary public notices having been given as required by the Municipal Code of the City of Cupertino and the Government Code, on \_\_\_\_\_, 2021, the City Council held a public hearing to consider the Ordinance; and

WHEREAS, the City Council of the City of Cupertino is the decision-making body for this Ordinance.

### SECTION III

NOW, THEREFORE, BE IT ORDAINED:

That after careful consideration of facts, exhibits, testimony and other evidence submitted in this matter the City Council hereby adopts the Ordinance based on the findings described below, the public hearing, and the record, as follows:

Section 1. The recitals set forth above are true and correct and are hereby incorporated herein by this reference as if fully set forth in their entirety.

Section 2. The City Council finds the following as set forth by Municipal Code Sections 19.152.020C and 19.152.030D:

1. That the proposed zoning is in accord with Title 19 of the Municipal Code and the City's Comprehensive General Plan (Community Vision 2040) and the proposed amendments are internally consistent with Title 19 of the Municipal Code.

*The proposed amendments have been adopted in accord with the requirements of Title 19, and the proposed amendments to Section 19.56.030F are proposed to achieve consistency with AB 2345 adopted by the State in 2020.*

2. The proposed zoning is in compliance with the provisions of the California Environmental Quality Act (CEQA).

*It is not possible to predict which properties in the City, if any, may be proposed to be developed with an increased density bonus, given market conditions, building types desired, and developers' individual decisions whether or not to request bonuses; nor whether any increased development*

*or density will result from the proposed changes, whether any development or density will result that would not already have occurred under the existing Municipal Code, nor whether any possible significant environmental impacts peculiar to the adoption of the proposed zoning code amendments would occur. Therefore, the proposed code amendments: (1) will not result in any direct or reasonably foreseeable indirect physical change in the environment (CEQA Guidelines Section 15060(c)) and so (2) do not constitute a project under CEQA (CEQA Guidelines Section 15378).*

*Further, the City has been informed by the California Department of Housing and Community Development (HCD) that its existing density bonus ordinance must be modified to be consistent with AB 2345, and the ordinance amendments reflect HCD's interpretation of the requirements of state law. The proposed zoning amendments do not permit any bonuses, incentives, or waivers other those provided by State law. The amendments can therefore be seen with certainty based on review of the facts to have no possible significant effect on the environment (CEQA Guidelines Section 15061(b)(3)). These amendments do not authorize the development of housing on any site where housing is not already permitted under the City's existing codes, and any housing development project with a density bonus component must be reviewed under CEQA.*

3. The site is physically suitable (including, but not limited to, access, provision of utilities, compatibility with adjoining land uses, and absence of physical constraints) for the requested zoning designation(s) and anticipated land use development(s).

*The proposed ordinance amendments are not being applied to any specific site, nor is it reasonably foreseeable which sites, if any, may elect to utilize the proposed ordinance amendments. The environmental impact of a density bonus of 50 percent and the suitability of a site for that bonus cannot be known and will be reviewed when an application is made for its use on a specific site.*

4. The proposed zoning will promote orderly development of the City.

*The proposed amendment is intended to promote the development of affordable housing in the City, consistent with State Law.*

5. That the proposed zoning is not detrimental to the health, safety, peace, morals and general welfare of persons residing or working in the neighborhood of subject parcels.

*The proposed ordinance amendments are not being applied to any specific site, nor is it reasonably foreseeable which sites, if any, may elect to utilize the proposed ordinance amendments. The impact of a density bonus of 50 percent and the effect of that bonus on the health, safety, peace, moral and general welfare of persons residing or working in the neighborhood of a site cannot be known and will be reviewed when an application is made for its use on a specific site.*

Section 3. The City Council hereby approves the following amendments to the Cupertino Municipal Code:

1. Table 19.56.030 in Section 19.56.030 of the Cupertino Municipal Code is hereby amended to read as follows:

**Table 19.56.030: Density Bonus Calculations**

Income Level of unit	Proportion of Total Affordable Dwelling Units	Maximum Density Bonus
Very Low Income	5%	20%
	6% - <del>12</del> <u>11</u> % <sup>(1)</sup>	22.5% - <del>37.5</del> <u>35</u> %
	<u>12% - 14%</u> <sup>(2)</sup>	<u>38.75% - 46.25%</u>
	<del>13</del> <u>15</u> % or more	<del>40</del> <u>50</u> %
Low Income	10%	20%
	11% - <del>22</del> <u>20</u> % <sup>(23)</sup>	21.5% - <del>38</del> <u>35</u> %
	<u>21% - 23%</u> <sup>(4)</sup>	<u>38.75% - 46.25%</u>
	<del>23</del> <u>24</u> % or more	<del>40</del> <u>50</u> %
Moderate Income (Common interest developments)	10%	5%
	11% - <del>44</del> <u>40</u> % <sup>(35)</sup>	6% - <del>39</del> <u>35</u> %
	<u>41% - 43%</u> <sup>(6)</sup>	<u>38.75% - 46.25%</u>
	<del>45</del> <u>44</u> % or above	<del>40</del> <u>50</u> %
<u>Affordable Housing Development</u>	<u>100%</u> <sup>(7)</sup>	<u>80% or as specified in Government Code Section 65915</u>

<sup>(1)</sup> For each 1% increase over 5% of the target units, the density bonus shall be increased by 2.5%, up to a maximum of ~~40~~35%.

<sup>(2)</sup> **For each 1% increase over 11% of the target units, the density bonus shall be increased by 3.75%, up to a maximum of 50%.**

<sup>(23)</sup> For each 1% increase over 10% of the target units, the density bonus shall be increased by 1.5%, up to a maximum of ~~40~~35%.

<sup>(4)</sup> **For each 1% increase over 20% of the target units, the density bonus shall be increased by 3.75%, up to a maximum of 50%.**

<sup>(35)</sup> For each 1% increase over 10% of the target units, the density bonus shall be increased by 1%, up to a maximum of ~~40~~35%.

**(6) For each 1% increase over 40% of the target units, the density bonus shall be increased by 3.75%, up to a maximum of 50%.**

**(7) Must meet the requirements of Government Code Section 65915(b)(1)(G) or successor provision.**

2. Section 19.56.030F of the Cupertino Municipal Code is hereby amended to read as follows:

F. Density Bonus Calculations:

1. A density bonus may be selected from only one category listed in Section 19.56.020A(1), except that density bonuses for land donation may be combined with others, up to a combined maximum of ~~40~~50 percent, and an additional square-foot bonus may be granted for a child day care facility as provided in Section 19.56.030C.

2. In determining the number of density bonus units to be granted, any fractions of density bonus units shall be rounded up to the next whole number.

3. Density bonus units authorized by this section shall not be included when determining the number of affordable units required to qualify for the density bonus. In determining the number of affordable units required to qualify for a density bonus, any fractions of affordable units shall be rounded up to the next whole number.

4. An applicant may request a lower density bonus than the housing development is entitled to, but no reduction will be permitted in the percentage of required affordable units as shown in Section 19.56.020 or Section 19.56.020C.

5. Regardless of the percentage of affordable units, no housing development will be entitled to a density bonus of more than ~~40 percent or as provided in Government Code Section 65915~~, unless approved by the City pursuant to Section 19.56.030F(6).

6. The City, at its discretion, may grant a density bonus higher than the maximum set forth in Table 19.56.030 or in paragraph (5) above to a housing development where all units (except manager's unit(s)) are affordable to lower income households.

7. For purposes of calculating a density bonus, the residential units do not have to be based upon individual subdivision maps or parcels. The bonus units shall be permitted in geographic areas of the housing development other than the areas where the affordable units are located.

3. Table 19.56.040A in Section 19.56.040 of the Cupertino Municipal Code is hereby amended to read as follows:

**Table 19.56.040A: Incentives or Concessions Calculations:**

Unit Type	Percent of Affordable Units	Number of Incentives/Concessions
Very Low Income Units	5% or greater	1
	10% or greater	2
	15% or greater	3
Low Income Units	10% or greater	1
	<del>20</del> <u>17</u> % or greater	2
	<del>30</del> <u>24</u> % or greater	3
Moderate Income Units	10% or greater	1
	20% or greater	2
	30% or greater	3
<u>Affordable Housing Development</u>	<u>100%*</u>	<u>4</u>

\*Must meet the requirements of Government Code Section 65915(b)(1)(G) or successor provision.

4. Add a new Section 19.56.080 of the Cupertino Municipal Code to read as follows:

**19.56.080 Interpretation.**

If any portion of this Chapter 19.56 conflicts with State Density Bonus Law (Government Code Section 65915 et seq.) or other applicable state law, state law shall supersede this Chapter. Any ambiguities in this section shall be interpreted to be consistent with State Density Bonus Law. All code references in this Chapter include all successor provisions.

Section 4. If any portion of this Ordinance or its application is for any reason held to be invalid, unenforceable or unconstitutional, by a court of competent jurisdiction, that portion shall be deemed severable, and such invalidity, unenforceability or unconstitutionality shall not affect the validity or enforceability of



the remaining portions of the Ordinance, or its application to any other person or circumstance. The City Council hereby declares that it would have adopted each section, sentence, clause or phrase of this Ordinance, irrespective of the fact that any one or more other sections, sentences, clauses or phrases of the Ordinance be declared invalid, unenforceable or unconstitutional.

Section 5. The City Council finds that the proposed code amendments: (1) will not result in any direct or reasonably foreseeable indirect physical change in the environment (CEQA Guidelines Section 15060(c)) and so (2) do not constitute a project under CEQA (CEQA Guidelines Section 15378), because it is not possible to predict which properties in the City, if any, may be proposed to be developed with an increased density bonus, given market conditions, building types desired, and developers' individual decisions whether or not to request bonuses; nor whether any increased development or density will result from the proposed changes; whether any development or density will result that would not already have occurred under the existing Municipal Code; nor whether any possible significant environmental impacts peculiar to the adoption of the proposed zoning code amendments would occur.

Further, the City has been informed by the California Department of Housing and Community Development (HCD) that its existing density bonus ordinance must be modified to be consistent with AB 2345, and the ordinance amendments reflect HCD's interpretation of state law. The proposed zoning amendments do not permit any bonuses, incentives, or waivers other than those provided by State law. These amendments do not authorize the development of housing on any site where housing is not already permitted under the City's existing codes, and any housing development project with a density bonus component must be reviewed under CEQA. The City Council therefore further finds that the amendments can be seen with certainty based on review of the facts to have no possible significant effect on the environment (CEQA Guidelines Section 15061(b)(3)).

The City Council further directs the Director of Community Development to file a Notice of Exemption with the Santa Clara County Recorder in accordance with CEQA and the CEQA guidelines.

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INTRODUCED this \_\_ day of \_\_\_\_\_, 2021, at a Regular Meeting of the City Council of the City of Cupertino and ENACTED on the \_\_\_\_ day of \_\_\_\_\_, 2021, at a Regular Meeting of the City Council of the City of Cupertino by the following roll call vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

ATTEST:

<p>SIGNED:</p> <p>_____</p> <p>Darcy Paul, Mayor City of Cupertino</p>	<p>_____</p> <p>Date</p>
<p>ATTEST:</p> <p>_____</p> <p>Kirsten Squarcia, City Clerk</p>	<p>_____</p> <p>Date</p>

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT  
DIVISION OF HOUSING POLICY DEVELOPMENT**

2020 W. El Camino Avenue, Suite 500  
Sacramento, CA 95833  
(916) 263-2911 / FAX (916) 263-7453  
[www.hcd.ca.gov](http://www.hcd.ca.gov)



May 3, 2021

Deborah Feng, City Manager  
City of Cupertino  
10300 Torre Avenue  
Cupertino, CA 95014-3202

**RE: City of Cupertino Resolution No. 20-141 and Ordinance No. 21-2226 (Density Bonus) – Letter of Technical Assistance**

Dear Deborah Feng:

The California Department of Housing and Community Development (HCD) is aware of the City of Cupertino's (City) actions at its December 15, 2020 City Council meeting adopting Resolution No. 20-141 and subsequent action at its April 20, 2021 City Council meeting approving Ordinance No. 21-2226. It is HCD's understanding that Ordinance No. 21-2226 is scheduled for its second reading at the City Council's May 4, 2021 meeting.

HCD's opinion is that Resolution No. 20-141 and Ordinance No. 21-2226 are insufficient to meet the exemption provisions set forth in Government Code section 65915, subdivision (s), and that the City should apply current State Density Bonus Law (SDBL) as amended by Assembly Bill (AB) 2345 (Chapter 197, Statutes of 2020). HCD offers the following technical assistance to help inform decision-makers.

**The intent of AB 2345 is that it would apply statewide with limited exceptions.**

When drafting AB 2345, the Legislature referred to successful density bonus programs in the Cities of San Diego<sup>1</sup> and Los Angeles. With the intent to create a provision allowing programs currently successful in incentivizing housing development to continue as implemented,<sup>2</sup> the bill included the exemption process provided for in Government Code section 65915, subdivision (s).

(s) Notwithstanding any other law, if a city, including a charter city, county, or city and county has adopted an ordinance or a housing program, or both an ordinance and a housing program, that incentivizes the development of affordable housing

<sup>1</sup> "The City of San Diego took steps to enhance the state's existing (density bonus) program and generated significant interest to build additional affordable and market-rate housing. Communities across California can take a page from the lessons learned in San Diego." Assembly Floor Analysis, 08/31/2020, p. 2

<sup>2</sup> "The amendments also ensure that cities like Los Angeles with programs like the Transit Oriented Communities (TOC) Affordable Housing Incentive Program that have created effective super density bonus programs are not impacted by this bill." Assembly Floor Analysis, 08/31/2020, p. 2.

that allows for density bonuses that exceed the density bonuses required by the version of this section effective through December 31, 2020, that city, county, or city and county is not required to amend or otherwise update its ordinance or corresponding affordable housing incentive program to comply with the amendments made to this section by the act adding this subdivision, and is exempt from complying with the incentive and concession calculation amendments made to this section by the act adding this subdivision as set forth in subdivision (d), particularly subparagraphs (C) and (D) of paragraph (2) of that subdivision, and the amendments made to the density tables under subdivision (f).

The City's actions on Resolution No. 20-141 and Ordinance No. 21-2226 clearly indicate the City's intent to implement the exemption process provided in paragraph (s). However, the City's actions fall short of the successful programs envisioned by the Legislature.

### **The City's resolution failed to create a program.**

As a matter of law, adoption of a resolution is nonbinding and does not create a program. Therefore, the City's adoption of Resolution 20-141 on December 15, 2020, failed to create a housing program as required by subdivision (s). On its face, the resolution only committed the City to adopting an ordinance at some point in the future, but that commitment is nonbinding. Unlike a housing element program (see Gov. Code, § 65583, subd. (c)), the nonbinding commitment in the resolution does not require the City to implement a new policy. It is merely a statement of the City's intent to adopt a new policy in the future. Therefore, the SDBL as amended by AB 2345 is in effect in Cupertino, and Cupertino must comply with the formulas for density bonuses and concessions and incentives that AB 2345 provides.

### **The City's resolution fails to incentivize beyond the requirements in place on December 31, 2020, and limits access to the concessions and incentives allowed by AB 2345.**

Over time, the Legislature has realized that substantial enticements beyond density bonus units are needed to incentivize the development of affordable housing. Provisions such as incentives and concessions, waivers, and reduced parking standards have been deemed essential to incentivize affordable housing. It is generally recognized that these "other tools are even more helpful to project economics than the density bonus itself."<sup>3</sup>

Accordingly, the subdivision (s) exemption to AB 2345 contemplates something more than simply allowing a developer to request a density bonus that is only slightly higher than the 35 percent maximum bonus in effect on December 31, 2020, without providing additional mechanisms that incentivize development. This conclusion is further supported by Government Code section 65915, subdivision (r), which provides, "This chapter shall be interpreted liberally in favor of producing the maximum number of total housing units."

<sup>3</sup> See, e.g., Jon Goetz and Tom Sakai, Guide to the California Density Bonus Law (Meyers Nave, January 2020, p.2).

Resolution No. 20-141 and Ordinance No. 21-2226 fail to provide for the reduced threshold requirements to qualify for incentives and concessions pursuant to AB 2345,<sup>4</sup> nor do they provide for other mechanisms that incentivize housing development beyond the SDBL requirements in place on December 31, 2020.

## Conclusion

HCD has reviewed the City's Resolution No. 20-141 and Ordinance No. 21-2226 under its authority pursuant to Government Code section 65585, which extends to State Density Bonus Law (Gov. Code, § 65915). HCD has found that neither Resolution 20-141 nor Ordinance No. 21-2226 meet the threshold for exemption from recent legislative changes. Accordingly, the City must apply State Density Bonus Law by processing density bonus applications in accordance with AB 2345 and take no further steps to adopt Ordinance No. 21-2226.

If you have any questions or would like to discuss the content of this letter, please contact Robin Huntley of our staff at [Robin.Huntley@hcd.ca.gov](mailto:Robin.Huntley@hcd.ca.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Shannan West", written in a cursive style.

Shannan West  
Land Use and Planning Unit Chief

<sup>4</sup> AB 2345 reduced the threshold from 20 percent to 17 percent lower-income units to receive two incentives/concessions and from 30 percent to 24 percent lower-income units to receive three incentives/concessions. (Gov. Code, § 65915, subds. (d)(2)(B-C).)

## Financial Assistance for Affordable Housing

The City's longstanding goal is to generate adequate housing to accommodate its growing population and workforce, including its teachers, first responders, baristas, laborers, domestic workers, and others. The City is particularly focused on providing opportunities to accommodate affordable housing for families, seniors, and individuals with disabilities. To meet these aspirations, the City has devoted significant resources towards developing lower income housing. The City recognizes that local funding is key to a project's ability to obtain tax credits and so has implemented a comprehensive program to provide financial assistance to affordable housing developments, including:

- Funding Affordable Housing Development. In 2019 the City issued final certificates of occupancy for the Veranda project—which provides 18 extremely-low and very-low income senior units, as well as an extremely-low income manager's unit—on one of the sites designated in the City's Housing Element, exceeding the 11 lower income units that the Housing Element had projected. This project was developed with a density bonus, CEQA streamlining by using a categorical exemption, flexible development standards adopted to accommodate senior housing, and unanimous support from the Planning Commission and City Council.



Figure 1: Veranda. Source: Mercurynews.com

The Veranda project was the first project in Santa Clara County to utilize 2016 Measure A - Affordable Housing Bond funds with a \$1 million contribution, which resulted in six units of permanent supportive housing reserved for homeless seniors with disabling conditions. Consistent with its Housing Element strategies, **the City contributed approximately 43% of the total development costs** for a total of \$5,172,000. The City initially paid \$3 million for site acquisition and contributed \$1 million through Housing Trust Silicon Valley. Subsequently, the City added \$672,000, when the project was not able to acquire adequate funding, and \$500,000 in HOME Investment Partnerships Program (HOME) funds, when project labor costs escalated. The continued contributions to this project reaffirmed the City's commitment towards ensuring production of affordable housing.

The City now looks forward to the next 100 percent affordable housing project in Cupertino. The County of Santa Clara recently initiated purchase of an underutilized site in Cupertino, also to be funded with Measure A Affordable Housing Bond funds. The City held a study session to help facilitate public outreach for the acquisition and is currently exploring possible assistance for an affordable project to be proposed on the site.

- Annual Notice of Funding Availability (NOFA). The City annually issues a NOFA for Below Market Rate Affordable Housing Funds (AHF) for eligible capital housing projects on a one-year funding cycle. The current balance of AHF monies is \$6 million. (e.g. <https://www.cupertino.org/home/showpublisheddocument/25344/637067305228970000>)
- City Funding of Affordable Housing Program Administration. Cupertino fully funds program administration for all 242 affordable rental and ownership units in the City's portfolio, at a cost of \$270,000 per year (\$1,118 per unit), unlike many cities that have adopted fees for monitoring and administering affordable housing. This provides a substantial savings in operating costs to projects such as the Veranda, freeing \$20,100 per year for other uses for that project.
- Adoption of a Commercial Linkage Fee. The City has collected Below Market Rate (BMR) housing mitigation fees from non-residential development since 1992 to provide funds for affordable housing. To maximize these affordable housing funds, the City increased the commercial linkage fee for offices and hotels in 2020 based on a study commissioned by the City demonstrating that increased fees would be feasible. The City has also negotiated the payment of additional BMR funds as conditions of development agreements.
- Outreach. City housing staff affirmatively reaches out for housing opportunities and makes referrals to the City's non-profit housing partners, providing information about potential funding sources when property with the potential to be developed for housing comes up for sale. Staff monitors local real estate listings for multi-family housing, duplexes, and triplexes to identify suitable properties for acquisition. Over the course of each year, staff engages with multiple developers and non-profits to provide technical assistance.

## **Zoning and Land Use Incentives**

The City of Cupertino continues to take actions to approve and incentivize the construction of affordable housing. The City has streamlined review of affordable housing projects and has approved housing on every site designated in its Fifth Cycle Housing Element for lower income housing. Housing approvals currently exceed the City's lower income RHNA.

To build on these efforts, the City has included several housing related projects as priority items on the City's Fiscal Year 2020-2021 and 2021-2022 Work Programs. This includes a Housing Strategies project with the objective to explore and adopt effective strategies and tools for the development of a variety of products across affordability levels including housing for the developmentally disabled and homes affordable to moderate, low, very-low, and extremely-low income households. The City also approved a work program item to consider options to develop Extremely Low Income (ELI) and BMR housing units for developmentally disabled individuals on City-owned property as well as investigating additional sites for BMR or ELI housing, with an estimated budget of \$250,000.

In addition, adopted Housing Element, zoning, and land use incentives for the development of affordable housing include:

- Parkland Dedication Fee and Construction Tax Waiver. The City waives parkland dedication fees and construction taxes for all deed-restricted affordable housing, whether included in an affordable project like the Veranda or affordable units in a market-rate housing development, as outlined in the City's Below Market Rate Procedural Manual. The average cost savings is \$54,795 per unit.
- Priority Approvals on Sites Designated for Lower Income Housing. The City adopted the 5th Cycle Housing Element in May 2015. By September 2016, it had approved housing development projects totaling 788 new residential units on sites designated for lower income housing. It also approved the Veranda senior housing project within seven months of receipt of the initial application. This project broke ground in April 2018 and was completed in May 2019. Over the past 14 years, the City has approved every development project application that would produce affordable housing.
- Generous Waivers and Concessions under Density Bonus Law. The City has granted generous waivers and concessions under density bonus law. Most recently, the City approved, among other waivers and incentives, a height waiver of close to 35 feet (an increase from 45 to 79 feet) for the Westport project; which, although entitled to a bonus of 35 percent (83 units), only requested a bonus of 13 percent (30 units). The City has also approved concession requests to locate affordable units in one building for the Westport and Marina projects, concessions which substantially increase the rate of return to the projects.
- Accessory Dwelling Unit (ADU) Incentives. In 2018, the City adopted amendments to its fee schedule to proactively reduce plan check and inspection fees for ADUs from \$7,500 or more, to a flat fee of \$2,500. The City is currently developing a program to allow residents to choose from pre-approved master ADU plans. Developers of manufactured or stick-built ADUs are being encouraged to submit plans for review as master plans and having these pre-approved by the City and available for residents to choose from, thereby streamlining permit review and reducing design costs for owners.
- Flexible Development Standards. The City provides flexible development standards to facilitate the development of affordable housing. The City implements this policy through its Planned Development zone, which allows the City to approve modified standards for otherwise applicable development standards for proposed projects. The City has consistently applied this policy to allow flexible development standards for proposed affordable housing projects, including the Veranda, Hamptons, and the Marina projects.
- Support for Funding Applications. The City supports the funding applications of qualified developers of 100 percent affordable housing for regional, state, and federal affordable housing funds, including Community Development Block Grants, HOME funds, Low Income Housing Tax Credits, and mortgage revenue bonds. The City recently issued support letters for the Veranda and Westport projects and assisted in the application process for tax credits.



## Concessions/Incentives/Waivers for Density Bonus Projects in Other Cities

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City	Density Bonus Projects (Year Approved by the City)	Concessions/Waivers/Incentives Requested	Concessions/Waivers/Incentives Requested Granted
Los Gatos	First Phase of the North Forty Specific Plan (2017)	-Waivers to increase maximum height from 45' to 51' -Waiver for the definition for measuring Maximum Height to exclude the inclusion existing grade due to the topographical constraints in certain locations of the site. -Deviation from our Below Market Price Guidelines which require BMP units to be spread out, units to be similar in size, and for sale units when the rest of the project are for sale units.	Approved as requested following litigation
Campbell	St. Anton Development (2015)	-Concession to increase building height from 50' to 59'	Approved as requested
Campbell	Park View (2019)	-Concession to increase building height from 45' to 59' (one additional story) -Concession to reduce open space from 29,500 sf required to 14,414 sf	Approved as requested
Mountain View	2700 El Camino Real (2017)	They do not have comprehensive records of early submittals so they cannot speak to what was originally requested	-Waiver to increase building height from 4 stories, 55' to 5 stories, 65' -Waiver to increase FAR from 1.85 to 2.27 -Waiver for reduce common usable open space from 175 sf/unit to 141 sf/unit
Mountain View	1313-1347 El Camino Real (2018)	They do not have comprehensive records of early submittals so they cannot speak to what was originally requested	-Waiver to increase building height from 5 stories to 7 stories -Waiver to increase FAR from 10' step back at 5th floor to 8'6" step back at 6th floor
Mountain View	1701 W El Camino Real (2016)	They do not have comprehensive records of early submittals so they cannot speak to what was originally requested	-Waiver to increase building height from 4 stories, 55' to 5 stories, slightly over 55' in limited areas -Waiver to reduce rear setback to go from 25' to 24' -Waiver to reduce side setback to go from 15' to 10' -Waiver to reduce common usable open space to go from 175 sf/unit to 120 sf/unit
Mountain View	400 San Antonio Rd (2016)	They do not have comprehensive records of early submittals so they cannot speak to what was originally requested	-Waiver to increase building height from 5 stories to 7 stories -Waiver to reduce residential height transition from 10' step back at 5th floor to 8'6" step back at 6th floor -Waiver to reduce height frontage setback from 10' step back at 5th floor to 8'6" step back at 6th floor
Mountain View	828 and 836 Sierra Vista Ave, 1975 and 1979 Colony Street (2018)	They do not have comprehensive records of early submittals so they cannot speak to what was originally requested	-Waiver to increase building coverage from 35% to 38.73%

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Mountain View	950 El Camino Real (2019)	They do not have comprehensive records of early submittals so they cannot speak to what was originally requested	-Waiver to increase building height from 4 stories, 55' to 5 stories, over 55' in limited locations -Waiver to reduce side setback from 5' to 0'-4' -Waiver to reduce common usable open space from 175 sf/unit to 95 sf/unit -Waiver to reduce open space from 40% minimum to 32% -Waiver to increase automobile paving coverage from 20% maximum to 42%
Mountain View	2645-2655 Fayette Dr (2020)	They do not have comprehensive records of early submittals so they cannot speak to what was originally requested	-Concession to reduce BMR unit size to go from 5 two-three bedroom BMR units to 5 one-bedroom BMR units -Waiver to increase FAR from 1.85 to 2.5 -Waiver to increase building height from 55' to 75' -Waiver to reduce residential height transition to not provide 10' residential step back in certain areas where additional height was permitted -Waiver to reduce height frontage setback to go from 10' step back at each façade for 80% of the building's linear frontage (for floors above 4 stories) to 6'6" step back at the 5th and 6th stories for one façade
Mountain View	1100 La Avenida (2021)	They do not have comprehensive records of early submittals so they cannot speak to what was originally requested	-Concession for build-to area to have use seatwalls, patios, and other elements to activate the corner rather than having the required 50% of the façade located within 50' of the corner -Concession to reduce personal storage from 164 cubic ft/unit to between 24-88 cubic ft/unit for 89 of the 100 units
Saratoga	Quito Village (2020)	-Concession to waive the requirement in the Saratoga Municipal Code requiring mixed-use developments to have commercial uses on the ground floor abutting public streets. The project includes residential uses that front on both Cox Avenue and Paseo Presada which is why the concession was requested and approved. -Concession to waive the requirement in the Saratoga Municipal Code requiring a 15 front setback. The commercial building that fronts on Cox Avenue has a setback of six feet which is why the concession was requested and approved	Approved as requested
Sunnyvale	Denny's Site Redevelopment (2018)	-Concession to increase building height from 50' to 65' -Concession to reduce minimum landscaping from 20% to 13.2%	Approved as requested

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City	Density Bonus Projects (Year Approved by the City)	Concessions/Waivers/Incentives Requested	Concessions/Waivers/Incentives Requested Granted
Sunnyvale	DSP 15 Affordable Housing Project (2020)	-Concession to increase minimum distance between buildings from 26' to 10-18' -Concession to increase maximum distance to solid waste enclosure from 150' to 250'	Approved as requested
Sunnyvale	St. Anton Project (2017)	-Concession to increase building height from 60' to 67' 4" -Concession to reduce minimum distance between buildings from 32' to 20' -Concession to reduce minimum parking from 201 spaces to 200 spaces -Concession to increase lot coverage from 35% to 39.4%	Approved as requested
Sunnyvale	Edwina Benner Plaza (2016)	-Concession to increase lot coverage from 40% to 55% -Concession to reduce usable open space from 380 sf/unit to 205 sf/unit -Concession to reduce minimum parking from 102 spaces to 87 spaces -Planned Development flexible standards: -Deviation for front setback from 25' to 20' -Deviation for side setback from 18' to 9' -Deviation for landscaped area from 375 sf to 179 sf	Approved as requested
Sunnyvale	16 Unit Development DSP (2020)	-Concession to reduce rear yard setback from 20' to 10'	Approved as requested
Sunnyvale	135 Unit Development (2021)	-Concession to reduce rear yard setback from 20' to 10' 5"	Approved as requested

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City	Density Bonus Projects (Year Approved by the City)	Concessions/Waivers/Incentives Requested	Concessions/Waivers/Incentives Requested Granted
Sunnyvale	Orchard Garden Affordable Housing Project (Pending Approval)	<ul style="list-style-type: none"> <li>-Concession to reduce front yard setback from 20' to 10-17'</li> <li>-Concession to increase lot coverage from 40% to 45%</li> <li>-Concession to increase solar shading from 10% to 30%+</li> <li>-Concession to reduce usable open space from 380 sf/unit to 232 sf/unit</li> <li>-Waiver to reduce landscape buffer from 15' to 13-15'</li> <li>-Waiver to reduce parking lot shading from 50% to 34%</li> <li>-Waiver to reduce building separation from 35' to 32' 9"</li> <li>-Waiver to not underground utilities to allow transformer to be above ground as opposed to underground or in the building</li> <li>-Waiver to reduce landscaping per unit from 375 sf/unit to 248 sf/unit</li> </ul>	Pending approval
Palo Alto	441 Page Mill (2015)	There were substantial changes to the design from the original proposal – the concessions ultimately seemed as though they didn't change, but the applicant reduced their commercial FAR, increased the housing FAR and provided 16 units, 5 of which were affordable instead of 10 units, 3 of which were affordable.	<ul style="list-style-type: none"> <li>-Incentive to increase FAR from 1:1 to 1.31:1</li> <li>-Incentive to increase lot coverage from 50% to 69%</li> <li>-Incentive to increase building height from 35' maximum to 40' for tower feature and 37' for remaining areas where 35' was required</li> </ul>